

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Helen Pickering (First Applicant)
AND NZ Amalgamated Engineering Printing & Manufacturing Union
(Second Applicant)

AND Timaru Herald, a division of INL Publishing Limited (Respondent)

REPRESENTATIVES Tony Wilton, Counsel for applicants
Peter Churchman, Counsel for respondent

MEMBER OF AUTHORITY Helen Doyle

SUBMISSIONS RECEIVED 26 September 2003, from the applicant
6 October 2003, from the respondent
7 October 2003, in reply from the applicant

DATE OF DETERMINATION 27 February 2004

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The first and second applicants want the Authority to resolve a dispute over whether the first applicant, Helen Pickering, is bound by a collective employment agreement to which the second applicant, NZ Amalgamated Engineering Printing & Manufacturing Union (“the Union”) and the respondent are parties.

[2] The applicants seek a determination from the Authority that Ms Pickering is not bound by the collective agreement and that her individual employment agreement continues to set her terms and conditions of employment. Costs are also sought.

[3] The respondent, Timaru Herald, a division of INL Publishing Limited (“Timaru Herald”) says its view is that, by virtue of her membership of the Union, Ms Pickering is bound by the terms of the Collective Employment Agreement dated 15 November 2002 and entered into between the Union and the Timaru Herald.

[4] Mr Wilton and Mr Churchman were able to agree to a statement of facts and to the matter being dealt with by way of written submission.

[5] After submissions were received by the Authority I became aware that the full Court of the Employment Court was to consider similar issues to that which I was being asked to determine in proceedings brought by National Union of Public Employees (NUPE) & Ors against New Zealand Customs Service.

[6] I indicated to Mr Wilton and Mr Churchman that in the circumstances I was minded to wait until a judgment was available from the full Court before issuing my determination. I advised the parties in a directions notice dated 14 October 2003:

In the circumstances, I am minded to wait until a judgment is available from the full Court, before determining this matter. I do not however, wish the parties to be unnecessarily disadvantaged.

If a delay in determining the matter is likely to cause disadvantage to the first or second applicant or to the respondent, then I suggest a further conference be held to address that matter.

[7] A further conference was not called for and when the full Court issued its judgment in *NUPE & Ors v New Zealand Customs Service*; WC 2/04 on 19 February 2004 Mr Wilton and Mr Churchman were duly forwarded copies.

[8] I then held a further conference with Mr Wilton and Mr Churchman to see if they wished to make further submissions in light of the judgment. They did not feel that was necessary and I have proceeded therefore to determine the matter.

The Background

[9] I have set out the agreed statement of facts by way of background.

[10] Ms Pickering is employed by the respondent as a journalist. She has been employed since 1994.

[11] The Union and the Timaru Herald are the parties to a collective employment agreement.

[12] The collective agreement covers the work performed by Ms Pickering.

[13] The Union has, in terms of section 18(2) of the Employment Relations Act 2000, a class of membership for members who have not authorised the Union to represent their collective interests.

[14] Ms Pickering is, and was at all material times, a member in that class of membership.

[15] The collective employment agreement does not refer to or distinguish between employees who may hold different classes of membership in the Union.

[16] In February 2000 Ms Pickering agreed an individual employment contract with the Timaru Herald. She and the respondent renegotiated this individual contract in July 2000 and July 2001. However, when she sought to renegotiate her individual terms in 2002 the respondent refused to engage with her because she was a member of the Union.

[17] At the time of the original agreement to the individual employment agreement in February 2000 and of the re-negotiation of it in July 2000 and July 2001 there was no collective employment agreement between the Union and the respondent negotiated pursuant to the Employment Relations

Act 2000 in place. By July 2002 a collective employment agreement had been negotiated between the Union and the respondent.

[18] At all material times Ms Pickering has made it clear that she wishes to retain the terms of her individual agreement and does not wish to be bound by the collective agreement.

[19] The respondent, however, insists that, now that a collective agreement negotiated under the Employment Relations Act 2000 with a coverage clause including journalists, is in place, and because that agreement does not distinguish between membership of different classes in the Union, that, by virtue of section 56, Ms Pickering is bound by the terms of that agreement.

[20] All the relevant documents accompanied the agreed statement of facts and I have perused them carefully.

The Submissions

[21] Mr Wilton submits that Ms Pickering is not bound by the collective agreement entered into by the Union and Timaru Herald because the Union had no right or power to bind her in that way.

[22] He submits that section 18 of the Employment Relations Act 2000 is the source of the Union's authority and power to represent and bind its members but that there are some restrictions set out in that section on that power and authority. Specifically he refers to the juxtaposition of the two subsections of section 18. Section 18(1) provides that *A union is entitled to represent its members in relation to any matter involving their collective interests as employees* and section 18(2) that *This Act does not prevent a union offering different classes of membership*. Mr Wilton says that the word *different* in subsection 2 is to be read as meaning *different from the above*; that is, classes of membership which are different from the class of members which the Union is entitled to represent collectively, and is thus able to bind collectively. He submits that this point is reinforced by section 18(3) that provides *A union may represent an employee in relation to the employee's individual rights as an employee only if the union has an authority from the employee to do so given under section 236*.

[23] Mr Wilton relies on the construction of the wording in section 18(2) *This Act does not prevent...* in his submission that other provisions of the Act, including section 56(1), must be interpreted subject to section 18(2) and that the phrase *members of a union* in section 56(1) of the Act must be read subject to section 18(2).

[24] Mr Wilton sets out rule 8.3 of the Union's rules:

Notwithstanding the provisions of Paragraph 1 above, the union may at its discretion admit to and/or retain in membership other persons who agree to be bound by and observe the rules of the union and whose membership of the union is deemed by the National Council to be consistent with the advancement of the objects of the union.

For the avoidance of doubt, the union may at its discretion admit to and/or retain in membership a person who, while their employment comes within the scope of the coverage clause of a collective agreement to which the union is a party, for reasons acceptable to the union does not wish to be covered by that collective agreement.

[25] He also refers to paragraph 8.1 of the rules that contain as a condition of membership a requirement (inter alia) that the member authorise the Union to represent him/her collectively.

Rule 8.3 sets out an exception to that requirement. That exception allows a class of members in respect of whom the Union has no authority to represent collectively. Mr Wilton submits that the Union having exercised its discretion to admit Ms Pickering to the class of membership referred to in rule 8.3 had no authority or power to bind her collectively.

[26] Mr Churchman in his submissions said that the case was about section 56 of the Employment Relations Act 2000 and whether the words in that section should have their plain meaning. He clarified in his submission that whilst Timaru Herald now knows of the nature of the class of membership held by Ms Pickering it did not know at the time it entered into the collective agreement with the Union. I did not understand Mr Wilton to disagree with that.

[27] Mr Churchman set out the legal principles for interpretation of a statutory provision such as section 56. He submitted that there was no ambiguity about the words used in section 56 and then applied the section to the agreed facts in this case. Section 56 provides:

56 Application of collective agreement—

- (1) *A collective agreement that is in force binds and is enforceable by—*
- (a) *the union and the employer that are the parties to the agreement; and*
 - (b) *employees—*
 - (i) *who are employed by an employer that is a party to the agreement; and*
 - (ii) *who are or become members of a union that is a party to the agreement;*
- and*
- (iii) *whose work comes within the coverage clause in the agreement.*

[28] Mr Churchman submits that Ms Pickering is employed by the Timaru Herald, a member of the Union and employed as a journalist being work that falls within the coverage clause. He further submits that the section has a clear and easily ascertainable meaning as it is written and does not produce an absurdity or contradiction. He says that the construction contended for by the applicants is contrary to the plain meaning and that the focus of Part 5, within which section 56 is found, is the promotion of collective bargaining rather than individual employment agreements.

[29] He submits that Ms Pickering falls squarely within the ambit of section 56(1)(b) of the Act in that all three subsections of that provision are clearly met and further that no modification of that section is required to permit section 18 to operate and the interpretation of the applicants is inconsistent with the text of the section, the purpose of the Act and, in particular, the purpose of Part 5 of the Act being the part within which the section is found.

The Legal Position

[30] The full Court in the *NUPE* case gave consideration to the effect of section 18(2) of the Act and posed the following question on pg 19 of its judgment:

In the absence of the “machinations”, if the union had a number of members belonging to two different classes – those who had authorised the union to represent them, and those who had not – would it have been possible for the union to act in such a way as not to bind some of its members?

[31] The Court said at pg 20:

There would seem to be a conflict between the object of the Act that relates to the promotion of collective bargaining, and the object of the Act that relates to the protection of the integrity of individual choice.

The Court went on to find in accordance with the view that prevailed with the full Court that decided *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v APN New Zealand Limited*; AC58/03, 14 November 2003 that:

...

The Act does not contemplate that there could be a class of membership of a union under which the union has no authority to bind its members to a collective agreement.

It further found that:

...

The Act therefore does not contemplate or authorise a situation of the Employment Contracts Act 1991 type of application for membership which suggests that some members can refuse to authorise the union to negotiate collective employment terms. The union does not need the permission of its members but is granted the ability to do so by the statute. That power is subject only to observing the correct processes in relation to ratification and to refraining from signing any agreement without the authority of ratification. In our judgment, in agreement with the judgment of the full Court that decided APN, s 56 prevails over s18.

The Issue for Determination

[32] The issue for determination is whether Ms Pickering is bound by the collective agreement or whether her individual employment agreement continues to set her terms and conditions of employment. There needs to be consideration in determining that issue whether Ms Pickering's class of membership of the Union has an effect on whether she is bound by the collective agreement.

Determination

[33] I accept Mr Churchman's submission that the first applicant falls within the ambit of s 56(1)(b) in that she is employed by the Timaru Herald, is a member of the Union that is a party to the agreement and that her work as a journalist is covered within the coverage clause in the collective agreement. Ms Pickering's special class of membership is not reflected in the agreement.

[34] The full Court has found in its judgments in both the *NUPE* and *APN* cases that section 56 prevails over section 18 of the Employment Relations Act 2000. Mr Wilton submits that *members of a Union* as referred to in section 56(1)(b)(ii) must refer only to members in relation to whom the Union possesses the requisite authority. The full Court also made it clear in the *NUPE* case that the Union is granted the ability to negotiate collective employment terms by the statute and does not need the permission of its members to do so. I do not accept Mr Wilton's submission therefore that the Union has no authority to bind Ms Pickering to the collective agreement.

[35] I find that Ms Pickering is bound by the Timaru Herald Limited Editorial Collective Employment Agreement and the dispute is therefore resolved in favour of the Timaru Herald.

Costs

[36] Costs are reserved. I would encourage discussions to take place in an endeavour to see if agreement can be reached about costs. If Timaru Herald wishes to seek costs, Mr Churchman has 14 days to file and serve submissions setting out the costs and disbursements claimed and Mr Wilton has a further 14 days to reply.

Final Comment

[37] I would like to make one final comment. Timaru Herald is now well aware that Ms Pickering who is still employed with the Herald as a journalist, does not want to be covered by the collective agreement. The Authority must, in carrying out its role, support successful employment relationships. I would hope now that the legal question has been answered the first and second applicants can work with Timaru Herald taking a common sense approach to ensure that the relationship not only between Ms Pickering and Timaru Herald but also between Timaru Herald and the Union continues to be a successful one.

Helen Doyle
Member of Employment Relations Authority