

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Association of University Staff (Applicant)
AND Vice Chancellor University of Auckland (Respondent)
REPRESENTATIVES Peter Cranney for applicant
Phillippa Muir for respondent
MEMBER OF AUTHORITY Y S Oldfield
SUBMISSIONS RECEIVED 23 March, 30 March 2005
DATE OF DETERMINATION 1 April 2005

**DETERMINATION OF THE AUTHORITY ON AN APPLICATION FOR URGENCY AND AN
APPLICATION FOR REMOVAL**

Employment Relationship Problem

- [1] On 16 February 2005 the Association of University Staff (the union) initiated bargaining with the respondent university for a multi-employer collective agreement ('MECA'.) The current (single employer) collective agreement between these two parties expires on 30 April. On 1 March the university formally advised the union that it was prepared to enter bargaining for a single employer collective agreement but not for a multi-employer collective agreement, and would be available to meet with the applicant and other unions but not with the other university employers. Later that day the university emailed staff who were members of the union repeating to them what it had just told the union.
- [2] On 11 March a further issue arose when the university offered staff on individual agreements a 4.5% increase. (On 22 March, subsequent to the lodging of the statement of problem, the university initiated bargaining for a single employer collective agreement with the union with a matching offer of 4.5 %.)
- [3] On Friday 18 March the applicant union lodged an application with the Authority regarding these matters. The union said:
- the university's refusal to participate in multi-employer collective bargaining is a breach of sections 4 and 32 of the Employment Relations Act 2000 and is an unlawful undermining of the bargaining;
 - the fact and timing of the university's offer to staff on individual agreements is an unlawful undermining of the bargaining.
- [4] The union sought the following:
- an injunction requiring the university to participate in the multi-employer collective bargaining;

- a declaration that the university has acted unlawfully by refusing to participate in multi-employer collective bargaining;
- a declaration that the university has unlawfully undermined the multi-employer bargaining by refusing to bargain and by making an offer to increase the salaries of those not involved in the bargaining, and
- costs.

[5] In the statement of problem, the union advised that the parties had not attended mediation and that *“because of the significant damage being done to the bargaining as a result of the Respondent’s conduct, an order requiring mediation would be inappropriate and unjust.”*

[6] The union also sought an order removing the matter to the Employment Court pursuant to Section 178 of the Employment Relations Act and on the grounds that important questions of law were likely to arise in the matter other than incidentally and that the case is of such a nature and urgency that it is in the public interest that the matter be removed immediately to the Court.

[7] The important questions of law identified as arising are:

- (i) Whether the obligations imposed on an employer by Sections 4 (1) (a), 4 (2) (b), 4 (4) (a), Sections 32 (1) (a), 32 (1) (b), 32 (1) (c), 32 (1) (ca) 32 (1) (d) and Section 33 of the Employment Relations Act apply only in respect of single employer bargaining or whether they apply equally to MECA bargaining, and
- (ii) Whether an employer may refuse to participate in MECA bargaining and instead insist on single employer bargaining.

[8] The union also sought urgency on the ground that *“unless the matter is heard and determined promptly, its members’ rights to participate in multi-employer bargaining will be vitiated.”*

[9] This determination will deal first with the application for urgency and with the making of an order directing the parties to mediation.

[10] I will then go on to determine the application for removal. The issues to be decided in relation to this application are:

- whether an important question of law is likely to arise in the matter other than incidentally;
- whether the case is of such nature and of such urgency that it is in the public interest that it be removed immediately to the Court;
- whether in all the circumstances the Court should determine the matter, and
- whether the Authority should exercise its discretion to remove.

Application for Urgency and Direction to Mediation

[11] I convened a telephone conference on the morning of Monday 21 March to talk to Mr Cranney and Ms Muir about the application for urgency, the timetable for the removal application and mediation. I record here directions made in the course of that telephone conference and the reasons for them.

[12] The statement of problem did not give details of the proposed timeframe for bargaining for the MECA or set out specifically why or how the union members’ rights to participate in

multi-employer bargaining would be vitiated if the matter were not treated with urgency. From attachments I learned that the current collective agreement expires on 30 April and that the union has met once with the other employer parties to the proposed MECA (in mid March.)

- [13] The conference was also attended by Ms Kelly of the union and Mr Skilton of the university. Ms Kelly explained the need for urgency by saying that the MECA negotiations could not progress until this matter was resolved and that the other parties (several employers and other unions) were waiting on its outcome before scheduling their next meeting. She did not tell me when such a meeting might otherwise have been expected to go ahead although she did say that work had already been completed on the bargaining protocol. She requested that I consider and determine the removal application within the next three days at the outside.
- [14] The current collective agreement does not expire until 30 April. Unless something specific was likely to happen in the next few days that could materially affect the situation (and I heard nothing to this effect) I could not justify treating this matter with the degree of urgency requested. To grant urgency means first that the matter will jump the queue over other matters that have been lodged long before it. This alone means that a very good reason is required. Secondly it means that the normal timeframes and processes are abridged so that replies and submissions cannot be prepared with the usual level of deliberation. Excessive haste in a situation where there is no need for it is not in my view doing justice between the parties. While I accept that it is important that we progress this matter quickly, extreme urgency is not called for.
- [15] I advised Ms Kelly that her request for extreme urgency was declined, however I would address the application for removal in the latter part of the week after Easter if Mr Cranney and Ms Muir could meet that timeframe. Mr Cranney told me he could get submissions to me by 23 March. Ms Muir confirmed that the respondent would not be opposing the application for removal and that she expected to be able to get both a statement of reply and submissions on the removal application to me by 30 March. The matter has proceeded on that basis.
- [16] I also advised that I was of the view that the matter should go to mediation as soon as possible. Noting the view the union had expressed on this issue I reminded the parties of my duty under s.159 (1) (b) to direct that mediation be used before investigating a matter, unless I considered that the use of mediation would not contribute constructively to resolving the matter or in all the circumstances be in the public interest. In this case I considered that mediation was very much in the public interest and had great potential to contribute to resolving the matter. I therefore ordered that the parties attend mediation no later than 31 March 2005. I understand that they did so on 30 March but unfortunately were unsuccessful in resolving the issues between them.

Application for removal

Is an important question of law likely to arise in the matter other than incidentally?

- [17] Mr Cranney argued that a question of law will be important if it is decisive of the case and if its resolution can affect a large number of employees or employers. Mr Cranney says that both criteria are met in this case. He also noted that the Authority has tended to remove where there are important questions arising from new statutory provisions. Ms Muir agrees that the statutory test for removal to the Employment Court is satisfied since there are

important and novel questions of law to be determined in relation to Sections 4, 32 and 33 of the Employment Relations Act.

[18] I too am satisfied that this case poses novel questions about the effect of the statutory provisions. These questions will be decisive of this case, and are important not just to these parties but indeed to all potential parties to a MECA. **I conclude that an important question of law is likely to arise in the matter other than incidentally. The first limb of section 178 has been met.**

Whether the case is of such nature and of such urgency that it is in the public interest that it be removed immediately to the Court.

[19] Only one limb of section 178 must be satisfied before I proceed to consider whether to exercise my discretion to remove. For completeness however I will also address the other arguments advanced.

[20] Mr Cranney says that the bargaining process is now underway and that the university's approach will deny the union's members their bargaining rights. He says that it is in the public interest that those rights be determined by the Employment Court. He says that the statutory provisions are new, and this is an early case which will test the effect of those provisions. Because of that and because a large number of public employees and significant public employers are affected, the public interest is served by removal. Finally he says that although there is some dispute about the extent of the urgency, both parties agree that the matter is of some urgency.

[21] Ms Muir did not specifically address this point in her submissions.

[22] For the reason already set out I accept that other union and employer parties have an interest in the outcome of this case and on that basis I accept that it is in the public interest that it be determined by the Employment Court. As for its urgency, while I did not consider that it was necessary for this case to be determined within a three day timeframe I am satisfied that it is critical to avoid unnecessary delay in progressing it. **The case is of such nature and of such urgency that it is in the public interest that it be removed immediately to the Court.**

Whether in all the circumstances the Court should determine the matter

[23] Under this head Mr Cranney reiterated his earlier points in particular relying on the public interest argument. Ms Muir did not make a submission on this point.

[24] There are no additional grounds for removal coming under this head however the reasons advanced under the first two limbs amount to a set of circumstances which support the removal of the matter to the Court.

Whether the Authority should exercise its discretion to remove.

[25] Mr Cranney noted that where one or more of the statutory tests is satisfied the Authority must consider whether there is any factor which should persuade it not to remove. However where both parties are represented by experienced Counsel and agree on removal the Authority need not be as stringent in considering any such factors. I accept this submission as entirely correct.

- [26] He goes on to submit that in this case there is no such reason. He says because there is very little factual dispute and no opposition to removal there is no issue about loss of appeal rights. Ms Muir concurs with all this.
- [27] For completeness I note that I identify one reason why I might have considered exercising the discretion not to remove some or all of this matter. That is the availability in the Authority of remedies (in relation to bargaining disputes) that are not available in the Court. The Employment Relations Act provides a framework for resolving bargaining problems through mediation followed, where necessary, by facilitation. The union in this case has opted for an alternative approach by applying for injunctive relief. I mentioned this to the parties during the telephone conference as part of our discussions on the pros and cons of mediation.
- [28] Neither Mr Cranney nor Ms Muir appeared to see it as appropriate or helpful for the Authority to open up a discussion about whether the employment relationship problem might usefully be reframed. I therefore left it at that. Given the degree of agreement by the parties about the best way forward and given that the Court can at any stage refer the matter back to the Authority, I am satisfied that the availability of alternative remedies is not sufficient reason to exercise a discretion not to remove the matter.
- [29] In summary, all three of the limbs of Section 178 have been made out, both parties agree that the matter should be removed, and there is no sufficient reason why I should exercise my discretion against removal.
- [30] **I order that the entire matter be removed immediately to the Employment Court.**
- [31] I leave costs to be determined at a later stage.

Y S Oldfield
Member of Employment Relations Authority