Determination Number: WA 43/05
File Number: WEA 468/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Service & Food Workers Union Inc. (applicant)
AND	Hadleigh Hospital and Retirement Home Limited (first respondent)
AND	Huntleigh Retirement Home Limited (second respondent)
REPRESENTATIVES	Lucie Highfield for the applicant Bridget Fleming for the respondents
MEMBER OF THE AUTHORITY	Denis Asher
SUBMISSION RECEIVED	8 March 2005
DATE OF DETERMINATION	11 March 2005

DETERMINATION OF AUTHORITY: Application for Removal to the Court

Employment Relationship Problem

1. In its original application, the applicant, the Service & Food Workers Union Inc. (the Union), says that the respondents have breached their good faith obligations by

refusing to engage in collective bargaining (ss. 32 (1) of the Act) and by refusing to conclude a multi-employer collective employment agreement (MECA) between themselves and the Union (s. 33 of the Act as amended by the Employment Relations Amendment Act (no 2) 2004) – statement of problem received on 17 December 2004. The applicant seeks a determination supporting its claim, an appropriate compliance order, penalties in terms of s. 4A of the Act and costs.

2. In an application filed in the Authority on 8 March 2005 the Union asks that the matter be removed to the Employment Court as it gives rise to two questions:

   a. Whether the respondents can refuse, in terms of s. 33 of the Act, to conclude a MECA for the reasons they have advanced; and

   b. Whether, by refusing to enter into a MECA, the respondents have breached the statutory obligation of good faith provided by s. 4A of the Act such that a penalty should be imposed.

3. The respondents deny the allegations. They acknowledge they have refused to conclude a MECA but say that they have genuine reasons based on reasonable grounds to do so, while continuing to be ready to conclude separate collective employment agreements between themselves and the applicant – statement in reply received 24 December.

4. The parties underwent mediation in respect of the original application but the employment relationship problem remained unresolved.

5. Subsequently, and as is made clear above, the Union sought the removal of this matter to the Employment Court and an abridgement of time for the respondents to file their statements in reply.

Investigation

6. In light of the above, and with the agreement of the parties, I convened a telephone conference today with the above named. Also attending the conference was Marika McClutchie, Authority support officer. An outcome of the conference was counsel for

the respondents, Bridget Fleming, copying to the Authority by fax its letter of 24 February 2005 to the applicant setting out in some detail the basis of the respondents' view that they have genuine reasons based on reasonable grounds to refuse to conclude a MECA.

7. Another outcome of the conference was the agreement of the parties for the Authority to consider the application for removal on the papers filed to date.

8. I am satisfied that mediation in respect of the application for removal would not contribute constructively to resolving the matter: ss. 159 (1) (b) (i) of the Act applied.

Background

9. Key background details can be summarised as follows.

10. The applicant is registered union per Part 4 of the Act.

11. The respondents are incorporated companies which are part of the Hunt Group of Companies, and operate as aged-related residential care facilities.

12. Following a ballot process in which members of the Union voted in favour of collective bargaining for a MECA between the applicant and the respondents, on 19 August 2004 the Union forwarded to the respondents a notice initiating collective bargaining, a draft bargaining process agreement and a covering letter requesting a response within 14 days in relation to the identity of the advocate for the respondents and suggested dates to meet and finalise the bargaining process agreement.

13. As a result of delays an allegation of breaches of good faith was filed in the Authority on 6 October. These proceedings were subsequently resolved with the respondents agreeing to enter into collective bargaining with the Union.

14. During subsequent collective bargaining the respondents refused to enter into collective bargaining for a MECA. The respondents also advised they would not jointly bargain in respect of the relevant two work sites, but would first do one and then address the other.

15. While the Union recognises the respondents as separate legal entities, it points out that the way in which the group of aged-care facilities are operated is not entirely separate in that they have similar management and shareholders with many management decisions being made by Hunt Healthcare Group Ltd (which manages the two respondents); the workers employed in the same positions at each site perform similar if not identical work albeit with different residents and the sites operate as part of one whole, for example joint health and safety and other meetings.

16. The Union advised the respondents of its views that their position amounted to a breach of good faith. Mediation was undertaken on 14 December – it was unsuccessful.

17. In his letter of 24 February to the Union, counsel for the respondents, Mr Peter Churchman, provides some detail as to why his clients refused to enter into collective bargaining for a MECA. He says there are commercial considerations relating to the history and structure of the Hunt Group of Companies that mean that each company in the group is strongly motivated to keep its affairs as separate as possible from the others. The respondents also rely on the claim that the Ministry of Health and some district health boards insist, when contracting with the various companies, that there be separate contracts for each company and for each site.

Parties' Submissions

Applicant's Position

18. The Union says that important questions of law are likely to arise in the matter other than incidentally (see above). They require consideration of two new provisions in the Act, i.e. ss 4A & 33. Neither has been judicially considered before. Both questions have general importance to many unions, union members and employers in New Zealand. The resolution of these issues has the potential to impact on current and future collective bargaining for the applicant and other unions.

19. The issue is also one of significant public interest.

Respondent's Position

20. The respondents say they have not breached s. 33 of the Act and that they each have genuine reasons based on reasonable grounds for not wishing to enter into a MECA.

21. In relation to the application for transfer, while of the view that the Authority could appropriately deal with this matter, the respondents will abide by a decision of the Authority to transfer this matter to the Court.

Discussion and Findings

22. Having regard to the above, and consistent with the requirements of s. 178 of the Act, I have no difficulty in acceding to the Union's request to transfer this matter to the Employment Court. First, I accept there is an important question of law that is likely to arise in this matter other than incidentally: at the core of the problem is the issue of defining "*genuine reasons, based on reasonable grounds"* for not entering into a collective agreement: s. 33 of the recently amended Act. Second, given the absence of judicial consideration of this matter, and (per s. 178 of the Act) as the case is of such a nature and of – I believe – such urgency that it is in the public interest, that it is appropriate it be removed immediately to the Court. Third, I am also of the opinion that in all the circumstances the Court should determine the matter.

Determination

23. For the reasons set out above I find in favour of the applicant's, the Service & Food Workers Union Inc., application to refer this matter to the Employment Court.

24. Costs are reserved.

Denis Asher
Member of Employment Relations Authority