Determination Number: AA 290/05
File Number: AEA 1111/02

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	NZ Amalgamated Engineering Printing & Manufacturing Union Inc. (Applicant)
AND	APN New Zealand Ltd (Respondent)
REPRESENTATIVES	Tony Wilton, Counsel for Applicant Rob Towner, Counsel for Respondent
MEMBER OF AUTHORITY	Y S Oldfield
INVESTIGATION MEETING	31 July 2003, 1 August 2003
FINAL SUBMISSIONS	18 March 2005, 1 April 2005
DATE OF DETERMINATION	29 July 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The origins of this employment relationship problem go back to 2001 when the applicant union and W & H Newspapers Limited (as the respondent employer then was) concluded an employment agreement to cover journalists at the New Zealand Herald. Negotiations for this collective agreement had involved an acrimonious dispute over coverage and underlying issues were not completely resolved. The top rates in the collective did not meet the market for some senior and experienced journalists and some union members in this category received personal to holder payments above the newly ratified pay scale.

[2] Towards the end of 2002 the union lodged this matter, alleging breaches of good faith which were undermining coverage. It said that the employer was pushing some senior journalists into leaving the collective agreement. It cited the example of Tony Wall, who had requested the respondent to match the package that a competitor had offered him and was told that the respondent would agree on condition that he withdrew from the collective agreement.

[3] The mechanism by which Mr Wall was purported to be withdrawn from the coverage of the collective agreement was Clause 4.3 of that agreement, which permitted employees to withdraw onto a separate individual agreement without giving up their union membership. Clause 6.1 of the same agreement provided that with the employer's consent, employees might move from wages to salary based remuneration while remaining under the coverage of the collective agreement. Within the document there were thus two alternative mechanisms for formalising the remuneration of individuals who were to be paid more than what was set out in the pay scales of

the agreement. In practice there was also a third simple mechanism by the payment of a margin on top of the scale.

[4] The union alleged that the employer had adopted a blanket policy that it would not use clause 6.1 at all and said that such a policy amounted to a breach of good faith. The employer said that it did not have any such policy and wanted Mr Wall to leave the collective because it could not afford to have him "double dip" by getting certain benefits of the collective agreement on top of a very substantial margin.

Relief sought

[5] In its second amended statement of problem, the union stated that it would like the employment relationship problem to be resolved by means of the following declarations:

> *a.* *" A declaration that the respondent was in breach of the CEA by failing to consider fairly and reasonably Mr Wall's request to remain covered by the CEA.*
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> *b.* *A declaration that the respondent was in breach of its duty of good faith to Mr Wall, in terms of sections 4(2)(a) and 4(4)(b) of the Act, by unfairly and unreasonably requiring him to withdraw from the coverage of the CEA.*
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> *c.* *A declaration that the respondent was in breach of its duty of good faith to the applicant, in terms of sections 4(2)(b) and 4(4) (a) of the Act, by behaving in a misleading and deceptive manner in bargaining, in that it agreed to a term of the CEA which provided a mechanism by which employees covered by the CEA could shift from wage-based pay to salary-based pay with the agreement of the employer, when it had no intention of agreeing to any employee making such a shift.*
>
> *d.* *A declaration that the respondent was in breach of its duty of good faith to the applicant, in terms of sections 4 (2) (b) and 4(4) (b) of the Act, by adopting policies and practices calculated to undermine the coverage application of a collective agreement in force between them and thereby to damage the legitimate interests of the union and its members."*

Issues for determination

[6] The central issues for the Authority were whether there was a blanket policy as alleged and if so, whether it was in breach of good faith. However, early in my investigation I formed the view that there was another issue which had not been raised by either of the parties but could affect the whole case. This was a question of law: whether clause 4.3 was consistent with the Employment Relations Act and so whether it could take effect in the way expressed by the parties. After meeting with the parties to gather evidence I advised them that before completing my investigation I would refer this question to the Employment Court pursuant to s.177 of the Employment Relations Act. The referral is appended to this determination as appendix 1.

[7] Before the Court the union adopted the position that clause 4.3 of the CEA is inconsistent with s.56 of the Employment Relations Act to the extent that it purports to allow employees to opt out of coverage notwithstanding that their work remains covered and they remain union members. The employer argued that resigning from the union is not the only way an employee

can leave coverage and that it is open to the parties to provide in the collective (as they had done here) for other methods, including a method that does not involve resignation from the union.

[8] The Employment Court concluded that a collective agreement purporting to provide that an employee can withdraw from its coverage simply by giving notice to that effect to the employer and the union is inconsistent with the specific and general provisions of the Act. Pending the hearing of an appeal from that decision, the Court of Appeal stayed my determination of the original employment relationship problem. In a decision dated 21 December 2004 the Court of Appeal upheld the finding of the Employment Court.

[9] I tend to the view that the conclusion of the Court of Appeal resolves the essence of this employment relationship problem. We now know that the parties are barred from using clause 4.3 at all, so there can be no suggestion that it would be permissible to have a blanket policy requiring its application in cases of "salarisation." Clause 4.3 will not be the cause of any future employment relationship problems. However, the union has indicated that it continues to want an answer to the factual question whether, in 2002, the respondent imposed such a blanket policy and whether in doing so the respondent acted in breach of good faith.

[10] The parties have provided closing submission to complete the investigation. I begin by addressing the question whether a blanket policy was adopted as alleged and then go on to consider each of the declarations in turn.

Was there a blanket policy?

[11] When Mr Wall approached his employer to say that he had been offered a big incentive to go to a competitor, he asked that the respondent match it by increasing his margin above the pay scale. The margin he sought was nearly 40% above his base salary. He did not expressly invoke clause 6.1 or ask specifically to be put on a salary within the collective. It appears he was not acquainted with the detail of the collective agreement. He also voiced a preference to remain in the collective, which produced the following response, by email, from Mr Harman on 30/7/02:

"The company's absolute bottom line is that the only way you will get a pay rise of the level we are talking is to go on a salary. And the company's present policy is that we will not entertain salaries in the Collective, beyond that small number that we agreed to grandfather."

[12] Mr Wall wanted his pay rise so upon getting Mr Harman's email he agreed to accept the terms of the individual employment contract offered to him, and signed an express provision confirming that he was leaving the collective.

[13] A simple increase to a union member's margin meant that that all the benefits of the collective (such as penal rates) would be retained. The respondent had a concern about such "double dipping" in circumstances where a very high level of increase was proposed, as it was here. In recognition of this the union had agreed to clause 6.1 which provided a mechanism for "salarisation" (the incorporation of penal rates and certain other benefits into the proposed rate) without leaving the collective.

[14] The union did not therefore have an objection in principle with the first part of Mr Harman's email. The problem was with the second part, as the union's position was that where the preference of the employee was to remain within the collective, 'salarisation' can and should be achieved pursuant to clause 6.1.

[15] Mr Harman told me however that clause 6.1 did not address all the employer's concerns regarding double dipping. If Mr Wall were put on a salary pursuant to clause 6.1 he would, like others covered by the collective, receive periodic salary adjustments during the term of the agreement. I was told that, because of the size of the increase being sought, the company did not wish to commit itself to another pay rise for Mr Wall in the near future. At the time, however, it did not explain this to Mr Wall as it was explained to me.

[16] Mr Harman told me that too much has been read into the second part of his email and that Mr Wall's situation, like every other, was to be determined on its merits. The company argues that it had a genuine good faith (financial) reason for wanting to apply clause 4.3 in this situation. It was also conceded however that pay increases to staff covered by the collective were usually passed on to those on individual agreements.

[17] In March 2003 there were two cases where union members took on additional responsibilities and requested, in return, increases in remuneration beyond the pay scales of the collective. One was simply paid a margin above the top of the scale, because the increase sought was not great. The other, Ms Herrick, was told that she would need to come out of the collective. Unlike Mr Wall, she did not express a preference for remaining in the collective (although she told me that this was what she did want) because, she said, she thought it would be pointless to say so. In the event, however, she was not required to sign a provision expressly agreeing to come out of the collective, although she did sign a new individual agreement and she did get her pay rise.

[18] The union says that Ms Herrick's example is evidence that the blanket policy was being implemented. In addition it also cited the example of a new journalist who upon his appointment in August 2002 was told that at the expiry of the initial 30 day period (in which he would be paid under the terms of the collective agreement) he could go on to a much more generous individual agreement and receive back pay to his commencement date.

Determination

[19] The language of the second part of Mr Harman's email could not be plainer. It contains a clear statement of the respondent's position as at 30 July 2002. The respondent "*would not entertain salaries in the collective beyond that small number that we agreed to grandfather*." I accept that this amounts to an unequivocal, blanket policy that there would be no further salarisation pursuant to clause 6.1.

[20] I accept that the policy as expressed was applied in Mr Wall's case. He was offered a pay increase on condition that he leave the collective; it was not negotiable. There is however very little evidence that the policy was actively pursued after that. Ms Herrick initially received the same ultimatum as him but in the end, was not required to consent to leave the collective.

[21] The union has submitted that the company probably pulled back from its original intention because of the union's protests at the suggestion that a blanket policy be put in place. This is a reasonable inference to draw. However, I do not see how it can be a breach of good faith for the company to change its plan in response to the union's concerns.

[22] As for the new employee, Mr P, I note that his circumstances were different from the other examples. He was not a union member and never expressed any interest in becoming one. There is no evidence of the respondent exerting direct influence on Mr P to remain outside the collective although the union submits that this is the effect of being offered an individual employment agreement on better terms than the collective.

[23] To address the question whether the respondent's treatment of Mr P amounted to any sort of breach of good faith is beyond the scope of this matter. It would require consideration of the effect of Part 3 of the Act as well as the good faith and bargaining provisions, and would itself give rise to questions of law which might warrant referral to the Court pursuant to s.177 of the Employment Relations Act. I confine myself to saying that Mr P gave evidence at the investigation meeting and said nothing to indicate that he was pressured to stay outside the collective. The offer made to him was consistent with the terms of the blanket policy but it was also consistent with what Mr P appeared quite independently to want. I cannot conclude that his treatment supports the contention that a blanket policy was implemented.

[24] In summary, the evidence has shown that, in July 2002 the respondent established a policy that there would be no salarisation within the collective and implemented it in relation to Mr Wall. After that, however, no other union member has been forced out of the collective and so it is not possible to say that the policy was pursued beyond July 2002.

Was the respondent in breach of the CEA by failing to consider fairly and reasonably Mr Wall's request to remain covered by the CEA?

[25] The union has argued that having agreed to the inclusion of clause 6.1 the company could not in good faith refuse to consider its use. I agree with this contention. At paragraph [46] of its decision on the questions of law I referred to it, the Employment Court noted that clause 6.1 provided a mechanism for salaried employees to remain within the collective and continued:

"Thus, insistence on salaried employees leaving the coverage of the collective agreement would fall down on a number of counts. It would be inimical to promoting observance of the principles of ILO convention 87 on freedom of association. It would not promote collective bargaining. It would at least indirectly undermine the effect of ss8 and 9 providing that membership of unions should be voluntary and prohibiting any arrangements that confer any preference on employees turning on whether the particular employee is or is not a member of a union."

[26] In submissions Mr Towner referred me to *Carter Holt Harvey v National Distribution Union Inc [2002] 1 ERNZ 239* at 252-253 where the Court noted:

"Whether rights have been breached and whether a person has acted in good faith involve rather different considerations."

[27] Many of the cases which come before the Authority concern breaches of rights which clearly do not amount to breaches of good faith. A very typical example might be the failure, through ignorance, of a small employer to meet its obligations pursuant to the minimum code. I accept that the respondent in this case had a genuine belief that it was acting within the terms of the agreement. I do not however consider it was acting in the spirit of the agreement. The respondent should have given fair and reasonable consideration to Mr Wall's request to remain covered by the CEA, including a full explanation as to why it wished him to leave the collective. I am not satisfied that it has been shown that it did so. It was not surprising that he considered the decision to be an arbitrary one.

[28] I accept that this was a breach of good faith.

Was the respondent in breach of its duty of good faith to Mr Wall by unfairly and unreasonably requiring him to withdraw from the coverage of the CEA?

[29] There was no consultation with Mr Wall and no consideration of any option other than the application of clause 4.3. The blanket policy meant that the parties never got to discuss the range of possible options. There was no opportunity for Mr Wall to negotiate any kind of trade off that might have worked for both parties. He did not therefore make a genuine choice about leaving the collective. The effect was that he was unfairly and unreasonably required to withdraw from the collective. This was a breach of good faith.

Was the respondent in breach of its duty of good faith to the applicant by behaving in a misleading and deceptive manner in bargaining?

[30] The union argues here that the company agreed to the inclusion of clause 6.1 with no intentions of ever applying it, and that this is not good faith behaviour. There is no direct evidence of this; the union's case is that it can be inferred from what has happened subsequently in particular Mr Harman's email. I am not prepared, from such scant evidence, to infer what was in the mind of the company negotiators when they sat around the bargaining table. Although behaviour might be accidentally misleading, deception and a breach of good faith both require intent. On the evidence I heard I cannot say that the respondent behaved in a deceptive manner in bargaining or was not acting in good faith at the time it agreed to the inclusion of clause 6.1.

Was the respondent in breach of its duty of good faith to the applicant by adopting policies and practices calculated to undermine the coverage application of a collective agreement?

[31] In its email of 30 July the respondent adopted a blanket policy that it would not use clause 6.1 at all. It was applied in the case of Mr Wall with the effect that he was induced to leave the collective when he wished to remain covered by it. Alternatives which might have met the respondent's concerns about "double dipping" without him leaving the collective were not able to be considered. A blanket policy of this type amounted to a breach of good faith towards the union and its members, and its application to Mr Wall was a breach of good faith towards him personally.

[32] Had the blanket policy expressed in Mr Harman's email been adhered to it had the potential to undermine the coverage of the agreement over time by whittling away the same senior journalists who were at the centre of the hotly contested coverage disputes. To that extent the publication of that blanket policy leads to an affirmative answer to this question.

[33] However, there was no evidence of substance to show that the policy was implemented; in the months immediately after the union lodged this matter with the Authority, the company stepped away from a blanket approach. The respondent has expressly stated that it no longer takes the position expressed in the email. There has been no on-going breach of good faith. In addition, it has now been established that there is no question of clause 4 being used in the future. This disposes of the employment relationship problem.

Y S Oldfield
Member of Employment Relations Authority