

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN NZ Amalgamated Engineering Printing & Manufacturing Union Inc.
(Applicant)

AND John Patrick Young (Respondent)

REPRESENTATIVES Tony Wilton, Counsel for Applicant
Andrew Gallie, Counsel for Respondent

MEMBER OF AUTHORITY R A Monaghan

INVESTIGATION MEETING 11 July 2005

SUBMISSIONS RECEIVED 29 July and 2 August 2005

DATE OF DETERMINATION 10 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The EPMU says its former employee, John Young, breached his duties to it of fidelity and confidentiality when he set up a new and competing union. It seeks declarations that:

- (a) in taking steps to set up the new union while still in the EPMU's employ, Mr Young was in breach of his duty of fidelity; and
- (b) in using confidential information gained by virtue of and in the course of his employment, in order to solicit members of the EPMU to resign from it and join the new union, Mr Young was in breach of his duties of fidelity and confidence to the EPMU.

[2] An application for injunctive relief was withdrawn.

The Bay Union Group Inc

[3] Mr Young was employed as a senior organiser in the EPMU, and during the relevant period he was responsible for some 44 sites in Hawkes Bay. More than a third of the members employed on those sites were employed in two Heinz Wattie sites at Tomoana and King St, Hastings.

[4] Significant internal union issues arose in 2004 respect of the negotiation of a new collective employment agreement covering all of the Heinz Wattie sites. Mr Young became so concerned about the strategy senior union officials were intending to adopt, and about his own treatment in the process, that on 10 November 2004 he approached the union's national secretary, Andrew Little, with his concerns.

[5] Then, on or about 12 November, Mr Young received an email message from a manager at Heinz Wattie regarding the Tomoana site, indicating a decision about bargaining at that site had been made without any input from him or from the members at the site. Moreover the decision was contrary to the wishes expressed by the members employed at the site. Mr Young said at the investigation meeting that he felt compromised, and that he had lost credibility with the members. He said he pretty much made up his mind he was 'out of there'.

[6] On 18 November 2004 Mr Young indicated to Mr Little that he wished to resign. On or about the same date he decided to set up another union. He took a week's leave to consider his position on the resignation, but by email message dated 23 November 2004 he advised Mr Little:

"... based on our discussions last Thursday, and given the untenable position I am currently facing I have no choice but to advise that I will be finishing up with the Union tomorrow Wednesday 24th November 2004."

[7] On or about 22 November 2004 Mr Young began collecting the 15 signatures necessary to support an application to have the Bay Union Group registered as an incorporated society. Six of the 15 signatories were EPMU members. The remainder were Mr Young's family and friends.

[8] Bay Union Group's application for incorporation was filed with the Registrar of Incorporated Societies and received on or about 29 November 2004. The society was registered on 30 November 2004.

[9] By application dated 6 December 2004 the Bay Union Group Inc sought registration as a union under the Employment Relations Act 2000. Its first members also signed up on 6 December. The society was registered as a union on 23 December 2004.

Breach of duty of fidelity and of confidence

[10] In addition to its concerns about Mr Young's setting up the Bay Union Group, the EPMU believes Mr Young breached his duty of fidelity and made improper use of his knowledge of the EPMU's membership and operations, by:

- (a) visiting the premises of ENZA Foods NZ Limited ("ENZA Foods") on or about 30 November 2004, speaking to EPMU members and attempting to persuade them to leave the EPMU;
- (b) visiting the Heinz Wattie sites on or about 22, 23 and 29 November, to attempt to persuade members of the EPMU to resign their membership;
- (c) through Michelle Griffin, a Tomoana site delegate, on or about 23 November 2004 inviting EPMU members at that site to join the new union, and soliciting their resignations in the event they wanted him to continue to represent them in an outstanding wage claim.

[11] It was said further that Mr Young improperly used his knowledge of the EPMU's operations by approaching EPMU members on the Tomoana site in relation to the wage claim.

[12] In addition the EPMU referred to Mr Young's apparent failure to hand over all EPMU information in his possession at the time his employment ended, and believed he retained confidential EPMU information after that date.

1. The ENZA Foods visit

[13] Mr Young did not deny visiting the ENZA Foods site on or about 30 November. The circumstances of the visit were that he had received a phone call from Kelvin Brown, an EPMU

delegate on the site, enquiring about the negotiations for a new collective employment agreement. A notice initiating bargaining had been served on ENZA in August 2004, and Mr Brown was unaware of Mr Young's resignation from the EPMU. Mr Young decided to call into the site. He said he did so because he did not wish to leave ENZA employees in the lurch.

[14] When Mr Young entered the site he went to see Mr Brown. There was no allegation he approached anyone else. It was common ground that Mr Young advised he had left the EPMU, and gave some indication of the reasons why. He told Mr Brown he had set up the Bay Union Group, and said if Mr Brown needed any help he could give him a call.

[15] After Mr Young's visit Mr Brown telephoned Garth Malpas, a regional organiser for the EPMU who took over the Heinz Wattie Tomoana site after Mr Young's resignation. According to Mr Malpas, Mr Brown said Mr Young was offering to complete the collective bargaining process at ENZA by getting the EPMU members to join the Bay Union Group. However neither Mr Brown nor Mr Young mentioned this in their evidence. It may be that, at the time, both Mr Malpas and Mr Brown inferred the existence of an express offer to complete the collective bargaining process from Mr Young's more generalised offer to provide assistance. Whether or not that is correct, the evidence overall leads me to consider it unlikely that Mr Young made any mention of a wish to have EPMU members join the Bay Union Group.

2. Visits to Heinz Wattie sites

[16] Mr Young admitted visiting the Heinz Wattie sites in late November, after his resignation. The visits were associated with his pursuit of an outstanding wage arrears claim on behalf of EPMU members.

[17] The EPMU had raised the wage arrears claim earlier in 2004, Mr Young was closely involved in it, and it had been to mediation in or about October 2004. There had been a general discussion about a suitable path to settlement, and the company had agreed to make payment, but no terms of settlement were finalised and no payments were made. Mr Young continued an involvement with the matter after his resignation in the circumstances I now set out.

3. The 23 November meeting at the Tomoana site

[18] Michelle Griffin was a signatory on the Bay Union Group's application for incorporation, has since resigned from the EPMU, and is now a member of the Bay Union Group. There was no allegation that her membership was solicited improperly, and it was apparent from her evidence that she was a supporter of Mr Young's. Also, as a delegate she was in a position to be well-informed about members' concerns both about the collective bargaining strategy and the wage arrears claim, and form her own views about the EPMU's actions.

[19] For those reasons I accept her evidence that she was the person who initiated the 23 November meeting. There were allegations that Mr Young had emailed certain material to Ms Griffin, to be read out at the meeting. Mr Young denied doing so, and Ms Griffin said she prepared the written material. It took the form of a brief statement, read out at the meeting, along the following lines: 'John Young is resigning from the EPMU as of 24 November 2004 at 5 pm because he feels he and the members have been compromised by the EPMU.'

[20] Ms Griffin had also prepared a form headed 'We the undersigned authorise John Young to be our representative for the purpose of recovering outstanding back pay issues.' She circulated it at the meeting and obtained a number of signatures.

[21] Mr Young's site visits later in November were made for the purpose of obtaining authority to discuss the wage claim with the company, although he denied going further and soliciting members for the Bay Union Group. He accepted that after his resignation he had discussions with the company about a resolution of the wage claim, and that he told the company he had a list of people wanting him to represent them.

4. Confidential documents

[22] A group of EPMU officials, including Mr Malpas and an EPMU solicitor Jills Angus Burney, visited some of Mr Young's former sites on or about 30 November. One was the ENZA site. After that visit Ms Angus Burney checked the files Mr Young had left in his office, noting that current documents relating to the Heinz Wattie Tomoana site were missing and in particular there was no list of those eligible for the arrears of wages being claimed.

[23] Mr Young said the documents were not there because he worked on current files at home. He denied referring to the material for the purposes of the Bay Union Group. The documents he had retained were returned following mediation in respect of the parties' employment relationship problem. They included: copies of current collective employment agreements and variations thereto; material relating to negotiations not completed; copies of EPMU membership lists; and a partial list of those entitled to wage arrears. Mr Young should have ensured all of that material was returned when his employment ended.

Declarations

1. Breach of duty of fidelity in taking steps to set up Bay Union Group

[24] The bare fact that Mr Young took steps to set up a new union while still in the employ of the EPMU does not necessarily mean he was in breach of his duty of fidelity. A decision of the Employment Court in **Walden v Barrance** [1996] 2 ERNZ 598 illustrates why:

"... the respondent's employment contract was subject to an implied term that he was under a duty of fidelity to his employer to abstain from conduct likely to do damage to the employer's business or having the potential to undermine the relationship of trust and confidence. Obviously, an employee who has given notice must be entitled to make preparations for departure and for his or her future working life. There is nothing wrong with any of that. For example, the respondent was perfectly at liberty in his spare time to look for premises and order stationery, as he says he did. However, conduct will be of a different colour if the preparations are at the expense of injury to the goodwill of the employer's business or involve some serious dereliction of the continuing duty of trust and confidence." (p 616 ll 14 – 24)

[25] Examples of serious dereliction of the duty of trust and confidence while still in employment include soliciting clients for the new business, diverting for the benefit of the new business opportunities or information that should be made available to the employer, or otherwise misusing the employer's confidential information. However, as the above statement about the law makes plain, an employee is entitled to make some preparations for a working future, including preparing to establish a new business. As far as this employment relationship problem is concerned that includes taking steps to set up a new union, provided the steps are essentially administrative and do not extend to attempting to obtain business for the new union at the EPMU's expense.

[26] I see nothing wrong with Mr Young's mere seeking of legal advice, even if prior to his resignation, about setting up a new union. Nor is there anything wrong in his preparing the documentation necessary to support applications for registration as an incorporated society, and as a union, although I have some concern about EPMU members acting as signatories. Aside from this, if the 'steps' involved in setting up the Bay Union Group were limited to spare time activities such as seeking advice and preparing documentation, there would be no breach of the duty of fidelity.

[27] The more important question in this employment relationship problem concerns exactly when Mr Young's employment ended, and hence the extent of the 'steps' taken to 'set up the new union' while 'still in the employ' of the EPMU.

[28] It was common ground that the applicable employment agreement required the parties to give four weeks' notice of the termination of employment. Mr Young did not give four weeks' notice of his resignation – at most he gave one week. Mr Little communicated to him on that point as follows in an email message dated 23 November 2004:

“[reference to discussions about a managed exit] In any event, notice effective tomorrow is in breach of your obligation to give 4 weeks notice.”

[29] The message went on to ask Mr Young to re-think his position. However the same morning Mr Young announced to all EPMU staff that he was 'finishing up' on 'Wednesday'. In an email message dated 24 November 2004 Mr Little said:

“If you insist on terminating your employment today you will not have given the required 4 weeks notice and so this will not be paid to you. ... As indicated yesterday, the offer made ... to manage your termination will also be withdrawn on acceptance of your resignation.”

[30] It was submitted on behalf of Mr Young that the communication amounted to an election on the part of the EPMU to cancel the employment agreement, so that the duty of fidelity was no longer owed after 24 November. I read it more as a reflection of the EPMU's position on payment in lieu of notice and the failed attempt to negotiate Mr Young's exit. I believe it amounted to bowing to the inevitable rather than a cancellation.

[31] Thus on the face of the matter Mr Young should have given four weeks' notice of his resignation. With reference to the principles in **Schilling v Kidd Garrett Limited** [1977] 1 NZLR 243, the duty of fidelity would have continued during the notice period although it would not survive the end of that period.

[32] Mr Young's attempts to pursue the wage arrears claim occurred during the four week period following his advice that he wished to resign. As an attempt to appropriate for himself or the Bay Union Group work that was being done by the EPMU, it is capable of amounting to a breach of the duty of fidelity.

[33] The conversation with Mr Brown also occurred during what would have been Mr Young's notice period. It is also capable of amounting to a breach of the duty of fidelity. This was certainly so if Mr Young expressly offered to continue with the negotiations for a collective employment agreement, but was also the case even if he did no more than make a generalised offer of assistance. In **Walden v Barrance**, for example, Mr Barrance had approached clients prior to the termination of his employment, discussed his intention of leaving, aroused their interest in retaining him after his departure, and made a list of their names with a view to approaching them again later. The Employment Court did not condone that behaviour, and I regard Mr Young's as sufficiently similar to warrant a conclusion that Mr Young said too much to Mr Brown. He should have referred Mr Brown to Mr Malpas or Mr Little.

[34] However, aside from the submissions concerning cancellation of the employment agreement, I have not been addressed fully on the implications of Mr Young's apparent breach of the notice provision. I have difficulty with the proposition that Mr Young could take advantage of the breach to act in ways that would otherwise have amounted to breaches of the duty of fidelity. On the other hand, there are dicta of Chief Judge Goddard in **Ongley Wilson Real Estate v Burrows** [1999] 1 ERNZ 231 (at p 243-244) to the effect that, as long as employment is ended, the duty has gone. His

Honour went on to say there may be consequences for an employee who fails to give the correct period of notice, but extending the period of employment against the employee's wish is not one of them.

[35] Any resolution of the point is further complicated by Mr Young's having raised a personal grievance in respect of his resignation, saying it amounted to an unjustified constructive dismissal. The grievance has not been withdrawn or settled, and I was told the parties are awaiting the outcome of this investigation before addressing it again. If the termination of Mr Young's employment amounted to a dismissal, then his employment ended on 24 November. His subsequent actions did not amount to breaches of the duty of fidelity.

[36] For these reasons I consider it premature to do any more than say the approaches in respect of the wage arrears claim, and the conversation with Mr Brown, were capable of amounting to breaches of the duty of fidelity.

2. Misuse of confidential information

[37] The declaration sought in respect of the misuse of confidential information referred to Mr Young's use of such information to solicit EPMU members to resign from it and join the Bay Union Group.

[38] There was no evidence that anyone actually solicited any resignation from membership of the EPMU. I observe that s 57 of the Employment Relations Act accepts the possibility of an employee being a member of more than one union at a time - addressing coverage under collective employment agreements when that is the case. Some of the EPMU's reasoning seems to assume that joining the Bay Union Group would inevitably require a resignation from the EPMU, but there is no evidence to support that proposition.

[39] As for soliciting members to join the Bay Union Group, Ms Griffin acknowledged that she did so, principally from her production line. The people who joined the Bay Union Group in December 2004 came from that pool of potential members.

[40] Mr Young was in possession of limited lists of EPMU members. There was no evidence he used those lists for the purpose of soliciting membership of the Bay Union Group, nor any evidence that he solicited anyone to join the Bay Union Group.

[41] Mr Young did, however, solicit authority in his own name to continue with the wage arrears claim. To the extent that the terms of the declaration sought are based on his actions in that respect, counsel for the EPMU cited **Peninsular Real Estate Limited v Harris** [1992] 2 NZLR 216, 219:

“Whether the departing employee takes customer lists or not, generally he may not solicit or approach a client of his former employer in respect of a transaction current at the time of his departure ...”

[42] Further to an ex-employee's knowledge of current transactions, in **Korbond Industries Limited v Jenkins** [1992] 1 ERNZ 1141 the Employment Court quoted the following extract from **SSC & B Lintas (No 2)** [1986] 2 NZLR 436, at p 1153:

“The difficulty ... is not in relation to the employee's knowledge of the names and addresses of the ex-employer's customers; it is in relation to the exploitation of particular and specific information concerning transactions – and especially on-going transactions – between the former employer and his customers. By availing himself of information of this kind an ex-employee is enabled to secure business from his former employer's customers which he would not otherwise be in a position to obtain. It is my view that, in some circumstances information in this category is not covered by the general principle that from the moment when his employment ceases, a servant is entitled to make use of knowledge and skill acquired while in his master's service, including

knowledge and skill directly obtained from the master in teaching him his business. Whether this is so must, I think, depend not only on the nature and quality of the information, but also on the way in which it is exploited in each particular case. At the same time, it must not be forgotten that we are looking at a situation where the service contract has been terminated and there remains no vestige of the servant's former duty of fidelity to his master.”

[43] Whether or not Mr Young’s employment ended on 24 November, his knowledge of the detail of the wage arrears claim, and his attempt to use that knowledge, was a misuse of the confidential information Mr Young possessed about the claim by virtue of his employment with the EPMU.

[44] I therefore make a declaration in those terms.

Costs

[45] Costs are reserved. The parties invited to agree on the matter themselves. If they seek a determination from the Authority they are to file and serve memoranda on the matter.

R A Monaghan
Member, Employment Relations Authority