

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Finegand Sub Branch of the New Zealand Meat Workers Union
(Applicant)

AND Primary Producers Co-operative Society (Respondent)

REPRESENTATIVES Greg Browne, Representative for the Applicant
Victoria Donaghy, Counsel for Respondent

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION MEETING 7 April 2005

DATE OF DETERMINATION 15 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] PPCS Limited operates the freezing works at Balclutha called Finegand. Many of the employees at Finegand belong to the New Zealand Meat Workers and Related Trades Union Incorporated, which is registered as a union under the Employment Relations Act 2000. The Finegand sub-branch of the union lodged a statement of problem with the Authority concerning serious difficulties concluding a collective agreement between PPCS and a section of its members known as Woolpullers, of whom there are currently nine. The Woolpullers seek a reference to facilitation by the Authority for the purpose of resolving their bargaining difficulties. They also ask the Authority to fix the provisions of the collective agreement on the basis of a serious and sustained breach of good faith by PPCS over the bargaining.

[2] Both parts of the problem refer to new law enacted by the Employment Relations Amendment Act (No 2) 2004. Set out at section 50C of the Employment Relations Act 2000 as amended are four distinct grounds, one or more of which must exist before the Authority can accept a reference to facilitation. The first is where in the bargaining there has been a serious and sustained failure by a party to comply with the duty of good faith which has undermined the bargaining. The second is where the bargaining has been unduly protracted and extensive efforts including mediation have failed to resolve the bargaining. The third is where there has been one or more protracted or acrimonious strikes or lockouts in the course of bargaining. The fourth is where a threatened strike or lockout would be likely to affect the public interest substantially. The Woolpullers say that the first three grounds exist. They also say that the Authority may now fix the provisions of the collective agreement under section 50J because serious and sustained breaches of good faith by PPCS have significantly undermined the bargaining. This claim partly overlaps the first ground on which a reference to facilitation is sought.

[3] To determine whether grounds for facilitation or fixing of terms of a collective agreement exist, I will review the relevant history of the bargaining under each provision relied on by the Woolpullers. It is helpful to first explain some events that occurred under the Employment Contracts Act 1991.

1990's bargaining

[4] Woolpullers at Finegand are skilled, seasonal, piece-rate workers. They operate woolpulling machines which separate wool from the skins of sheep killed at Finegand or elsewhere. They also grade the wool. At Finegand, there are three men per machine. Finegand has three machines but the number in use depends on how many of the six chains are operating. The Woolpullers are paid a rate per 100 skins set by negotiation between Finegand management and the Woolpullers through their union. A Woolpuller's income varies depending on the rate set, the number of Woolpullers who share the payment, and the number of skins available.

[5] The Woolpullers say that in August 1994, under duress and protest, they signed a new contract that reduced their income. In 1995, the number of Woolpullers was reduced by one and the rate also reduced pro-rata. Subsequent Employment Tribunal proceedings resulted in a full and final settlement achieved through mediation in January 1996.

[6] There are various hurdles in the way of treating the bargaining prior to January 1996 as part of the problem currently before the Authority, including the terms of that settlement and the requirement that legal proceedings be commenced within the applicable limitation period. While the events mentioned and others discussed at the meeting remain very much part of the current problem for the Woolpullers, I am not able to treat them as relevant for the purposes of the current application. The relevant bargaining for present purposes commenced about February 2003.

[7] Since the rate reduction in 1994, there has been some improvement in the piece rate. However, the Woolpullers point out that the current rate is lower than the 1994 rate even without consideration of the effects of inflation. By comparison with 1993, they now work harder for less pay. Their piece-rate is lower than applies to other PPCS Woolpullers. That is the context for the bargaining.

Current bargaining

[8] The NZ Meat Workers Union initiated bargaining with PPCS Limited which resulted in a collective employment agreement (the PPCS Limited Meat Processors Agreement) that came into force on 28 February 2003 and which expires on 28 February 2006. It applies to members of the Union at a number of freezing works including Finegand. The preamble to the collective agreement explains the long standing practice that terms and conditions of employment are negotiated at department level as well as on a multi-site basis. It also stipulates that the terms more favourable to the employee prevail if there is any inconsistency between the minimum terms in the PPCS Limited Meat Processors Agreement and the departmental contract. Hence the collective agreement resolved the bargaining in respect of the minimum terms applicable to the Woolpullers (and others) but it did not resolve the bargaining at a departmental level.

[9] At Finegand, departmental level negotiations commenced on 20 February 2003. Wayne Shaw is the Finegand plant manger. I accept his evidence that there were no less than 5 meetings between February and April 2003 to discuss, among other things, the Woolpullers' claims. There was then a mediation in May 2003 over the unresolved negotiations including the Woolpullers' claims. Following the mediation, the Woolpullers wrote to Mr Shaw confirming that they stood by their earlier claims. There were further meetings on 19 & 28 November 2003 then another mediation on

29 January 2004. PPCS then made an offer in writing which the Woolpullers rejected in favour of their position at the mediation. PPCS replied in writing rejecting that position but saying that they remained open to considering any counter offer. There followed 3 strikes on 10 – 12 February, 20 – 21 February and 27 February 2004. In the lead up to the strikes, the Woolpullers asked PPCS to agree to a binding third party arbitration but that was not accepted. There were also exchanges between the Woolpullers and PPCS on 9 & 13 February 2004 which did not resolve the problem. In March 2004, the Union wrote requesting specific financial information and Mr Shaw responded with an offer of the company's annual report. In March 2004, the Union wrote to say that if the company had an improved offer, the Union would be willing to meet to try and settle the matter. In reply, PPCS said that it would meet although it had no other offer, then the Woolpullers increased their claim. There were further exchanges in August, September and December 2004 following which this application was made.

[10] I am told that there is no written bargaining process agreement in respect of either the bargaining for the PPCS Limited Meat Processors Agreement or the departmental agreement.

Serious and sustained breach of good faith undermining bargaining

[11] The heading refers to section 50C (1) (a) of the Act. The Woolpullers say that PPCS has breached good faith by showing no genuine interest in settling their agreement. They say that the offers made are token and derisory and, if serious, PPCS would have offered at least the Pareora rates (another PPCS site). The Woolpullers say there was a point blank refusal to consider third party arbitration. They also refer to the refusal to supply financial information following the request in March 2004.

[12] PPCS does not wish to settle the negotiations on the terms claimed by the Woolpullers but I do not agree that the offers made demonstrate a breach of good faith. It might just as easily be said that the Woolpullers are in breach of good faith by refusing to accept less than the Pareora rates, but that would be equally wrong. There is a significant gulf in the parties' positions and neither wants to make a concession of any significance towards the other's position. Neither party accepts the rationale advanced in support of the other's position. That happens without it constituting a breach of good faith by either.

[13] PPCS did not refuse to consider third party arbitration; it declined to bind itself to that proposal because it preferred to retain control over the negotiations. PPCS did nothing illegal or improper in refusing that option. The Employment Relations Act 2000 promotes collective bargaining and does not require any party to the bargaining to submit to arbitration.

[14] At the investigation meeting, the Woolpullers exhibited a 1998 PPCS spreadsheet setting out the sort of financial information covered by the 2 March 2004 request. The request was for current information. Mr Shaw conceded that similar but current information does exist. PPCS's response in March 2004 was to offer a copy of the company's 2003 annual report rather than directly respond to the information request in the terms it was made. There was evidence at the investigation meeting that management made some inquiries about the sort of available information before the March 2004 response. However, the obligation under section 4 of the Act at the time was not to do anything likely to mislead. The response dated 3 March 2004 fell short of that obligation because of the implication that the information sought was not available. Depending on the view one takes of whether the February 2003 settlement concluded the bargaining for a collective agreement, it might also be that the duty in section 32 (1) (e) and section 34 applied and the response would similarly fall short of PPCS's obligations. However, the information request and what it should have returned were incidental to the bargaining. The principal component of the comparative data across several PPCS plants sought by the Union was known to the Union because it was the

departmental piece rates payable at the other plants. I do not regard the breach of good faith as *serious and sustained* and it did not undermine the bargaining.

[15] The Woolpullers are also critical of PPCS for breaching a confidentiality clause in the previous departmental agreement. A careful reading of the press coverage of the dispute does not support the view that Mr Shaw made any inappropriate disclosure to the media. Mr Shaw did circulate an email to various people prior to a strike seeking volunteers to cover the Woolpullers work. In that email, Mr Shaw referred to the existing piece rate. During the investigation meeting, he acknowledged that he should not have disclosed that information. However, I do not think that Mr Shaw's action was a breach of the duty of good faith and it certainly has had no impact on the bargaining.

[16] I find that the ground set out at section 50C (1) (a) is not established.

Bargaining unduly protracted and unresolved despite extensive efforts including mediation

[17] This heading refers to section 50C (1) (b) of the Act. The efforts of PPCS and the Woolpullers to resolve their differences mostly occurred between February 2003 and February 2004 but it must be remembered that this is seasonal work. In *Service & Food Workers Union Inc v Air New Zealand*, 19 January 2005, A Dumbleton (Member), AA11/05 the Authority concluded that bargaining over an eight month period did not meet the standard of *unduly protracted*. It must also be said that the effort put in to the current bargaining is far less than that described in the *Service & Food Workers* case. Accordingly, I find that the bargaining has not been unduly protracted nor have there been extensive efforts to resolve the difficulties. This ground for reference to facilitation is not established.

Protracted or acrimonious strikes

[18] This heading refers to section 50C (1) (c) of the Act. I was given a number of clippings from the local papers that reported on the strikes. Both parties are quoted giving their respective positions on the dispute but there is nothing in the reporting to support the view that the dispute is acrimonious on either side. The strikes' effect was limited to the Woolpullers and the management personnel who attempted to cover their work. While PPCS says that the strikes are illegal, no legal proceedings for injunctions or damages were filed. After the strikes ended, the Woolpullers resumed their normal duties. While the exchanges between the parties at the investigation meeting were direct, there was no evidence of acrimony in the relationship between those present. During the investigation meeting, there was some informal chat about previous protracted strikes at Finegand. In some situations, 6 strike days over three separate strikes might be considered *protracted*, but in my judgment, it falls well short of that description in this case. I find that there has not been either protracted or acrimonious strikes so this ground for a reference to facilitation is not established.

Remedy for serious and sustained breach of good faith

[19] The heading refers to section 50J which empowers the Authority to fix the terms of a collective agreement if the grounds specified in subsection (3) are established. These grounds set a higher test than exists for a reference to facilitation under section 50C (1) (a). The breach of the duty of good faith relied on must be *sufficiently serious and sustained as to significantly undermine the bargaining*. My earlier finding that the breach of the duty of good faith in respect of the provision of information had not undermined the bargaining means that the Woolpullers cannot succeed under section 50J either.

[20] There are two further reasons why the requirements of section 50J are not satisfied. I do not accept that all other reasonable alternatives have been exhausted nor do I accept that fixing the terms of the collective agreement is the only effective remedy. To some extent, the dialogue during the investigation meeting disclosed some misunderstanding or at least misplaced suspicion about the motives and effect of offers already made. I consider there remains scope for these parties to engage to further discussion or mediation. They have the capacity to reach agreement on at least some of the outstanding issues.

Conclusion

[21] Grounds for a reference to facilitation are not established.

[22] Grounds for the Authority to fix the terms of a collective agreement are not established.

[23] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority