

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN TPF Restaurants Limited, Trading as Burger King (Applicant)

AND The Autonomous Workers Union (Respondent)

REPRESENTATIVES Nikki Dines, Counsel for Applicant
Jo Hambleton, Counsel for Respondent

MEMBER OF AUTHORITY Paul Montgomery

INVESTIGATION MEETING 13 October 2005

DATE OF DETERMINATION 26 January 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, TPF Restaurants Limited (TPF), alleges that The Autonomous Workers Union (AWU) breached section 148 of the Employment Relations Act 2000 in disclosing in an email to its members, matters that had been raised and discussed at a mediation conference. Further TPF alleges that AWU breached section 21(2) (a) and (b) of this Act by visiting the applicant's premises at times that were not reasonable and without regard to the normal business operations. Finally, TPF alleges that AWU has breached the good faith obligations imposed by section 4 of the Act.

[2] The applicant seeks declarations and penalties for these alleged breaches, a retraction and apology and costs.

[3] For its part, the respondent denies the breaches and therefore does not accept that penalties are payable.

Brief history

[4] The parties have experienced considerable difficulties establishing a professional, working relationship. They sought the assistance of the Department of Labour's mediation service and attended a mediation conference on 5 July 2005. As a result of discussions in the mediation setting the parties established and signed a *Memorandum of Understanding* (MoU) which set out the way forward in the developing relationship. The Memorandum is attached to this determination. The names of relevant staff members have been removed.

[5] Following the mediation Mr Clark, the AWU's secretary, emailed a document to a group of members. As chance would have it, the email was received by a TPF staff member who did not belong to the Union, and who provided the applicant with a copy. No useful purpose would be served by setting the email out in full as the parties are thoroughly familiar with its contents. I shall refer to relevant extracts as and when they apply to the events.

[6] Having received and studied the email, the company took exception to it and posted a *staff announcement* on the notice board in the Anderson's Bay restaurant on 5 August 2005. Again, it is not necessary to set it out in full, but it closes by saying;

We weighed up what options to take and ultimately decided that seeking legal redress was the most appropriate way of trying to undo some of the damage done by the AWU. We are reluctant to do this but the actions of the AWU to date have demonstrated that other more satisfying options which involve goodwill, trust and integrity are unlikely to be productive.

[7] The AWU was advised of the notice by one of its members and promptly sought a copy of it. As the MoU stated that all contract by the Union was to be through Ms Heather Butland, the Area Manager, Mr Clark attempted to contact her on her cell phone. Ms Butland was not available to take the call as she was hosting a major sporting event on behalf of the applicant. Unable to visit the restaurant himself, Mr Clark asked a Mr Phillip Mason, a Union member employed elsewhere, to call and collect a copy of the notice.

[8] Mr Mason called at the premises and initially met with Ms Forscutt, a Junior Manager, who, after some discussion with the visitor, went for assistance and brought Mr Kilpatrick, the Assistant Manager, out to meet with Mr Mason. Mr Mason explained the purpose of his visit and asked that they give him a copy of the notice from the notice board. During this discussion Ms Urwin, the Restaurant Manager, arrived and joined the group. Mr Mason again asked for the notice, but Ms Urwin declined, pointing out that the MoU confirmed the parties' agreement that all communication was to be with Ms Butland. A debate ensued. Mr Mason says he felt intimidated when surrounded by three of the respondent's staff. Ms Urwin says she too felt intimidated but by Mr Mason's manner and insistence.

[9] The visit appears to have occurred around 5.00pm on Sunday 21 August 2005. The salient point is that Mr Mason departed without a copy of the notice.

[10] It is evident that the company took a dim view of this incident and pressed on with its intended application to the Authority. It says this incident was a breach of the MoU and a breach of good faith by the Union.

The issues

[11] The Authority is called on to determine the following issues;

- Did Mr Clark's email breach the confidentiality of the mediation; and
- If it did, how serious was the breach; and
- Did the Union, through Mr Mason's visit, breach its good faith obligations under the Act and in the context of the MoU; and
- What, if any, remedies are appropriate in the event that a breach has occurred?

The investigation meeting

[12] Each party was ably represented by counsel at the meeting and I record the Authority's appreciation for the contribution to the investigation and for their written submissions which I have found helpful. It was an essentially a genial meeting and each witness gave evidence that has assisted me in coming to my determination.

Analysis and discussion

[13] There are elements analogous to a David and Goliath struggle in this matter. The AWU is a small, committed yet inexperienced Union, while TPF is a large, professional organisation. Each has its own integrity and objectives and the Memorandum of Understanding was a genuine attempt to work towards a constructive, workable, ongoing relationship between the parties. It is regrettable that the alleged breaches were not dealt with in a mediation setting.

[14] The Employment Relations Act 2000 makes it plain that the Act's objectives are to:

3. Object of this Act

The object of this Act is—

(a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship –

(i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and

(ii) By acknowledging and addressing the inherent inequality of power in employment relationships; and

(iii) By promoting collective bargaining; and

(iv) By protecting the integrity of individual choice; and

(v) By promoting mediation as the primary problem solving mechanism; and by reducing the need for judicial intervention.

[15] Section 148 of the Act sets out the confidentiality requirements.

148 Confidentiality

(1) Except with the consent of the parties or the relevant party, a person who;

(a) provides mediation services; or

(b) is a person to whom mediation services are provided; or

(c) is a person employed or engaged by the Department; or

(d) is a person who assists either a person who provides mediation services or a person to whom mediation services are provided —

must keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.

[16] At section 148(6) the Act goes on

Nothing in this section—

(a) prevents the discovery or affects the admissibility of evidence (being evidence which is otherwise discoverable or admissible and which existed independently of the mediation process) merely because the evidence was presented in the course of the provision of mediation services; or

- (b) *prevents the gathering of information by the Department for research for educational purposes so long as the parties and the specific matters in issue between them are not identifiable; or*
- (c) *prevents the disclosure by any person employed or engaged by the Department to any other person employed or engaged by the Department of matters that need to be disclosed for the purposes of giving effect to this Act; or*
- (d) *applies in relation to the functions performed, or powers exercised, by any person under section 149(2) or section 150(2).*

[17] It is evident that the document which resulted from the mediation between the parties is not the standard settlement agreement resulting from most mediations. It is clear that for the purposes of detailing the agreement between the parties as to the ongoing relationship between them, the MoU and the terms set out therein do not fall within the terms of section 148. However, the parties in attendance at mediation must keep confidential *any statement, admission, or document created or made for the purposes of the mediation and any information, for the purposes of the mediation, is disclosed orally in the course of the mediation.* To put it another way, any debate or discussion between the parties which gave rise to the agreed terms of the Memorandum necessarily must remain confidential between those in attendance.

[18] The applicant contends that matters relating solely to the mediation process itself were revealed in Mr Clark's email to members. Mr Clark says he disagrees with that position. However, in the course of the investigation meeting following clarification of the confidentiality requirements, to his credit he appeared to concede that he may be in error on this particular point.

[19] So, what went wrong in this case? I believe the first error was the email from Mr Clark. It overstepped the confidentiality boundaries imposed by section 148. I accept that some matters traversed in the email were issues existing and discussed by the parties prior to mediation, others were discussed within the terms of section 148.

[20] I do not accept that the mediator failed to advise those participating in the mediation of the statutory obligation on both parties to observe the rules of confidentiality. I do not accept that because the mediation resulted in the production of a document, the MoU, which was clearly not confidential, the confidentiality in respect to the debate and discussions which led to that document were waived.

[21] The respondent argued that the removal of the confidentiality clause in the Mediation Services standard template for a settlement agreement allowed it to take the course it did in the email to members. I think it is clear from what I have said above that I do not accept this. The confidentiality of matters relating to mediation is clearly covered in the statute.

[22] Having said that, the Authority also has to consider how widely a breach of the statute has been noised abroad. On the evidence put to the Authority, about 6 to 7 persons received the email and all but one were members of AWU. That the distribution was so limited needs to go into the balance. A wider circulation would have likely have occasioned greater harm to the applicant company.

[23] I perceive a high degree of frustration on the part of TPF and its executives. It is a frustration with which I empathise. Having had problems getting a positive and productive relationship on foot with the Union, it went to mediation to set up an agreed way forward. The MoU reflects this. The evidence from its witnesses clearly stated this. The *staff announcement* states this. I think this frustration is well justified given Mr Clark's email.

[24] The question in my mind is whether TPF took undue affront at the email and to the visit of Mr Mason to secure a copy of the *staff announcement*. The company had every right, in the light of the MoU, to expect that neither incident would arise and the parties could move forward on agreed terms.

[25] Once these two incidents arose, TPF was thoroughly entitled to question the behaviour of the Union and to bring it to heel under the terms of the Memorandum of Understanding. I am unsure why TPF chose not to pursue *other more satisfying options which involve goodwill trust and integrity* regarding such as *unlikely to be productive*, but I believe it is because it accepted it had established a working arrangement with the AWU and had been let down by the Union's actions.

[26] I would observe the posting of the *staff announcement* one month after the mediation is a little puzzling. Having had a copy of the email from Mr Clark with which it clearly had issues, was it a wise move to place its notice on the board when only 5 or 6 of its staff were Union members?

[27] While I accept TPF's view that elements of Mr Clark's email were inflammatory, I am of the view that TPF could have addressed those statements directly with him, perhaps with mediation assistance, rather than incurring the expense of putting the matter before the Authority. On the other hand, I appreciate that it took into consideration Mr Clark's statement that *we got a useless mediator who has allowed the company to ride roughshod over employment law* in preferring the matter to be determined by the Authority.

[28] The visit by Mr Mason to collect a copy of the staff announcement breached the MoU on two fronts. The agreement was that AWU had access to the restaurant lobby for recruitment purposes. Mr Mason's visit was not for recruitment purposes and the agreed 24 hours notice of a visit was not given. The second issue is the agreement that all communications with the applicant were to go through Ms Butland. I accept efforts to contact her were genuine yet unsuccessful, but the situation viewed objectively, was insufficiently urgent to ignore an agreed protocol.

[29] There was considerable debate at the investigation meeting as to whether the restaurant was busy at the time of Mr Mason's visit. The applicant says the visit was disruptive to operations with a considerable number of customers seeking service, while the respondent says there were few customers in the premises at the time. I have not found it necessary to determine this clear conflict in the evidence, having found for the applicant on the grounds outlined above.

Determination

[30] I find that AWU is responsible for two breaches of the Memorandum of Understanding, specifically Mr Clark's email and Mr Mason's visit for other than recruitment purposes and without giving notice. Having made these findings against AWU, the Authority, having considered the issues with care, regards the breaches as relatively restrictive in their effects. I am mindful in this context of the evidence of Ms Tracey Miller, the HR Manager for the applicant company, in which she made it plain that once the Memorandum of Understanding had been signed, she saw the way forward to have been established in a positive and progressive manner. The Authority thoroughly understands the high degree of frustration occasioned by these breaches.

[31] I find that the AWU has breached its obligations under the Memorandum of Understanding. However, those breaches fall short of breaches of the Union's obligations in good faith.

Remedies

[32] The applicant sought penalties for the breaches it alleged, a retraction and an apology from the Union and costs.

[33] The applicant is entitled to redress for the inconvenience and costs it has incurred. However, the imposition of penalties on a nascent Union which is likely to deprive others of representation is inconsistent with the aims of the Employment Relations Act 2000. For that reason alone, I decline to award penalties against AWU.

[34] I direct that AWU formally apologise in writing to the applicant company, that the apology is also to include a retraction of the allegations made in Mr Clark's email and that this is to be done within 14 days of the issue of this Determination.

[35] But this is not the end of the matter. I direct the parties to return to mediation to refine and make more explicit the terms of the Memorandum of Understanding. As the applicant party, I require that TPF, as the applicant party, approach the Mediation Service in Dunedin to arrange for its assistance.

Costs

[36] Rather than put either party to further costs in making submissions on this issue, and in the light of the largely impecunious status of the respondent, I order AWU to pay to the applicant the sum of \$450 as a contribution to its reasonably incurred costs.

Paul Montgomery
Member of Employment Relations Authority