Determination Number: AA 25/06
File Number: AEA 806/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Epic Packaging Limited (Applicant)
AND	New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc. (Respondent)
REPRESENTATIVES	Tim Cleary, Counsel for Applicant Helen White, Counsel for Respondent
MEMBER OF AUTHORITY	Y S Oldfield
INVESTIGATION MEETING	23 September 2005
DATE OF DETERMINATION	8 February 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The parties disagree about whether the respondent (EPMU) may initiate bargaining (in terms of s. 42 of the Employment Relations Act) in relation to the possible joinder of the applicant as a subsequent party to a multi-employer collective employment agreement (MECA.)

[2] The applicant company is engaged in the manufacture of flexible packaging. Significant numbers of its staff are members of EPMU. By notice dated 7 April 2005 EPMU purported to give notice to the company of bargaining for a collective agreement pursuant to s.42. There was no collective agreement in force between the parties at the time. The notice contained the following:

"INITIATION OF BARGAINING FOR COLLECTIVE AGREEMENT"

To: Epic Packaging Ltd

The NZ Amalgamated Engineering Printing and Manufacturing Union hereby initiates bargaining for a collective agreement.

1. *PARTIES: The intended parties to the collective agreement are:*

Union Party: *NZ Amalgamated Engineering Printing and Manufacturing Union*

Employer Party *Epic Packaging Ltd*

2. *COVERAGE: The Union is seeking by way of this bargaining to have the named employer agree to become a subsequent party to the Plastics Industry Collective*

Agreement. (I September 2003 to 31 August 2005.) This is possible through the following provision of that agreement:

> *2.1* ***Subsequent Employer Variation****: The parties agree that this Agreement may be varied from time to time by the NZEPMU, without requiring the agreement of any other party, to include further employers in the Plastics Industry who agree to become parties.*

The coverage clause of that agreement is:

3. ***Coverage:*** *This agreement shall cover employees whose work is described in clause 5.1 of this agreement and who are employed by an employer in the Plastics Industry and is a party to this agreement [*sic*] and who are or become members of the union.*

…

If there is anything about this notice which you believe is contrary to the requirements of the Act, or which otherwise would make the initiation of bargaining ineffective, please advise the union promptly. Failure to do so will be regarded as acceptance that bargaining has been properly initiated by this notice."

[3] At the time this notice was served on the company a copy of the MECA was provided to it by the union organiser.

[4] Union witnesses told me that they had used notices of this sort on many previous occasions when seeking to join subsequent parties to this and other MECAs. EPMU says that this notice established a process arrangement which compelled the applicant to enter into collective bargaining, in just the same way as it would if the union had initiated bargaining with the company as an original party to a MECA or for a Single Employer Collective Agreement (SECA.) In the union's view all the obligations set out in sections 32-50 applied to the parties as a result. The company disagrees.

Issues for determination

[5] One of the issues the company has raised can be disposed of immediately. This is the question whether the notice clearly identified the intended coverage of the agreement

[6] The notice, read with its attachments, makes it clear that the MECA is to cover employers in the Plastics Industry, but none of these documents define "Plastics Industry" or show why the company is considered a part of it. The company considers the notice to be invalid as a result. In addition it says that however the industry might be defined, Epic Packaging Limited is not part of it and so joinder to this MECA is inappropriate.

[7] The union's position is that the term "Plastics Industry" applies to companies with the primary purposes of manufacturing plastic products, supplying services to those manufacturers or recycling plastic products. In written submissions the union observed that there could be no practical doubt on the part of the applicant regarding the proposed coverage because the coverage provisions clearly described the work and the industry to be covered. Subsequently it conceded the absence of a definition in the MECA and told me that it was proposed to rectify this in the current round of negotiations.

[8] I checked the website of the Plastics Industry Training Organisation (Pampito) and found no definition of "plastics industry" there either. The union advised that other flexible packaging manufacturers have been joined as subsequent parties, but the company told me that it does not consider itself part of that industry and has no association with Pampito, or indeed any Industry Training Organisation.

[9] The term "plastics industry" must be defined or identified in some way before it can be said that proposed coverage has been identified much less whether flexible packaging falls within it. I accept that the April 7 notice did not clearly identify the proposed coverage.

[10] Coverage however is not the principal issue between the parties. Even if the coverage clause were to be rewritten in such a way that the company clearly fell within it, the company would still consider the notice invalid and of no legal effect. The reason it gives is that the terms of the MECA have already been set and in such circumstances there could be no bargaining between the parties.

[11] The union disagrees saying that it is open to the parties to negotiate a schedule of site specific variations pursuant to clause 2.2 of the MECA which sets out:

"*2.2 Variations (General)*

The parties agree that any clause may be varied by agreement between the employer and the union party/ies with affected membership, subject to the following process:

- *The proposal shall be discussed by the employer, the union(s) and the elected employee representative/s in the first instance and a variation proposal developed.*
- *The variation shall be presented by the union(s) to the employees affected. (Nothing in this clause shall prevent the employer from being able to discuss the proposed variation with the employees affected.)*
- *The variation proposal may be adopted if agreement is reached between the employer and a majority of the least 60% of the employees affected as determined by ballot. This ballot shall be a secret ballot if requested by at least one of the employees participating in the ballot.*
- *The agreement shall be recorded in writing and signed by the employer and the union(s).*
- *Such agreement may include provisions for trial periods and terms of review.*
- *Copies of any agreement so reached shall be stored by the parties.*
- *Where agreement on variation is reached by operation of this clause, all employees affected shall be bound by the variation.*

[12] Finding a way of getting to the bargaining table is not the issue here. The company concedes that if the issues surrounding coverage were addressed the union could validly and effectively initiate bargaining with it as an original party to the MECA. There was no dispute either that the union could have validly and effectively initiated bargaining with the company for a SECA on identical terms as the MECA, or that discussions on joinder as a subsequent party could have formed part of the bargaining if the union had provided a general notice of initiation of bargaining.

[13] The union has not sought, at any time, to include this employer as an original party to the MECA or, pursuant to s.49, to join them to the bargaining after it had begun. The union's policy is to bargain for the MECA with a selected group of employers (which it

considers representative of the industry) in order to keep bargaining to a manageable size. It considers the approach it has taken here to be more transparent and consistent with its objectives.

[14] Both the parties now want the answer to an essentially technical question about the validity of a bargaining notice expressed to be in relation to joinder of a subsequent party.

[15] This matter was lodged with the Authority in August 2005, with the company requesting the Authority to make a determination that the 7 April notice was invalid and could not be relied upon by the union in initiating bargaining. The MECA to which that notice related expired on 31 August 2005. The respondent union has now advised the company and the Authority that it has engaged in bargaining for a new agreement with the original parties to the expired MECA. It has also signalled that it proposes to use the same mechanism to join the applicant as a party to any new MECA once it is ratified.

[16] The applicant has therefore asked in submissions that in addition to determining the status of the 7 April notice, the Authority also determine the validity of any future notice issued in respect of the applicant becoming a subsequent party to another MECA either agreed or to be agreed.

[17] The remaining issues for determination are therefore whether there were matters to be bargained in relation to the proposed joinder; and whether the notice of 7 April or any similar notice in the future served or might serve to initiate bargaining in terms of s.42.

Applicant's submission

[18] The applicant's position can be summarised as follows:

i. A bargaining notice sets in train the mandatory good faith provisions relating to the minimum steps to be taken and the behaviour to be displayed when parties are engaged in new collective bargaining (ss 32-50). This statutory framework has been expanded by the 2004 amendments, which include the provision requiring that a collective bargain be concluded unless there are genuine grounds not to do so. Since so much rides on it is imperative that a bargaining notice is valid.

ii. The applicant argues that it is wrong in law, and contrary to common sense, to apply the otherwise mandatory provisions of the Act to a subsequent party situation. That framework is aimed at new agreements not subsequent party situations. A bargaining notice is valid for collective bargaining in respect of original parties to new collective agreements only. Any notice which purports to initiate bargaining for an employer to become a subsequent party to a MECA (either agreed or to be agreed) cannot be a valid notice pursuant to s.42 of the Employment Relations Act 2000. The most fundamental reason for this is that "*in a subsequent parties situation there are no terms on which to bargain"* where bargaining is defined as "*the process of negotiating the terms and conditions of a transaction."*

iii. Section 56A establishes a stand alone mechanism by which an employer may join a MECA as a subsequent party. That process is different from the collective bargaining processes described in ss 32-50. In particular, there is

no requirement for ballots, unlike the situations provided for by section 47 (where an employer initiates bargaining for a single collective agreement) and by section 56A (3) (where a union that is not party to a collective agreement may become so.) The company asserts that s.56A(1) establishes an automatic process whereby:

"it is for the qualifying employer to decide whether to join a MECA as a subsequent party. This could be as a unilateral decision or after consultation with the union/employees."

The applicant did concede however that under clause 2.1 of the MECA in question, an employer party could not join it without the agreement of the union.

iv. In addition the applicant says that the bargaining notice in this case was invalid when issued because it did not identify the intended parties to or coverage of the agreement. It says that there can be no intended parties if these are pre-determined in an already agreed MECA.

[19] In summary, the company says that it cannot be coerced or compelled to enter into a MECA as a subsequent party since in such circumstances it can have no influence over terms and conditions.

Respondent's submissions

[20] The union says that it sought to open negotiations with the company in this case in good faith and as transparently as possible, and the company's opposition to this is contrary to the practical and non-technical approach promoted by the Employment Relations Act. Its position can be summarised as follows.

i. The notice of 7 April was a valid initiation notice for bargaining for a Collective Agreement between one union and an employer with which it had no collective agreement in force. The union anticipated working through the process it has used on previous occasions where it has sought to have an employer joined to a MECA as a subsequent party as follows:
   - an initiation notice would be issued to the employer which complied with s.42;
   - the parties would discuss and agree a bargaining process;
   - the proposed coverage would be discussed, with the employer free to make any counterclaim;
   - if the company agreed to join the MECA (possibly with a site specific schedule) then the requirements of s.56 would be met;
   - if not, there would be two alternatives: acceptance by the union of any counterclaim the company had proposed or industrial action by the union in support of the employee's desire to join the MECA.

ii. Section 56 is not in any way a replacement for s.42 and its requirements. It provides a mechanism for the joinder of a subsequent party once an employer party has agreed to this, but is silent on how the process of achieving that agreement should be commenced. Therefore it can only be presumed that

parliament intended bargaining in such circumstances to be initiated pursuant to s. 42 as it is for bargaining in all other circumstances.

iii. Section 42 must be read in a manner which accommodates the realities of subsequent party bargaining, with the key issue being whether the notice properly informs the other party of what the initiating party seeks from the bargaining in terms of the intended parties and the intended coverage. "*An overly literal or technical approach to s42…will subvert the objective of the Employment Relations Act."*

iv. The intended parties to the bargaining initiated here were EPMU and the company (those subject to the negotiation to which the notice of 7 April related.) These parties were clearly identified in the notice itself. (The union noted also that it is willing to inform the company of the identities of the other employer parties as it accepts that this information may be relevant to the question whether it will suit the company to agree with this proposed coverage.)

v. The proposed bargaining would cover whether the MECA was appropriate, desirable or acceptable, with the employer being free to counterclaim on that issue.

vi. Depending on what counterclaims were made, bargaining might then go on to deal with variations to the MECA and the agreement of a schedule of variations tailored to meet the needs of this particular company. At the time the notice was served on the company, the proposed process agreement was appended to it. That agreement provided that site specific variations were to be negotiated along with the issue of joinder. This is possible because of the provisions of clause 2.2 of the MECA.

vii. Each and every one of the terms and conditions of the MECA was up for discussion. (The union's evidence is that approximately half the subsequent parties to the MECA have site specific variations.)

[21] In response to the applicant's reference to the fact that there is no requirement to ballot before joining an employer as a subsequent party, Ms White argued that this is a different situation from commencing a MECA, and is essentially a matter between two parties only.

Determination

(i) Were there matters for the parties to bargain in relation to the proposed joinder?

[22] The existence of the variation clause in the MECA deals with the objections raised by the company on this score. The company was on notice of the capacity for site specific variations upon receipt of the claim for joinder. The draft process agreement which accompanied the notice addressed the mechanism for negotiation of any or all terms of any agreement between the parties.

[23] I am satisfied that there were terms over which to bargain. I do not accept the company's contention that it was simply being asked to join the existing MECA on a take it or leave it basis. The bargaining process proposed to be initiated was genuine and in good faith as the terms of the bargain between the parties had yet to be set.

(ii) Would a notice of the sort served on 7 April serve to initiate bargaining in terms of s.42?

[24] The applicant's next argument is that s.56A establishes a stand alone mechanism by which an employer may join a MECA as a subsequent party. It argues that this is a matter for decision by the employer without any statutory requirement for agreement by the union concerned. As further support for this argument the company also cites the fact that there is no statutory requirement for a ballot of union members before joinder of an employer party. If this argument is correct, it follows that there can be no bargaining (in the formal sense) over joinder because it is not a matter for agreement.

[25] Again, however, whether other employers may join other MECAs without the agreement of the union parties concerned is not for me to determine here. This MECA provides that the union's agreement is required, and indeed requires a ballot of the members on site.

[26] The Act is silent as to what if any process might be required in the reaching of such agreement. The company argues that this signifies that the bargaining provisions of the Act do not apply to this type of situation. I cannot agree. Having found that the activity initiated by the union was in fact the negotiation of terms and conditions of a transaction (bargaining) and in the absence of specific provisions for bargaining in joinder situations, I accept that the bargaining provisions set out in sections 32 to 59 apply.

[27] The other main area of objection from the company was that the intended parties were not identified. On this point, again, I accept the union's argument that the intended parties cannot mean existing parties and that what is required is identification of the proposed new party or parties who will enter into agreement as a result of the bargaining in question. I note that the union has accepted that it is reasonable for the company to expect information about the existing parties. Had the union been unwilling to do so it would in my view have been a matter more appropriately dealt with as a question of good faith than as a technical issue relating to the validity of the notice.

Summary

[28] The company has said that it cannot be coerced or compelled to enter into a MECA as a subsequent party since in such circumstances it can have no influence over terms and conditions. However, it has been established as a matter of fact that "*Everything was up for discussion*" as the union has put it. This disposes of the applicant's fundamental objection that there could be no actual bargaining in relation to joinder. In such circumstances there can be nothing inherently wrong in law or contrary to common sense about applying the bargaining provisions of the Act to this situation.

[29] I note that my conclusions on this point are derived from the particular circumstances of this case. Had there been no mechanism for the negotiation of a site specific schedule of variations, or had the agreement of the union not been required for joinder of a subsequent employer party a different conclusion may have resulted. However that is another matter and not for me to decide here.

[30] I conclude that, subject to it being established that the applicant company fell within the scope of the coverage clause, notice in the form supplied to the company on April 7 2005 may serve to initiate bargaining in relation to the joinder of the applicant company to the Plastics Industry MECA.

Costs

[31] The applicant party did not seek costs. Given the circumstances my inclination at this stage is to say that this is an appropriate case for costs to lie where they fall. However the union party has yet to comment to me on the subject. The union (and indeed the company) has a period of 28 days in which to make any submission on the issue.

Y S Oldfield
Member of Employment Relations Authority