Determination Number: AA 196/06
File Number: AEA 1085/05

NOTE: An order for the payment of a penalty appears on p 12

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	New Zealand Amalgamated Engineering, Printing and Manufacturing Union Incorporated (Applicant)
AND	Transfield Services E&T (New Zealand) Limited (Respondent)
REPRESENTATIVES	Anne-Marie McInally, Counsel for Applicant Justine O'Connell, Counsel for Respondent
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	27 February 2006
SUBMISSIONS RECEIVED	28 March 2006
ADDITIONAL INFORMATION AND SUBMISSIONS RECEIVED	10, 11, 18 April, 2 and 29 May 2006
DATE OF DETERMINATION	7 June 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc ("the EPMU" or "the union") has members employed by Transfield Services E & T (New Zealand) Limited ("Transfield") to perform work in its electrical and telecommunications divisions. The work of the telecommunications division ("Telco") is carried out almost exclusively under contracts with Telecom New Zealand Limited ("Telecom"). The work involves telecommunications field maintenance and construction services.

[2] The union and Transfield have been in negotiations for a collective employment agreement. In the statement of problem the union said the following employment relationship problems have arisen out of the bargaining:

(a) Transfield is obliged to pay to all employees a minimum increase of 2% commencing 1 July 2005, and as it has not paid the increase to union members the union seeks orders for payment;
(b) Transfield has made a series of misleading or potentially misleading statements about its engagement with Telecom and its ability to fund wage increases. The union seeks a determination that the statements were misleading or potentially misleading, and in breach

of the duty of good faith, as well as an order that Transfield comply with its request for information about negotiations with Telecom;

(c) The union believes Transfield has failed to recognise its representative role in the bargaining and has bypassed it, so seeks various orders for compliance to remedy the matter; and

(d) The union believes Transfield has breached s 97 of the Employment Relations Act 2000 by engaging another person to perform the work of striking workers, and seeks a compliance order and penalty in that respect.

[3] Transfield denied the union's allegations and said no remedies were warranted.

Partial settlement

[4] I was about to issue a determination when I was advised the parties had reached a settlement in respect of claim (a) in [2] above. Since that issue seemed the most contentious, and for reasons arising out of the conduct of the investigation, I asked the parties to consider whether it was necessary for the Authority to determine the rest of the employment relationship problem or whether they were in a position to put their differences behind them. The union advised that it still seeks determinations in respect of (b), (c) and (d) in [2] above, although some associated applications have also been withdrawn. I refer to those in the text of this determination.

Transfield's engagement with Telecom

1. Background

[5] During early-mid 2005, Mike Sheffield, Transfield's general manager Telecommunication Services, had been renegotiating the Telco contract with Telecom. Inevitably the outcome of those negotiations would have an impact on Transfield's stance on the amount of money available to fund wage increases. The EPMU believes that Transfield bargained directly with Telecom about wage increases, to the extent it says there was a 'wage agreement' with Telecom. It also says Transfield's denial that there was such an agreement was an 'outright lie'.

[6] For its part, Transfield says that it alone determined the amount of the wage increase to be offered to staff. Mr Sheffield's explanation of the basis on which Transfield bargains with Telecom about the Telco contract was that there is a standard contract under which Transfield provides specified services in return for specified payments, or prices. The prices are broken down into fixed and variable costs. Broadly speaking the Telecom negotiator has no interest in addressing the wages Transfield offers its staff, rather Telecom's focus is on prices it pays for services received. The services, and the prices, are detailed in a schedule to the contract. Moreover there is provision in the contract for annual reviews, and I was told negotiations typically involved Transfield in seeking to counter the annual reductions in the prices Telecom was prepared to pay.

[7] During the course of their negotiations in early-mid 2005 Telecom and Transfield discussed ways which Telecom could support Transfield's retention of staff working on the Telco contract, and encourage new trainees into the industry. The areas of discussion included the prospect of Telecom making a one-off adjustment to the fixed cost price component in respect of wages, provided Transfield demonstrated an adjustment had been agreed, as well as the impact of the adjustment on its wage bill.

[8] A message from Telecom to Mr Sheffield, dated 12 July 2005, contained the following passage:

> "Telecom is prepared to make a one off, extraordinary and discretionary adjustment for CPI to contribute towards labour wage claims in the current labour market.

> This offer is to increment by a maximum of … per year the fixed cost component of the maintenance systems remuneration model. To be eligible for this adjustment Transfield Services must demonstrate to Telecom that its telecommunications employees have received a wage adjustment from a mutually agreed date and the impact of this adjustment on Telecom's wage bill. Any wage adjustment in excess of … is to be met by Transfield Services. No further payment will be made by Telecom except in accordance with the CPI adjustment provisions of the Field Services Contract."

[9] Exchanges of messages in July 2005 illustrate Mr Sheffield's concern about Transfield's ability to fund wage increases at the levels it was then considering, if the one-off adjustment was capped at the amount Telecom was then offering. Mr Sheffield sought to negotiate a higher adjustment. There was no evidence of discussion or negotiation about the amount of the increases Transfield was planning to offer to staff.

[10] In October 2005 Telecom and Transfield finally agreed on the detail of the one-off adjustment to the fixed cost component. The adjustment was to be the greater of the amount Telecom had originally proposed as a cap, and the amount of wage increases actually paid. It would apply from 1 July 2005 until the expiry of the contract and was to cover a staff general wage adjustment. Transfield was obliged to account to Telecom for the payment, which it did by letter dated 18 October 2005.

2. Determination

[11] The union has indicated that the material now available satisfies its request for an order for the production of information about the Telecom negotiations. The order is no longer sought. There remains a request for determinations that Transfield:

(a) breached the duty of good faith under s 4 of the Employment Relations Act by making misleading or potentially misleading statements regarding its engagement with Telecom and the consequent wage increase; and
(b) made misleading or potentially misleading statements in relation to its wage offer and its response to the union's claimed wage increase.

[12] As the matter developed in the evidence, I find Transfield probably indicated to the union in or about January 2005 that its negotiations with Telecom would affect its stance on wages. More particularly, the contract with Telecom would need to generate greater profitability in order to fund greater wage increases. The statement of problem linked a delay in the initiation of bargaining with a representation on behalf of Transfield to the effect that it would be in a better position to deliver an acceptable increase in wages following its negotiations with Telecom. I can see nothing misleading about the representation, unless the union believes it was misled into expecting an 'acceptable' increase which was not forthcoming. However, even if the representation was made, there was nothing to suggest Transfield was doing any more than communicating a statement of fact or opinion reasonably held. Section 4(3) of the Employment Relations Act permits such communications.

[13] In July 2005 Transfield announced to its staff that Telecom had 'made a commitment' that would enable Transfield to 'offer a wage increase to all Telco staff'. The detail of the proposed increase was then set out, namely that there would be an increase of 2%, with a further 0.5% performance 'pot'. The announcement was carefully worded, but was still reasonably capable of raising a question about the nature of the discussions between the two companies about wages for the Telco staff.

[14] Later in this determination I turn to additional issues arising out of the announcement and the ensuing correspondence.

[15] Otherwise, it seems the parties discussed the negotiations with Telecom during a mediation meeting on 4 October 2005, because in a letter of that date the union's advocate Paul Graham said:

> "It has become clear to us that a major barrier to the settlement of a collective agreement is the prior negotiations and agreement between Transfield and Telecom about wages and conditions of employment.
>
> Mike has been very open about the fact that this process has occurred, but we remain in the dark as to the details. Please provide us with all information in the possession or control of Transfield relating to these negotiations and agreement, including a detailed explanation of how the 2% across the board increase and 0.5% 'pool' were decided.

[16] Obviously Mr Graham was aware that Transfield and Telecom had discussions about wages, and he considered they amounted to 'negotiations and agreement about wages and conditions of employment'. Indeed, during the investigation meeting the union made frequent reference to the two companies having reached a 'wage agreement'. Transfield's advocate in the negotiations, Tony Teesdale, replied by letter dated 6 October 2005, saying there was no agreement between the companies about 'wages and conditions', and so there was no information to be provided. In support he explained the nature of the companies' negotiations in broad terms, denying again that there was any agreement between the companies about wages and conditions of employment. He said repeatedly that Transfield had no ability to seek funding for wage increases from Telecom.

[17] It is unfortunate the explanation was put that way. General statements bearing on the usual practice between Telecom and Transfield were probably true, and were consistent with the evidence given to the Authority. Further, I accept Mr Sheffield's evidence that, usually, Telecom was not interested in the detail of the wages Transfield offered its staff. However the companies' negotiations clearly incorporated a new element in 2005, to the extent that Transfield did seek further funding expressly for wage increases. That aspect required further explanation.

[18] The union seems to have thought that Telecom and Transfield negotiated and agreed that Telco staff would be offered a 2% increase plus a 0.5% performance pot. It was not satisfied with the 6 October response and repeated its request, so Mr Teesdale wrote another letter dated 2 November 2005. Again he declined to provide the information sought and failed to explain properly how, in 2005, Transfield and Telecom came to be discussing a proposed wage increase for Telco staff. Nor did he explain the nature of the discussions. This time he said his earlier explanation: "was intended to make clear that there is no contractual basis for our client to seek funding from Telecom for future wage increases. …" That statement of intention may be true, but it is not quite what was said in the 6 October letter, did not answer the union's concern and certainly did not address how and why Transfield was seeking such funding in 2005.

[19] Thus in a sense Transfield misstated matters when it asserted in the letter of 6 October that Transfield had no ability to seek funding for wage increases from Telecom. In 2005 it was doing precisely that. Its letter of 2 November fell short of correcting the misstatement. Although it might be true that there was no contractual basis for Transfield to seek funding from Telecom for future wage increases, the letter still failed to acknowledge that funding was being sought in 2005 and to explain the basis for it. The deficiencies in the explanation in the correspondence are made stark by the fact that the company otherwise appears to have been open with the union about the importance of obtaining something from Telecom to fund wage increases in 2005.

[20] In the absence of any detailed submissions from the union I have relied on the statement of problem for an indication of how the misstatements could or did mislead it. Mr Graham had discussed with Transfield the fact that it would be seeking funding from Telecom on a number of occasions, and there was no evidence he was ever misled into believing that was not the case. Rather it seems from Mr Graham's response that, because he believed Telecom and Transfield had

agreed the Telco staff would be offered an increase of 2% plus 0.5%, and that this was not being acknowledged, he also believed Transfield was lying to or misleading the union.

[21] The nature of the correspondence meant the underlying problem - that the union believed the two companies' negotiations amounted to Transfield engaging in 'wage bargaining' with Telecom - was not resolved. Nor was Mr Graham's view that the union could have negotiated a better 'wage deal' with Telecom than Transfield achieved. However I do not believe the union's position on either of these matters was correct, and accept that Transfield and Telecom did not bargain directly about the amount of the increase to be offered to staff. Rather they bargained about what, if any, additional funding Telecom would make available to assist with an increase.

[22] That means, despite the deficiencies in Transfield's explanation, I do not accept that the union was misled about the engagement with Telecom, the wage offer or the ability to obtain funding for a higher wage increase. It took a stance that was not well-founded. Aside from the deficiencies in its explanation, I do not accept Transfield made misleading statements about those matters.

[23] The union did not address me in any detail on s 4 of the Act, but if there was any breach by Transfield it arises out of those deficiencies. Section 4(1A), reads in part:

> "The duty of good faith in subsection (1) –
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
> (c) …"

[24] Mr Teesdale's letters were not as responsive or communicative as they could have been, and therein lay their flaw. On the other hand the fact that the union has persisted in its view that Transfield and Telecom engaged in wage bargaining, in the face of the evidence concerning the actual nature of the companies' negotiations, suggests a more accurate explanation would have had made little difference. I do not consider it necessary to make the determinations the union seeks in any but the very limited form just set out.

Background to allegations of failure to recognise the role of the union

[25] The bargaining with which the present applications are concerned was formally commenced by a notice dated 4 July 2005, initiating bargaining for a collective employment agreement to replace the expired agreement. The new agreement was to cover existing and future Transfield employees who were union members, and who were employed in the categories of tradesperson/technician, non-tradesperson, and trainee or casual.

[26] The parties completed a bargaining process agreement on 24 August 2005. The material provision was:

> "Communication
>
> The parties may agree to issue joint statements or progress reports from time to time. However, each party is entitled to communicate as it sees fit, provided that in doing so it does not breach the requirements of section 32(1)(d) of the Act."

[27] The union says its role was not recognised and it was bypassed in the following ways:

(a) by the publication of the July 2005 issue of 'Bandwidth', the staff newsletter for the Telco group;

(b) in the content of letters sent to employees in September 2005 regarding the proposals announced in the July Bandwidth;
(c) by its comments about upcoming strike action in the September and October issues of Bandwidth; and
(d) by letters to linesmen employed in the South Island.

1. The July edition of Bandwidth

[28] In late June or early July 2005 Mr Sheffield sought to communicate with the Transfield staff about developments in his discussions with Telecom. The July edition of Bandwidth set out his summary of the developments, with particular reference to the proposals to support the retention of staff and encouragement of trainees. It included the following statements:

> ". A commitment to Transfield Services that will enable Transfield Services to offer a wage increase to all Telco staff. The increase proposed is a 2% minimum with a further 0.5% performance 'pot' ie 2.5% overall. This increase, backdated to 1 July or from a date 6 months after the start date for new employees, is in addition to increases in July 2004 and January 2005, plus significant adjustments to Stand By rates in February 2005.
>
> These initiatives are wide ranging and important and from where I sit, as GM of Telco, they are a demonstration that Telecom are serious about making this business work, both for Transfield Services and our staff."

[29] Another advocate for Transfield, David Munro, copied the issue to Mr Graham, referred to the timing of the initiative with Telecom as being coincidental with the bargaining process, and asked for the union's position on the application of the wage proposal to its members. Unfortunately he also referred to a dispute early that year about the application of 'company policy' regarding wage increases – a dispute which I consider arose in very different circumstances. Hence Mr Graham did not comment directly on the relationship of the proposal to the bargaining, or the implications of the Bandwidth announcement in the light of the bargaining. Instead he asserted that the announcement was a statement of company policy, and said the union's position on its application was that it should be applied to all staff accordingly.

[30] I do not agree that the Bandwidth announcement can be read as a statement of company policy, but it seems the matter has confused the bargaining process ever since. It also appears the union regarded the application of the 'policy' as something quite separate from any wage negotiations during bargaining.

[31] Further correspondence in August 2005 from Mr Teesdale eventually took the view that the union had agreed the proposal should be offered to its members, so the company would offer accordingly. The correspondence does not specify whether Transfield's intention was to make the offer through the bargaining process or in some forum outside the process. Certainly there is nothing in the evidence to suggest either party regarded the proposal as having been agreed in the course of the bargaining process.

[32] The parties met on 25 August 2005 to further the bargaining. The following action points were identified at the meeting:

. negotiations were adjourned until 16 September;
. the union would obtain legal advice about the July edition of Bandwidth and associated correspondence;
. the union would respond on that matter by 29 August;
. the company would send letters to Telco employees, and more accurately cost the union's claims; and
. the union would hold meetings to explain to members what was happening.

[33] By letter dated 26 August Mr Teesdale advised that the application of the proposal was to be deferred until the new collective agreement was signed. Purporting to delay the application of the proposal was an obvious bargaining tactic, but it also raised a question of whether the proposal was part of the bargaining process and capable of negotiation, or whether it was being viewed as something outside the bargaining process and to be implemented at the end of the process.

[34] Mr Graham's evidence was that union members expressed concern about what would be left for the union to bargain about, if the proposal in Bandwidth was implemented.

2. Letters to staff dated 12 September 2005

[35] In the 26 August letter Mr Teesdale also said:

> As advised, in the next few days there will be advice to unrepresented staff about their increase under the Company proposal. The company is proposing to send a letter to each of your members at the same time. A draft of this letter as presented to you on 25 August is attached for your consideration….."

[36] The letter ended with a request for a response by 29 August. When no response was received Mr Teesdale contacted Mr Graham on 30 August. On 31 August Mr Graham advised that there was a delay in obtaining legal advice. Mr Teesdale sought a response again on 2 September and 12 September. On 12 September he also advised that letters to represented and to unrepresented employees would be sent that day.

[37] The letters to union members read:

> "As set out in Bandwidth the Company has developed a revised remuneration package to offer staff. The purpose of this letter is to set out the proposal.
>
> Remuneration
>
> Under this proposal your new rate of pay would be $----------. This represents a --------% increase. The next review date would be 30 June 2006.
>
> **Please note that as you are a member of the EPMU this increase will be paid when the new collective agreement is signed**." (Emphasis original)

3. The September and October issues of Bandwidth

[38] On 22 September 2005 the EPMU forwarded a notice of strike action on 7 and 10 October 2005. The pending strike was commented on in the September 2005 issue of Bandwidth as follows:

> ". We will be asking some staff to perform the work of those union members taking strike action. This is lawful. Obviously we will be making arrangements to recognise the circumstances as appropriate ..
> . There will be work available for those union members who indicate in sufficient time that they wish to work."

[39] Strike action eventually commenced on 14 and 17 October. It took the form of one-day full work stoppages in various regions on those days respectively, and continues in the form of overtime and callout bans. In commenting on the strike, the October 2005 issue of Bandwidth repeated the information set out in [38] above.

4. Letters to linesmen

[40] Linesmen are covered by the expired collective agreement, but do not do work covered by the Telco contract. Appropriately, no further mention was made in submissions of certain

communications concerning them. The union had led the company to believe the communications could proceed and the present issue arose out of no more than a misunderstanding. Transfield was not in breach of its obligations regarding those letters.

Determination in respect of failure to recognise the role of the union

[41] The union seeks the following remedies:

(a) a determination that Transfield has failed to recognise the EPMU's representative role in the bargaining;
(b) an order under s 137(1)(a)(ii) of the Act requiring it to recognise the union's role;
(c) an order under s 137(2) of the Act requiring Transfield to cease soliciting feedback directly from employees covered by the bargaining; and
(d) a further order under s 137(2) requiring Transfield to cease making misleading or potentially misleading statements about the bargaining or about the union's position in the bargaining.

[42] The union did not make any submissions on the law, and nor did it address the way in which the law should be applied to the facts.

[43] However in order to determine whether any or all of the above remedies should be granted, I must first consider the law relating to good faith in general, and to good faith during collective bargaining. The applicable law suggested by the present facts is contained in ss 4(3) and 32(1)(d) of the Act, and a number of decisions in which those provisions were considered.

[44] Section 4(3) reads:

> "[the parties' obligation to deal with each other in good faith] does not prevent a party to an employment relationship communicating to another person a statement of fact or opinion reasonably held about an employer's business or a union's affairs."

[45] Section 32(1)(d) reads:

> "(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:
>
> (a) …
> (d) The union and the employer –
>
> (i) must recognise the role and authority of any person chosen by each to be its representative or advocate; and
> (ii) must not (whether directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise; and
> (iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining; and
>
> …"

[46] 'Bargaining' is defined in s 5 as:

> 'bargaining', in relation to bargaining for a collective agreement, -
>
> (a) means all the interactions between the parties to the bargaining that relate to the bargaining; and
> (b) includes -
>
> (i) negotiations that relate to the bargaining; and
> (ii) communications or correspondence (between or on behalf of the parties before, during or after negotiations) that relate to the bargaining"

[47] Relevant decisions are those of the full court of the Employment Court in **Christchurch City Council v Southern Local Government Officers Union Inc** (7 September 2005, Chief Judge Colgan, Judges Travis and Shaw, CC 12/05), and in **Association of University Staff Inc v Vice Chancellor University of Auckland** [2005] 1 ERNZ 224 (4 May 2005).

1. The July issue of Bandwidth

[48] The July issue of Bandwidth was circulated on 22 July 2005. Mr Sheffield's evidence was that that the text was drafted in June, and was written in ignorance of the notice initiating bargaining.

[49] However the fact remains that the issue was circulated over two weeks after the date of the notice, and over a week after Transfield had notified the staff of the notice. The process of bargaining had commenced, and s 32 applied. Although the relevant item was not intended to relate to the bargaining when it was drafted, it concerned a wage increase and was promulgated after the bargaining process commenced. The timing and content brought it within the scope of 'matters related to the bargaining'. That meant Transfield could not engage in negotiations about the content, or communicate or correspond directly with staff members for whom the union was acting.[1] For the same reasons I do not accept the communication is necessarily saved by Transfield's freedom to communicate directly with its staff on operational matters.[2]

[50] Counsel for Transfield referred in submissions to the evidence that Transfield has 850 staff, of which 250 are union members. That consideration is relevant, as is the general validity of a wish to update staff about the results of its discussions with Telecom. They mean there was nothing inherently sinister about the promulgation of the July issue of Bandwidth. However the action did undermine the bargaining and the union's role in it, because it caused union members to question that role.

[51] One way of addressing the matter at the time might have been to adopt suggestion in the **AUS** case to the effect that the communication make it clear the proposal would be discussed with staff who were not union members, but would also be a claim in bargaining with the union.[3] Although the **Christchurch City Council** case places even that in doubt[4], it was not the applicable law at the time the issue was promulgated.

[52] In terms of the remedies sought, my determination is as I have just set out. The circumstances were unusual in that the text was prepared before the bargaining process began although circulated after it, was not intended to address the bargaining, and was promulgated during a time when the law was new and yet to be settled. I see no need to make any further orders.

2. The letters sent to employees in September 2005

[53] The letter sent to union members in September 2005 related to the bargaining. The bargaining process agreement did not oblige Transfield to seek union approval before the letter was sent, but nor did it abrogate the obligation to comply with s 32.

[54] The effect of the letter was to cement an impression that Transfield was offering a 2% increase to all employees, irrespective of the bargaining, except to the extent that the increase would not be implemented for union members until bargaining was concluded. This underlined the

[1] See the **Christchurch City Council** case at [87]
[2] See the **AUS** case at [92]
[3] At [93]
[4] At [87]

question about the union's role in negotiating wage provisions in the collective agreement, and the relevance of the bargaining process itself, which began with the proposals in the July issue of Bandwidth and developed in the subsequent correspondence. Either there was little or nothing left to negotiate in respect of the proposals (not palatable to the union), or members were entitled to the proposed increase anyway with the union being free to raise further wage claims and seek to negotiate about them (the approach it apparently took).

[55] For that reason I accept that effect of the 12 September letter was to undermine the union's role in the bargaining.

[56] However the union bears some responsibility. In particular Transfield had forwarded the draft of the 12 September letter to the union for its comment 17 days earlier. In a message dated 30 August the draft was said to be a letter to members: "advising them of their pay increase under the company proposal." The union's response was to advise on 31 August that there was a delay in obtaining legal advice, and to comment: "If you can wait I will advise as soon as possible, otherwise I guess you will go ahead and make your own decision." Mr Graham did not respond to further requests in early September for an indication of when a response would be forthcoming, and for a discussion about the matter.

[57] That failure was not constructive. Even if the September letter undermined or was likely to undermine the bargaining, not taking any of several opportunities to do anything about it detracts from subsequent accusations of breach of good faith. I make no orders in respect of the matter.

3. References to upcoming strike action in September and October issues of Bandwidth

[58] The union expressed a concern about the failure to include in the relevant passages reference to it - and in particular to suggest that its members contact it - regarding work during the strike.

[59] Transfield was entitled to communicate with employees about operational aspects of the way the effects of the strike would be managed. It said in submissions that was all it did. Its evidence was that employees were asking their managers what would happen, with particular reference to the allocation of work, and the statements in Bandwidth were intended to provide an answer.

[60] I accept that, since the ongoing strike was not in the nature of a full withdrawal of labour, employees needed to know how their workloads were to be organised. It is part of a manager's job to make the necessary arrangements, and managers must be free to communicate them or respond to queries about them. To that extent the direct communications in Bandwidth concerned operational matters, and to that extent they were acceptable.

[61] However the communications should have distinguished between questions about genuinely operational matters, and wider questions about the effect and application of the strike. The latter are appropriately the province of the union, and failure to make the distinction or mention the union was capable of being misleading.

[62] As to remedies, again I believe this determination should suffice and there is no need to make any further order.

Engaging another person to perform the work of striking workers

1. Background

[63] The evidence relied on in support of the allegations that Transfield engaged other people to perform the work of striking workers in breach of s 97 concerned:

(a) work carried out at the Telecom exchange at Takapuna on 14 October 2005; and
(b) sightings of contractors carrying out work at Nelson during the Christmas 2005 vacation.

[64] Information provided in response to the allegation about work being done by a contractor at Takapuna meant the union says it no longer takes issue with that matter. I now turn to the Nelson matter.

[65] Grant Sidwell, Transfield's area manager for the Nelson/Marlborough branch of the Telco business, deposed that he had engaged two subcontractors to work for the Nelson branch on 9 and 10 January 2006. Industrial action in the form of the bans was continuing.

[66] In oral evidence Mr Sidwell said the work in question was new inside plant (or ASAM) work. Overall ASAM work had increased significantly from October 2005. Transfield had maintained a core workforce sufficient to meet its workload, but Mr Sidwell developed a spreadsheet in September 2005 which identified staffing shortfalls in a number of areas. Of inside plant work he noted: "We are struggling with inside plant build – fully stretched. Telecom have underestimated the amount of IP build time required." His forecast was that Transfield would need another 1.8 full time equivalents in the last quarter.

[67] The workload continued to build, but there was no recruiting of additional staff until it became necessary to complete a particular job for Telecom by 14 January 2006. The two subcontractors were engaged to complete that job. Two striking employees, who also gave evidence, asserted that they would have done the work but for the effect of the strike.

[68] Mr Sidwell's evidence was that, while the strike had an effect on the management of the workload, the increase in the workload itself had more. He said that, if he had deployed the two striking employees to the job in question, he would have had to engage contractors for another job. Throughout the last several months he had been juggling workloads in an attempt to avoid the need to engage additional workers, but this time such action was unavoidable whether or not there was a strike.

[69] In the light of the general evidence about increasing workloads, understaffing and the need to juggle, I accept that - strike or no strike - it would have been necessary to engage additional contractors in January. At the same time, I did not understand there to be a dispute that the skills of the striking employees were such that, but for the strike, they would have been deployed on the particular tasks carried out by the contractors. The employees were not available to do that work because of the effect of the strike.

2. Determination

[70] Section 97 of the Act provides in part as follows:

> "(1) …
> (2) An employer may employ or engage another person to perform the work of a striking …employee only in accordance with subsection (3) or subsection (4).
> (3) An employer may employ another person to perform the work of a striking … employee if the person, -
> (a) is already employed by the employer at the time the strike … commences; and
> (b) is not employed principally for the purpose of performing the work of a striking … employee; and
> (c) agrees to perform the work.
> (4) [performance of work necessary for reasons of safety or health]

[71] Section 97(6) sets out the liability to penalties imposed by the Authority in respect of each person who performs work where s 97 has not been complied with.

[72] Aside from the performance of work necessary for reasons of safety or health – which is not in issue here – determining whether there has been a breach of s 97 involves addressing whether the work to be performed 'the work of a striking employee', and if so whether;

> (i) the person employed (or engaged) to perform that work is already employed by the employer at the time the strike commences; and
> (ii) the person is employed principally to perform that work; and
> (iii) agrees to perform the work.

[73] The findings of fact I have set out amount to findings that:

> (i) the particular work to be performed was the work of a striking employee; and
> (ii) the contractors were not already employed by the employer at the time the strike commenced; and
> (iii) the contractors were employed principally for the purpose of performing the work of a striking employee.

[74] So, given the contractors were engaged to perform the work of a striking employee, the engagement had to be entered into in accordance with s 97(3). The second and third of the findings just set out mean that was not the case. There has been a breach of s 97.

[75] Turning to remedies, the engagement of the contractors was a one-off event, lasting for two days. There is no continuing breach of s 97 and no reason to anticipate there will be one. Further, the breach came about because of a decision about the deployment of contractors in circumstances where the need to engage contractors was established in principle, although the contractors should not have been deployed on work that would otherwise have been done by the striking employees.

[76] For that reason, I do not consider it necessary to make an order for compliance.

[77] As to penalties, the breach was not at the serious end of the scale. Transfield is ordered to pay a penalty of $1,000 in respect of it.

Summary of orders

[78] Transfield is ordered to pay the sum of $1,000 as a penalty for a breach of s 97.

Costs

[79] Costs are reserved. The parties are invited to agree on the matter. If they are unable to do so they shall have 28 days from the date of this determination in which to file and serve memoranda on the matter.

R A Monaghan
Member, Employment Relations Authority