

Determination Number: WA 144/06

File Number: 5053972

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Service and Food Workers Union Nga Ringa Tota (first applicant)
AND	Ken Archer, Glynis Martin and Margaret Treweek (first additional applicants)
AND	Lalopua Sanele and Brian Randall (second additional applicants)
AND	Judith Fox and Hine Jackson (third additional applicants)
AND	Spotless Services (NZ) Limited (first respondent)
AND	OCS Limited (second respondent)
AND	ISS Facilities Services Limited (third respondent)
REPRESENTATIVES	Peter Cranney for the applicants Paul Wallace for the first respondent Guido Ballara for the second respondent Stephen Langton for the third respondent

MEMBER OF THE AUTHORITY	Denis Asher
TELEPHONE CONFERENCE	26 October 2006
DATE OF DETERMINATION	26 October 2006

Determination of Authority: Urgent Application for Removal to the Employment Court

Employment Relationship Problem

1. The Union and the other applicants, by way of an urgent application filed in the Authority on 24 October 2006, seek to have removed to the Employment Court an issue of compliance with the Code of good faith for the public health sector at Schedule 1B of the Act. Specifically, the issue is whether employees who exercise their code rights to participate in meetings, discussions and activities for collective bargaining purposes are entitled to do so without the deduction of wages.
2. Because of the urgent nature of the application no statements in reply have yet been filed by the respondents.
3. By fax advice received later today, counsel for the applicants, Mr Peter Cranney, advised that this matter was considered in detail during the discussions to settle a bargaining process, and that a mediator assisted the parties during six of the 10 days taken to settle that process. The parties were unable to resolve this issue despite the mediator's assistance.

The Applicants' Facts Giving Rise to the Problem

4. The Union is registered under Part 4 of the Act.
5. The additional applicants are members of the Union and sue on behalf of the respective respondents' employees who are employed in public hospitals and who are also Union members.

6. The applicants and the respondents are bound by the Code.
7. The Code requires the parties to, amongst other things, promote productive employment relationships in the public health sector, engage constructively and participate fully and effectively in all aspects of their employment relationships, recognise the importance of collective arrangements, recognise the role of unions in the public health sector and search for solutions that will result in productive employment relationships and the enhanced delivery of services (clause 2 Purpose).
8. On 21 June the Union initiated bargaining with the respondents and other employers for a multi-employer collective agreement. The Union and the employers attempted, but did not succeed in resolving the matter referred to at par 1 above as part of the bargaining process agreement. Around late September the Union arranged meetings to discuss bargaining issues. The meetings were between 15 to 30 minutes duration. The respondents, but not all the employers, deducted wages from the first, second, and third additional applicants and those they represent.
9. The Union says the deductions are unlawful, and in breach of the Code and Wages Protection Act 1983. It seeks arrears of wages, a compliance order, declarations that the deductions breached the Code and costs.

Telephone Conference

10. Because of the nature of the application the Authority convened an urgent telephone conference of the parties today, Thursday 26 October 2006. The Union reiterated its position. The position of the respondents is set out below.

Questions of Law: Parties' Positions

Applicants' Position

11. The applicants seek the removal of this matter to the Employment Court on the following grounds:

- Important questions of law are likely to arise other than incidentally, namely the extent and scope of the code obligations, the relationship (if any) between the Code's obligations and other provisions in the Act and whether wages can lawfully be deducted from employees who are reasonably exercising Code rights; and
- The case is of such a nature and urgency that it is in the public interest that it be removed immediately to the Court. This is because bargaining has been initiated, the wage deductions have unlawfully weakened the applicants' bargaining position and the bargaining relates to essential services, including public hospitals.
- In all the circumstances the Court should determine this matter.

Respondents' Positions

12. The respondents set out their positions during today's conference and by fax shortly afterward.

13. The first respondent does not consent to the proceedings be removed directly to the Court but neither does it oppose the application. It asks that the Authority waive any requirement to file a statement in reply on the basis that a statement of defence will be necessary in the Court. In the event agreement cannot be reached on the venue for the proceedings it prefers that the matter is heard in Auckland.

14. The second respondent similarly does not oppose the application for removal to the Court. It also prefers an Auckland venue.

15. The third respondent does not oppose removal of this case to the Court on the first ground raised by the applicants, and does not consent to removal on the second and third grounds. It prefers an Auckland venue but will talk with the other parties with a view to reaching agreement in the meantime. It also asks that a statement in reply be waived so that instead a statement of defence would be filed in the Court.

Discussion and Findings

16. Section 178 of the Act provides that, where a matter comes before the Authority, any party may apply to it to have the matter removed to the Court.

17. The Authority may order the removal of the matter to the Court if, amongst other things, there is an important question of law that is likely to arise in the matter other than incidentally or the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court or the Authority is of the opinion that in all the circumstances the Court should determine this matter – s. 178(2).

18. I am satisfied this application meets all of these three requirements. That is because the issue is novel, untested and is central to the employment relationship problem. It also involves a bargaining problem in an essential service and relates to public hospitals. Finally, the application is sought by a senior employment law practitioner whose peers – representing the respondents – do not oppose the application.

19. I direct that statements in reply be waived so as to accommodate the respondents' preference to file statements of defence instead in the Court: clause 8 of the Employment Relations Authority Regulations 2000 applied.

Determination

20. For the reasons set out above I find in favour of the applicants' application for removal to the Employment Court. The respondents are not required to file statements in reply. The matter of venue is best addressed either by agreement of the parties or with the Court's assistance.

21. Costs are also reserved.

Denis Asher

Member of Employment Relations Authority

