IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 338A/07
5089607

	BETWEEN	SERVICE AND FOOD WORKERS' UNION NGA RINGA TOTA INC Applicant
	AND	AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Simon Mitchell, Counsel for Applicant Andrew Caisley, Counsel for Respondent
Submissions made:	14 November and 12 December 2007
Determination:	12 December 2007

DETERMINATION OF THE AUTHORITY

---

[1] The Authority has previously determined that the respondent, Air New Zealand Limited ("ANZ"), is liable to pay penalties for breaching a provision of the Employment Relations Act 2000. That determination was issued on 29 October 2007 in writing under AA 338/07.

[2] ANZ was found by the Authority to have breached the good faith requirements imposed by s 4(1) of the Act in that, being an employer, it made representations to a number of its employees with the intention of inducing them not to be covered by a collective agreement.

[3] The Authority established as a fact that ANZ wrote a letter dated 4 April 2007 and sent it to 269 workers who had been employed by the company to provide ground handling services at Auckland, Wellington and Christchurch airports. Those workers were sent the letter because their names were in ANZ records kept of company

employees who had joined the applicant Service and Food Workers' Union Nga Ringa Tota Inc ("the SFWU").

[4] The letter referred to the collective employment agreement ("the CEA") that ANZ had negotiated with the SFWU and that consequently was binding on the employer, the union and the employees who were sent the letter. Reference was also made in the letter to the employees' membership of the SFWU, a status that conferred on them the entitlement to employment under the terms and condition of the CEA.

[5] The particular circumstances and facts as had been established by the Authority are set out in its determination of 29 October 2007.

[6] The Authority found that through its actions, which had been carried out with intention to undermine a collective agreement, ANZ had rendered itself liable to penalties as prescribed by s 4A(b)(ii) of the Act.

[7] In its determination the Authority observed that because the letter had been sent by ANZ to 269 of its employees, there was potential for the total of any penalties awarded to be considerable. For that reason ANZ and the SFWU were offered an opportunity to be heard further on the question of penalties, before the Authority decided that.

[8] Counsel Mr Mitchell for the SFWU and Mr Caisley for ANZ met with the Authority on 14 November 2007 and for the assistance of the Authority they provided written and oral submissions on the question.

[9] Counsel addressed two issues in particular on which the parties had different views:

a. Whether total penalties should be proportionate to the combined number (269) of employees to whom the letter of 4 April had been sent, or whether penalties should be fixed on the basis of a single breach of s 4(1) of the Act, and

b. Whether any penalties awarded by the Authority should be paid to the Crown, or whether some or all of the money should go to the SFWU.

[10] The Authority reserved its determination as to penalties after receiving the submissions.

[11] Now, an unusual development has taken place. The SFWU wishes to withdraw the application for penalties, before it has been finally determined.

[12] The union considers there are new circumstances making it unnecessary for any penalties to be awarded. Those circumstances arise out of recent successful mediation between ANZ and the SFWU. Mediation had been provided for the assistance of the parties in several respects, including the negotiation of a replacement agreement for the CEA. Bargaining for a new agreement had been formally initiated by the SFWU in May 2007, before the CEA was due to expire. Attempts by ANZ to persuade employees to remove themselves from coverage of a number of contentious provisions of the expiring CEA, had led the company to breach the Act. In the circumstances, bargaining for a new agreement could have been expected to be acrimonious and protracted.

[13] In relation to the bargaining ANZ had notified its employees who were members of the SFWU that it would take direct industrial action against them by locking them out of their employment, as permitted by Part 8 of the Act during bargaining. The lockouts were intended to commence on 26 November 2007 and were to last for several days. Highlighting the difficulties of the bargaining was the application for facilitation under the Act that was recently made to the Authority.

[14] Counsel for the parties Mr Mitchell and Mr Caisley have now advised the Authority, on 12 December, that as a result of the mediation the current bargaining issues between the parties have been resolved and the planned lockouts will not now take place.

[15] Counsel have also advised that the terms of settlement reached in mediation between the parties address the circumstances that led the Authority to find ANZ had breached s 4 of the Act, and they also address the situation that ANZ had become liable to an award of penalties. Counsel advised that the parties have agreed upon a form of amends to be made by ANZ to the SFWU to meet the interests of the union and its members in making the company accountable for the breach of the Act. A copy of the settlement has been provided to the Authority by counsel.

[16] My view is that the terms of settlement in this particular regard do squarely address the relative seriousness of the breach, as I found that to be from the Authority's investigation. The remedy to be provided by ANZ does closely fit the breach in respect of its gravity and any harm caused by it.

[17] These now are merely matters of opinion, for the application for penalties must be regarded as withdrawn upon the motion of the applicant party, the SFWU. Clause 14 of Schedule 2 of the Act provides that a matter before the Authority may be withdrawn at any time by the applicant. There is no question of leave being required in this case, as ANZ is in full agreement with the SFWU about the way this investigation should end.

[18] Accordingly, the investigation is concluded without further determination or order being necessary.

[19] The Authority is grateful for the assistance provided throughout by counsel Mr Mitchell for the SFWU and Mr Caisley for ANZ, in both this and in related recent cases involving the same parties.

A Dumbleton
Member of the Employment Relations Authority