

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 338/07
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 and Rachel Larmer, Counsel for
 Respondent

Investigation Meeting: 18 and 20 September 2007

Determination: 29 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This dispute for determination by the Authority is one of several that arose out of the development and implementation by the respondent, Air New Zealand Limited (ANZ), of plans to reorganise the ground handling services business unit of the company, operating at Auckland, Wellington and Christchurch airports.

[2] The applicant Service and Food Workers' Union Nga Ringa Tota Inc (the SFWU) is one of 3 unions whose members are employed by ANZ in providing ground handling services, work that is covered by a collective employment agreement. The other two unions are the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc (EPMU) and the Aviation and Marine Engineers Association (AMEA).

[3] Each of the SFWU, EPMU and AMEA, has separately negotiated with ANZ a collective agreement currently covering the work.

[4] The plans ANZ formed in 2006 to reorganise the delivery of the ground handling services by its employees, were modified later by the company after EPMU and AMEA proposed changes to certain terms and conditions of their respective collective agreements. Those changes were to enable greater flexibility and productivity in performance of the work, as had been hoped by ANZ could be achieved through its original outsourcing plan. The changes were agreed between EPMU and AMEA and ANZ. Some, but not all, of the employees employed on individual employment agreements also agreed to similar changes to accommodate the reorganisation.

[5] The affected membership of the SFWU decided not to change any terms and conditions of the collective employment agreement (the CEA) that union had with ANZ and, accordingly, they chose not to participate in the In-house Solution. The SFWU wishes to address the question of change to its CEA during the bargaining, which the union commenced in early May 2007, for a replacement of the CEA.

[6] The arrangements entered into between ANZ, EPMU and AMEA and some of the employees on individual employment agreements, became known as the In-house Solution.

[7] The dispute brought to the Authority is a complaint by the SFWU that ANZ, in the way it has promoted the In-house Solution to staff employed in ground handling services work, acted in breach of its obligation of good faith owed to the union. The SFWU complains that ANZ, in April 2007, attempted to undermine the CEA and the union by inducing its members employed by the company to resign from the union. The SFWU also complains that its affected members were misled about the consequences to them of retaining their membership of the union.

[8] The SFWU asks the Authority to order ANZ to comply with the particular obligations of good faith that are expressly imposed by the Employment Relations Act 2000 (the Act). Also, the SFWU asks the Authority to impose a penalty for each and every breach of the statutory good faith obligations, on the basis that ANZ's complained of actions were carried out with the intention of undermining the CEA and undermining the employment relationship between the SFWU and its members.

[9] The promotion and/or implementation of the In-house Solution spawned 4 applications to the Authority for the resolution of inter-related disputes. One application (brought by ANZ) was withdrawn without the need for a determination. This one is the last to be determined.

[10] The 3 applications brought by the SFWU requiring a determination were investigated by the Authority in one meeting, which was held after the parties had attempted to resolve their differences by mediation.

The In-house Solution

[11] The In-house Solution has been described in detail by the Authority in recent Determinations given by it on 1 October 2007 under 5095092, and on 9 October 2007 under 5089607. The broad objective of ANZ's plans for reorganisation was the improvement of the financial performance and competitiveness of the business unit carrying out the ground handling services work. Initially ANZ had planned to contract out the work to other companies or a consortium. After reaching an advanced stage towards securing contracts with interested parties, ANZ responded to initiatives from unions and discussed with them alternatives to outsourcing the work.

[12] By eventually adopting the In-house Solution at the end of March 2007, the company believed it could achieve its business objectives and also preserve the jobs of about 1800 employees carrying out the ground handling work at Auckland, Wellington and Christchurch airports. As at the beginning of 2007 about 1100 of those jobs were held by members of EPMU, which was a proponent of the solution and is now a partner in it with ANZ. The remainder of the jobs were held by SFWU members (263), AMEA members (11) and non-union members (390).

[13] To maximise the benefits of the In-house Solution, it was the hope of ANZ that all 1800 ground handling services workers would participate in the arrangements made. This ideal could not be achieved, as the SFWU and its affected members did not agree to align their CEA terms and conditions of employment with those that EPMU and AMEA have now changed, in their respective collective agreements, to accord with the In-house Solution. Some employees on individual employment agreements have also declined to participate in the solution, but it now applies to about 1500 of the total staff of 1800 employed in ground handling services.

[14] Even without the participation of the SFWU in it, the In-house Solution is regarded by ANZ as being able to achieve at least the cost savings, productivity, flexibility and other benefits offered by outsourcing the work. ANZ hopes that the SFWU will eventually agree to participate in the solution, as an outcome of the bargaining that is now under way for a replacement collective agreement between the company and the union and its members.

SFWU members remain party to and bound by the CEA

[15] In the meantime and while bargaining continues, the SFWU members employed in airport ground handling work remain covered by the particular terms and conditions of the CEA signed by the parties in April 2005. Although the nominal expiry date of the CEA (30 June 2007) as expressed in the document has passed, the CEA continues to apply with the full force it had prior to that date. This situation is the direct consequence of the initiation by the SFWU, in May 2007, of bargaining for a replacement agreement, and is also a result of the operation of s 53 of the Act. Currently, pursuant to s 56 of the Act, the CEA is binding upon and enforceable by ANZ, and by the SFWU and members of the union who are employed in the work.

Good faith obligations

[16] Section 4 of the Act expressly imposes on parties to an employment relationship a duty to deal with each other in good faith.

[17] In this case there is not just one employment relationship but 3 in existence that are subject to the duty of good faith. Within the general specification of s 4(2) of the Act, those relationships are between;

- ANZ and the SFWU members employed by the company, and
- ANZ and the SFWU, and
- the SFWU and its members.

[18] Of relevance to the circumstances of this case, the duty of good faith is expressed at s 4(4) of the Act to apply to matters including bargaining for a collective agreement or for a variation of a collective agreement, and to any matter arising under or in relation to a collective agreement while the agreement is in force. In relation to the CEA currently in force, ANZ strongly wishes for the number of employees

covered by it to be reduced by as much as possible, so as to optimize for the company the In-house Solution.

[19] Also of relevance is the following particular requirement of good faith dealing, which is imposed on parties to an employment relationship by s 4(1A)(b);

..... to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative;

[20] Of further importance to this case is s 4(3), which qualifies the scope of the duty of good faith by providing that a party to an employment relationship is not prevented from communicating to another person a statement of fact or opinion reasonably held about an employer's business or a union's affairs.

[21] Circumstances in which an employer may breach the duty of good faith are provided at s 4(6) of the Act, as follows;

It is a breach of subsection (1) for an employer to advise, or to do anything with the intention of inducing, an employee ---

(a) not to be involved in bargaining for a collective agreement; or

(b) not to be covered by a collective agreement.

Remedies

[22] The remedies sought by the SFWU are within the Authority's jurisdiction to grant. The imposition of a penalty for certain breaches of the duty of good faith by any party to an employment relationship, is a matter expressly provided for by s 4A.

[23] Section 135 of the Act provides for a penalty not exceeding \$5,000 in the case of an individual in breach of the Act (where a penalty has been expressly provided for the breach) and, in the case of a breach by a company, the Act provides for a penalty not exceeding \$10,000.

[24] Under s 137 and s 138 of the Act, the Authority may order compliance where any person has not observed an employment agreement, or Part 1 of the Act in which are contained the good faith provisions relevant to this case.

Communications by ANZ with SFWU members

[25] At the heart of this dispute is the content of communications, both written and oral, by ANZ with members of the SFWU employed by the company in ground handling services work. There is no dispute about the ability of ANZ to write to or telephone any employee who is a member of the SFWU or of any other union. It is not contended that ANZ requires the permission of the SFWU before making direct contact with any of its members employed by the company (except during bargaining). This dispute is about the nature of the communications that took place, and in particular whether they breached of the duty of good faith where owed in any of the employment relationships between ANZ, the SFWU and the members of that union employed by the company in ground handling services work.

ANZ's letter of 4 April 2007

[26] On 4 April 2007, ANZ had a letter delivered by hand to the 269 staff members employed at the airports who were believed to be members of the SFWU. (A copy of the letter and the form that was attached to it is appended to this Determination.) The letter was headed **Airports Consultation Process – In-House Solution** and was signed by Mr Bruce Parton, a senior ANZ executive. Mr Parton is the General Manager Domestic Airline of ANZ.

[27] His letter confirmed to each recipient that the In-house Solution had been agreed with EPMU and AMEA, and also with the majority of employees covered by individual employment agreements. The letter also confirmed that ANZ had made a final decision to accept the In-house Solution and to not proceed with outsourcing the ground handling services work. The letter advised of an undertaking given to EPMU and AMEA, that for the life of the new collective agreements that had been agreed to with those two unions under the solution, the company would not table any new proposal to outsource or joint-venture the work.

[28] The next part of the letter listed the gains to be realised by employees participating in the solution, as follows:

For those staff who have voted to accept and are participating in the in-house solution we will be:

1. *Paying a \$1,000 (net) lump sum payment;*

2. *Paying an additional \$3,000 (gross). Payment to those who are entitled to first round targeted redundancy/severance but who elect to stay;*
3. *Running a first round targeted redundancy/severance programme;*
4. *Creating and filling new leadership roles with the business (team managers, turn co-ordinators, and on-job trainers). Eligible staff are encouraged to apply for those new roles if they have the experience and are interested in new opportunities. Other opportunities in higher clusters may also become available as some participating staff choose to exist the business; and*
5. *Depending on the numbers staying and going in each area, running a second found voluntary redundancy programme.*

[29] Immediately after this part, the next sentence in the letter repeated the advice that the “benefits” of the In-house Solution would be available only to those covered by the solution. The same sentence is an admission that this advice ought to have been made clear earlier in the letter:

The benefits are of course only available to those who are covered by the in-house solution.

[30] Next, the 4 April 2007 letter, for a third time, advised recipient SFWU members of their ineligibility to participate in the solution and its “benefits.” To reinforce this advice the letter confirmed that the SFWU members were to get nothing out of the solution but instead were to remain on their CEA which, they were advised, “expires on 30 June 2007.” To further contrast the SFWU members’ position with that of their colleagues participating in the solution, the letter announced to them that ANZ had commenced a process likely to end a particular roster pattern in operation and put in its place a different one. The above advice in the letter is conveyed as follows:

Our records show that you are an SFWU member and as a result you will not be participating in the in-house solution. This means you will not be eligible for any of the benefits, features or new roles associated with the overall proposal.

Instead, you will remain on your existing Collective Agreement, which expires on 30 June 2007. You should also be aware that the Company has written to SFWU commencing a process that is likely to end the 6/3 roster pattern for SFWU members at Auckland International Airport and replace it with a 5/2 roster pattern. This is necessary as we now need to consider how to organise arrangements in a way which maximises the benefits of the in-house solution for

the Company and participating staff, whilst also cost effectively utilising the non-participating staff.

[31] This proposed replacement roster pattern was a disadvantage to the SFWU members in their conditions of employment with regard to shift work rostering. (The proposed change of roster pattern became the subject of a dispute raised by the SFWU. It has been now been determined by the Authority, in favour of ANZ, on 1 October 2007, under 5095092.)

[32] The 4 April letter then requested the recipients of it to complete and return the form attached to the letter, to provide ANZ with confirmation of their membership of the SFWU and to signal any interest they had in participating in the In-house Solution:

Obviously, given the changes that will be occurring, it is important that we accurately know who is participating in the in-house solution and who is not.

Accordingly, we would be grateful if you would complete the attached form and return it to your local HR Manager by Friday 13th April.

[33] “Finally,” the letter advised recipient SFWU members of their eligibility to participate in the In-house Solution if they resigned from the SFWU. They were also told they could join another union, “the EPMU,” if they wanted “ongoing Union support” after resigning from the SFWU. The letter also advised that some members of the SFWU had chosen to resign from the union and sign up to the In-house Solution. The above advice is conveyed as follows;

Finally, you should be aware that although you are not currently eligible to participate in the In-house Solution you do have a chance to be a participating employee should you so wish. Some SFWU members have been choosing to resign from the Union and sign up to the In-house Solution on an individual basis. This option is available to you as well. In addition, you can also join the EPMU if you wish to have ongoing Union support.

[34] A deadline for participating in the “benefits” of the In-house Solution was given near the very end of the letter, as follows;

You should be aware that the final cut off date for receiving many of the benefits of the In-house Solution, and in particular the lump sum payments is 16 April 2007, so if you do wish to participate you will need to decide in the next few days so that required processes are completed before 16 April 2007.

[35] The letter concluded by inviting recipients to contact their local HR Managers at drop in centres, if they had any further questions.

[36] Mr Parton's evidence was that the letter signed by him was delivered to the 269 staff named in company records as being SFWU members, and that one of the purposes of the letter was to check the accuracy of that information. I accept the evidence of Ms Jill Ovens, Northern Regional Secretary of the SFWU, that before delivering the letter ANZ did not ask the union for a list of its members employed by the company. She also said that ANZ ought to have known who was a member of the union, because the company had been deducting union fees from the pay of most members. In responding to Mr Parton's letter, 24 recipients of it advised that they were not members of the SFWU.

[37] Although the company had advised the SFWU in general terms that a letter was to be sent to members of the union confirming the adoption of the In-house Solution and its impact, ANZ did not consult the SFWU about the detail and wording of the letter of 4 April 2007. I accept Ms Ovens evidence about that.

[38] Immediately Ms Ovens saw Mr Parton's letter she protested about it to him by email sent on 5 April, in which she said;

Thank you for the attached letter which I have just received. This was sent to me last night, after you had sent a letter to all our members telling them how to leave the union!

I note that you did not pass a copy of your proposed letter to our members by their authorised representative, ie the SFWU. Please send me a copy of the letter you sent to our members forthwith.

.....I believe this to be both a serious breach of good faith.

Parties' contentions about the 4 April letter

[39] For the SFWU, counsel Mr Mitchell submitted that the letter of 4 April 2007 was clearly intended to entice employees into resigning their membership of the SFWU. He submitted that the action of ANZ in communicating with an employee in this way was a breach of s 4(6) of the Act.

[40] For ANZ evidence was given by Mr Parton that the 4 April letter was a part of the communications ANZ needed to have with its staff regarding the acceptance and implementation of the In-house Solution, and the options that were available to staff

under the solution. Mr Parton said that SFWU members and also the non-union members on individual employment agreements were targeted by one particular wave of communications, which was intended only for employees who would not be participating in the In-house Solution.

[41] Mr Parton's evidence was that in order to implement the In-house Solution in a proper and accurate manner, he had written to all staff on 4 April so that the company could:

Advise each individual what options were available to them; and

Ascertain what option those staff members wished to pursue; and

Implement the chosen option.

[42] Mr Parton said it was considered to be a legal obligation of ANZ to tell staff what options they had as a result of the In-house Solution being accepted. Further, the evidence for the company was that ANZ thought it likely that there had been some attrition in the membership of SFWU as recorded in the company's records, and for that purpose it needed to confirm whether any employee was still a member or not.

[43] The requirement of an employer to be active and communicative towards its employees is expressly an aspect of the duty of good faith, as provided by s 4(1A) of the Act. Also, under s 4(3) the duty of good faith does not prevent an employer from communicating statements of fact or opinion reasonably held, about an employer's business or a union's affairs.

[44] The contents of the 4 April letter are almost entirely matters of fact, or supposed fact, about ANZ and the SFWU. Most of the letter is 'informational,' although the advice to SFWU members on how to participate in the In-house Solution – i.e. by resigning from the union – is 'instructional' as well. However, when carried out with the intention of inducing an employee not to be covered by a collective agreement, the action of communicating or conveying such information can be a breach of the duty of good faith, under s 4(6) of the Act.

ANZ's intentions

[45] The intentions of ANZ, the author of the letter, are best ascertained from the words and construction of the letter itself of 4 April, viewed against the material circumstances as they existed in the employers workplace at the time the letter was

written. The clear intention readily presumed from the first part of the letter, read in isolation, is to advise all 1800 employees of ANZ that the consultation process regarding the far reaching proposal to outsource work at Airports had been concluded with a solution that retained their jobs. No legal objection can be taken to the contents of the letter insofar as employees, including the SFWU members, are advised of the benefits of participation in the Solution. Up to the point at the end of the 5 items of gain listed, the letter is informational only. After that, however, the character of the letter changes significantly.

[46] In the second part of the letter the advice is repeated and emphasised that only staff participating in the solution will receive its benefits, and that the recipients of the letter, being members of the SFWU, are ineligible to participate. The letter makes no reference to any disadvantages flowing from participation in the solution.

[47] The SFWU members are then advised of a step ANZ intended taking to change their terms and conditions in a way that will maximise the benefits of the In-house Solution *for the Company and participating staff* while also *cost effectively utilising* the non-participating staff. This step is a change to roster patterns in a way that will detrimentally affect SFWU members in their terms and conditions of employment.

[48] Next, the letter emphasises the importance to ANZ of knowing accurately who is participating in the solution and who is not, and for that purpose requests that the SFWU members complete the attached form. The object of the form itself is clearly to provide information as to whether the letter recipient is or is not a member of the SFWU, although it is presented in a way that confirms more than that:

I am a member of SFWU and do not wish to participate in the In-house Solution.

[49] Under a second option in the form a recipient may also confirm membership of the union but ask to know more about participating in the In-house Solution, and the third option is for the recipient to confirm that he or she is not a member of the SFWU.

[50] The letter then goes on to the particularly contentious paragraph in which recipients are advised of the opportunity to participate in the In-house Solution if they wish. The SFWU members are advised that some of their fellow unionists have

chosen to resign from the SFWU and sign up to the solution on an individual basis. They are also advised that this option is available to them and that, as an alternative, they can join the EPMU if they wish to have ongoing union support after leaving the SFWU. Giving advice to members of the union about resigning from the SFWU and joining a competitor union, in my view was not an act promoting good faith in the employment relationship between ANZ and SFWU.

[51] The letter advises its recipients that there is a deadline for taking action if they want to receive many of the benefits of the Solution, in particular the lump sum payment of \$1,000.

[52] The Authority does not accept that the sole purpose of the letter was to fulfil a legal obligation of ANZ to communicate to staff the options available to them under the In-house Solution and confirm whether they were still members of the SFWU.

[53] I consider that the dominant purpose of the letter was to persuade SFWU members to release themselves from coverage of the CEA and by doing so become free to participate in the In-house Solution, an outcome that ANZ strongly desired. The operation of the CEA prevented ANZ from fully exploiting the gains available to the company's business from the In-House Solution. The trigger for release of employees from the CEA was resignation from the SFWU, an action the letter suggested and invited I find.

[54] The letter is written in a style intended not just to inform but to persuade, or induce. While ostensibly in part it is an informative letter, the same information contained in it had already been provided to the recipients' agent or representative, the SFWU, by Mr Parton in his letters to Ms Ovens of 26 March and 2 April 2007. There is no suggestion in the evidence seen and heard by the Authority that ANZ was concerned that Ms Ovens or the SFWU executive was not passing on this information to keep its members advised of developments. The most likely reason why ANZ communicated directly to the SFWU members is that ANZ wanted to persuade them. It wanted to persuade them to free themselves from the CEA and participate in the benefits of the In-house Solution.

[55] Persuasion was needed at this point in time because before delivering the letter ANZ had known perfectly well the attitude of the SFWU and its members to

becoming involved with the In-house Solution. Mr Parton said in his evidence, at para.7.7:

There was never any particular expectation that SFWU members would join up although since some members would be better off (eg those who wanted voluntary severance) there was always a possibility that some SFWU members would elect to participate. However, the Company made its decision on the basis that none of the SFWU members would join the In-house Solution. The Company's position was that the terms and conditions for SFWU members would be dealt with at the bargaining table.

[56] Mr Parton said also in his evidence that because the benefits of the In-house Solution were only available to those who elected to participate in that Solution:

That excluded SFWU members since SFWU did not support the In-house Solution and had made it clear that they would not contemplate any change to terms and conditions except in the context of formal bargaining (which ...was still some way in the future).

[57] I find that ANZ had clear knowledge before 4 April when it wrote the letter, that SFWU members through their agent and representative had elected to limit their options to just one; continuing their employment under coverage of the terms and conditions of the CEA. In his letter to Ms Ovens of 26 March 2007, Mr Parton had acknowledged that;

.....SFWU has said to date, on behalf of its members, that they are not willing to consider any substantial changes to terms and conditions at this time. Air New Zealand respects that position.

.....

SFWU have chosen not to participate in the In House Solution. As a result, the payments and severance opportunities will not be available to SFWU member (unless they elect to resign and sign up to the In House Solution.....).

[58] In the circumstances, it can be readily inferred that the point of writing directly on 4 April to those employees who were members of the SFWU, was to get them to reconsider their choice.

[59] The additional claim is made by ANZ that sending the letter was necessary to ascertain who was and who was not a member of the SFWU. That claim would have greater credibility if ANZ had first attempted to ascertain that information through the union itself, rather than going directly to members. I have accepted the evidence of Ms Ovens, that there was no attempt made by ANZ to find out from records kept by the SFWU the names of current members. I find from the evidence that having

SFWU members receive this communication directly from ANZ was viewed as strategically important by the company, and I reject the claim that the letter in part was merely a survey carried out to update company records.

[60] It is also significant that the letter is constructed with a persuasive slant, in that it presents to SFWU members the *benefits* of the Solution while omitting any reference to its “burdens,” such as Mr Parton acknowledged in his written evidence accompanied the solution. He said;

Air NZ made it clear from the outset that the benefits (and of course burdens) of the In-house Solution were only available to those who elected to participate in the In-house Solution.

[61] His letter of 4 April did not advise recipients of any “burdens” to them whatsoever. Mr Parton said in his evidence that about 35% of employees participating in the In-house Solution would suffer some detriment in relation to their terms and conditions of employment as a result. One burden for some SFWU members was a significant reduction in their remuneration. In this regard I find that the letter was designed to entice recipients of it to participate in the In-house Solution. To do so they needed first to free themselves from coverage of the CEA, which they could do by resigning from the SFWU.

[62] I find that ANZ, in writing the letter of 4 April to SFWU members, fully understood the consequences of the act of resignation from the SFWU by a member. Mr Parton showed his understanding of this in the following passage in his evidence:

10.10 The requirement to resign from SFWU arises because the In-house Solution is materially inconsistent with the [CEA] so it was not possible for an employee to remain an SFWU member (and therefore covered by the [CEA]) and also join the In-house Solution on a supplementary IEA basis.

[63] The goal to be achieved by having members resign from the SFWU was the reduction of the number of employees who were covered by the CEA, but who were covered under terms and conditions of employment that were inconsistent with those of the In-house Solution. ANZ did not want to be bound by those terms and conditions.

[64] I find as a matter of strong and clear inference from all the circumstances that the intention of the letter’s author was to induce SFWU members not to be covered by a collective agreement - the CEA. That intention can be presumed from the wording

and construction of the letter itself, which give more compelling evidence than any witnesses saying what the author of a letter intended.

[65] Doing anything with intention to inducing an employee not to be covered by a collective agreement is, under s 4(6)(b) of the Act, expressly a breach of the duty of good faith imposed by s 4(1). As to the conduct that s 4(6)(b) may be aimed at, it clearly includes attempts by employers to persuade employees to have the coverage of an individual agreement as distinct from a collective agreement. That can be gleaned from the general object of the Act at s 3, which includes the promotion of collective bargaining. However, the reference to a collective agreement generally must include reference to a specific collective agreement, such as in this case the ANZ-SFWU Ground Staff Collective Employment Agreement.

[66] For the above reasons I find the complaint of the SFWU justified that ANZ has acted in breach of the statutory duty of good faith provided at s 4(1) of the Act.

[67] It was submitted for ANZ that the letter of 4 April did not disparage the SFWU. Disparagement of a party to an employment relationship is not expressly a breach of the Act. Even so, I consider there was considerable disparagement by ANZ of the SFWU clearly evident in a scenario where;

- ANZ told the SFWU it would “respect” the advice of the union that its members did not want to change their terms and conditions of employment to accommodate the In-house Solution,
- A few days later ANZ wrote directly to SFWU members, to some extent behind the back of the SFWU, appealing to members to reconsider their position,
- ANZ suggested the members could resign from the SFWU,
- ANZ further suggested the SFWU members could not only resign but could join a competitor union, the EPMU.

Undermining – proof of intention

[68] It was also submitted for ANZ that there was no evidence of actual undermining of the CEA in any way. The relevant provisions of the Act at s 4(6) are however directed at the intentions of the employer rather than the affects of the employers conduct.

[69] Although neither case was referred to in submissions, the Authority has considered the decisions of the Employment Court in *Assn of University Staff v Vice Chancellor, University of Auckland* [2005] ERNZ 224, and *National Distribution Union Inc v General Distributors Limited*, unreported, 16 February 2007, AC 7/07. The cases deal with undermining during collective bargaining and therefore have reference to the particular good faith provisions of s 59A of the Act. The case before the Authority is not concerned with those provisions.

[70] Of relevance from the 2 decisions is the finding that the means of undermining can include action taken overtly as well as surreptitiously or insidiously. Also, the Court found that an intention to harm need not be the primary purpose of an action but it must at least be a concurrent or activating purpose. The Court held that in many cases intention can be proved by properly drawn inference.

[71] Although there was an element of underhandedness in ANZ's actions of writing to the SFWU members without first at least consulting the union on the full contents of the letter, the communication was largely overt. Even as such, according to the above authorities it may be action that undermines or is intended to undermine.

[72] I have found from the letter and the surrounding circumstances in which it was written, that the intention of ANZ to induce the SFWU members to resign and escape the coverage of the CEA was deliberately formed. There was no carelessness or recklessness involved in the communications by letter of 4 April and the persuasive force of it was not just an incidental by-product of an innocent attempt to keep employees informed of events affecting them. Bringing persuasion to bear was, I find, the activating and the primary purpose of the communication.

Misleading or deceptive behaviour by ANZ

[73] It was submitted for the SFWU that in referring to the benefits of the In-house Solution but not to its burdens, ANZ's letter of 4 April was misleading. I do not agree that the letter in some way implies that there were to be no burdens to those

participating in the solution. The letter was merely silent about any disadvantages, so as to give the letter a positive spin and make it more persuasive.

[74] It was also submitted that the letter was misleading in advising that non participants in the solution would not be eligible to apply for new roles under the In-house Solution. This advice seems to the Authority to have been a statement of ANZ's intention not to appoint non-participants to the solution roles. As it is clear that ANZ did have that intention, it could not be misleading or deceptive for it to say so. The real objection to the statement must be that it was put forward as a further matter to persuade SFWU members to leave the union and the CEA.

[75] Mr Peter Linn said in evidence that when he saw in the 4 April letter that he was not allowed to apply for the new roles, this influenced his decision to resign his employment. In doing so he helped achieve the outcome wanted by ANZ of reducing the number of employees covered by the CEA. The letter did not tell Mr Linn he would face a \$20,000 per annum pay reduction if he participated in the In-house Solution, but he found this out. I consider that the main reason why Mr Linn resigned was that by doing so he would become entitled to a significant sum of redundancy compensation, because of his very long service.

[76] The reference in the 4 April letter to the appointment to new roles of "eligible staff" is somewhat vague. Certainly the SFWU members could not be prevented from applying for a new role position. If the letter meant that the criteria of eligibility for appointment was non-membership of a union, such as the SFWU, then there may be a question about compliance with the freedom of association provisions of the Act, but that is not the issue before the Authority.

Telephone calls by ANZ to SFWU members

[77] Evidence was given to the Authority by Mr Gregory Edmonds, the Manager of Air New Zealand International Airport, a division within Airport Services. Mr Edmonds was closely involved in the development and implementation of the In-house Solution. Once the Solution had been accepted by ANZ he gave instructions to a team of his staff, requiring them to contact by telephone SFWU members employed by ANZ in Airport Services, and to also contact staff employed under individual employment agreements. The telephone communications were intended to follow on from Mr Parton's letter of 4 April 2007.

[78] I accept from Mr Edmonds' evidence that the phone calls started on Tuesday 10 April and continued until Monday 16 April 2007, at the latest.

[79] Further, I accept that Mr Edmonds in briefing his team at the call centre, told them to:

- (a) *Identify themselves to the person called;*
- (b) *Ask the employee if they had received the letter of 4 April 2007 regarding the In-house Solution and options available under it;*
- (c) *Advise the employees that if they had any further questions then these could be directed to the drop-in centre at the Airport;*
- (d) *If the employee said they had not received the letter, then they were to be told that the company would make arrangements to send them a copy and they were to be asked to advise where they should be sent.*

[80] Mr Edmonds denies that any of his call centre team harassed SFWU members or intimidated them by ringing on multiple occasions. Evidence has been given to the contrary by several members of the SFWU. Obviously, these telephone communications were likely to take a different course in each case, depending on who the individual caller was and also the employee contacted. If a tape recording of the conversations was kept by the call centre, it has not been heard by the Authority which therefore does not have precise evidence as to what was said during these communications.

[81] Mr Edmonds accepts that on one occasion a member of his staff did give incorrect information. I accept in the circumstances of that episode that this was done unintentionally and was the sort of mistake likely to be made when many phone calls are made by people about technical matters to do with union membership and collective agreement coverage. It is an isolated example and does not require any sanction to be ordered.

[82] Mr Edmonds said in his evidence that the company had not engaged in a *misinformation campaign* as alleged by the SFWU. He said that ANZ was complying with its good faith obligations to ensure that every member of staff was aware of their options under the Solution, and he said that only factual information had been communicated and no advice was given about any particular option an employee ought to take.

[83] Mr Edmonds accepted that the callers on his staff, to assist them, may have had a two page document headed, **Questions and Answers to assist with the briefing of SFWU membership – not to be issued or distributed: 3 April 2007**. This was a document prepared by ANZ but which was obtained and produced by the SFWU. ANZ was reluctant to draw attention to this document in presenting its response to the claims in this case.

[84] I consider that the questions and answers document is likely to have been heavily relied upon as an aid by the callers in their communications with SFWU members. The conversation between caller and member is likely to have been built around the contents of the questions and answers document. I accept it as evidence of the likely flavour or tenor of the communications by ANZ to SFWU members.

[85] The questions and answers document sets out information to be given under 8 headings which cover the possibilities raised, depending on whether the employee called is a member of the SFWU or not. The headings are as follows:

1. *I am not an SFWU member. The company records must be incorrect. How can I rectify this?*
2. *If I remain an SFWU member can I participate in the In-house Solution?*
3. *If I decide to resign from the SFWU and sign up to the In-house Solution, will I still be eligible to receive the \$1,000 (net) lump sum payment?*
4. *If I decide to resign from the SFWU and sign up to the In-house Solution, will I still be eligible to redundancy if my earnings have reduced, as defined in the transition arrangements?*
5. *Can I remain an SFWU member and be eligible for any of the benefits, features or new roles associated with the overall proposal? Eg second round voluntary redundancy?*
6. *If I resign from the SFWU and sign up to the In-house Solution, do I have to join the EPMU or can I have an individual employment contract?*
7. *Where can I get a copy of the In-house Solution and the migration arrangements?*
8. *Is the company allowed to do this – aren't you undermining my bargaining agent?*

[86] Under each of these headings the advice given is much the same as that contained in the 4 April letter, including, under question 2, *the only way in which*

you could participate is if you choose to resign from the Union and sign up to the In-house Solution.

[87] Under the last heading, question 8, ANZ had obviously anticipated being challenged about whether its actions in delivering the 4 April letter undermined the SFWU as bargaining agent. The model answer given to the question was as follows:

8. Is the company allowed to do this – aren't you undermining my bargaining agent?

The Company is issuing this type of letter to all employees in order to confirm their status, ie member of SFWU, individual agreement, member of EPMU etc and also to describe how they will be affected by the decision to implement the In-house Solution. It is important that:

- *Our employees are fully informed;*
- *We have confirmed status of each employee as this will determine the terms and conditions for that employee once the In-house Solution is implemented;*
- *Our employees know what their options are and can make their own decisions in an informed way.*

[88] It is clear that the asking of the question - ***Is the company allowed to do this*** – was able to be anticipated from what was contained in Mr Parton's letter of 4 April which, by the time the calls were made to SFWU members, had been delivered to them.

[89] The explanation for the letter includes the importance of fully informing employees. As found previously in this determination, the 4 April letter does not “fully” inform particular employees. It certainly advises what the *benefits* are of the In-house Solution to them, but it does not advise of the “burdens,” the term used by Mr Parton. The burden in the case of Mr Lim, for example, was a considerable pay cut of about \$20,000 per annum, which the letter did not disclose. Other long serving employees would have to carry the same burden under the In-house Solution, but were not told that by Mr Parton in his letter.

[90] I consider that the call centre staff are likely to have relied heavily on the Question and Answer written material. That is natural since they had many calls to make in limited time and the document would have provided a guide or focus for the conversation that ensued after contact was made with an SFWU member. I further consider that the question and answer material leans heavily towards the issue of

whether the SFWU member contacted might remain a member or might resign from that union.

[91] Where a penalty is being claimed under the Act the standard of proof of the breach is a higher one than the civil standard, although it is not necessarily the standard of beyond a reasonable doubt. It is quite possible that on a very few occasions encouragement was given by the ANZ caller to the SFWU member to resign from membership of the union and join the mainstream of employees who were regarded as having the benefits of the In-house Solution available to enjoy. Encouraging resignation may have the effect of inducing an employee not to be covered by a collective agreement. This result is clear from the advice given under heading (2):

2. If I remain a SFWU member can I participate in the In-house Solution?

No. The SFWU has not agreed to the In-house Solution. Hence members of the SFWU will remain on the existing Collective Agreement. The only way in which you could participate is if you choose to resign from the Union and sign up to the In-house Solution.

[92] However I am not satisfied from the evidence about the telephone communications by ANZ call-centre staff that any of those calls breached s 4(1) of the Act, which requires parties to employment relationships to deal with each other in good faith. I do not consider that the primary or dominant purpose of the calls made by call-centre staff in the way they were, was to advise or induce employees not to be covered by the CEA.

[93] The sending of the letter of 4 April to employees is therefore the sole ground for ordering remedies. Those sought are compliance and penalties.

Breach of s 4(1) of the Act

[94] In summary, in relation to the elements required to be present under s 4(6) before there is a breach of s 4(1) of the Act, with regard to ANZ the Authority finds;

- it was an employer – of members of the SFWU carrying out ground handling services work,
- it did something – it wrote on 4 April to the employee members of the SFWU,

- it wrote with the intention of inducing,
- it intended to induce the employees not to be covered by a collective agreement – the CEA

Compliance

[95] The SFWU has sought orders of compliance against ANZ for the various breaches of the Act.

[96] Under s 137 of the Act compliance is available where any person has not observed or complied with Part 1 of the Act.

[97] Section 137(2) expressly provides that a compliance order may be made:

... for the purpose of preventing further non-observance of or non-compliance with that provision (of any employment agreement or of Part 1 of the Act).

[98] I find in this case that the compliance orders sought are not available in the circumstances where there has been no breach of Part 1 of the Act continuing after about 4 April 2007. I find that the failure to comply by ANZ was completed within a period around 4 April, when the letter of that date was sent or given to SFWU members employed by the company. Although there was a breach of s 4(1) which is in Part 1 of the Act, that breach did not continue beyond early April and therefore the remedy of compliance is not necessary and is unavailable under the Act.

Penalty

[99] I consider that the enticement given to members to leave the union, and thereby escape the coverage of the CEA, was deliberate in the sense that the letter of 4 April was intentionally written and sent to employees and, it is obvious from reading the letter, that it was constructed with great care and thought. Attempting to interfere in relations between a union and its members by encouraging resignation of membership, is also a serious failure to comply with the requirements of good faith. It is conduct that may undermine the role of the union whose membership is a matter entirely between the union and the employees who have chosen to join it. The freedom to do so is given to them under the Act.

[100] However, the deliberate and serious breach of s 4(1) cannot be regarded as a sustained one, as the communication made by letter on or about 4 April 2007 was one-off. A penalty is not therefore available under s 4A(a) of the Act which requires any failure to be deliberate, serious and sustained.

[101] I am, however, satisfied that the failure to observe s 4(1) by ANZ was a failure intended to undermine a collective agreement, being the CEA. The stated aim of ANZ was and is to have as many employees as possible participate in the In-house Solution. ANZ has acknowledged that employees cannot be under both the solution and the CEA, so release from the CEA must occur before that aim can be achieved with regard to those employees who are members of the SFWU. Their resignation from the union, as suggested and invited in the letter of 4 April, is the key to their withdrawal from the coverage of the CEA, at the same time opening the door to the In-house Solution.

[102] I therefore consider that the failure by ANZ to comply with the requirements of good faith in s 4(1) of the Act was intended to undermine a collective agreement, being the CEA. The fewer the employees covered by the CEA, the better for ANZ to achieve maximum effectiveness from the In-house Solution.

[103] A penalty for that conduct may be imposed under s 4A(b)(ii) of the Act.

[104] The intermixed intention of ANZ in writing and distributing the letter was also to persuade SFWU members to end their relationship with the union. Resignation by the members was a pre-condition for removal of coverage of the member's work by the CEA. The smaller the membership of the SFWU by ANZ airports employees, the greater the returns for the company from the In-house Solution. By encouraging resignation, ANZ intended to completely undermine that particular employment relationship as it is defined to be between union member and union. That conduct also attracts a penalty, under s 4A(b)(iii) of the Act.

[105] Penalties are usually to be paid to the Authority and remitted by it to the Crown. The Authority may however order that all or part of any penalties recovered is to be awarded to an applicant or any other person at all.

[106] The sending of the letter of 4 April to even just one employee is a breach of s 4(1), and it is one for which a penalty to a maximum of \$10,000 can be imposed against ANZ as a company. Accordingly, the sending of the letter to more than one

member of SFWU may attract multiple penalties, depending on the number of recipients. Mr Parton said in evidence that ANZ had sent the letter dated 4 April to 269 employees believed to be members of the SFWU.

[107] The scale of the communications by ANZ to SFWU members goes to the gravity of the breach and is therefore relevant in determining the total penalty to be imposed, although proportionality needs to be kept in that total. The greater the number of employees who may be persuaded by unlawful means not to be covered by a collective agreement, the greater the undermining of that collective agreement, and also the greater the undermining of the union. The undermining of the collective agreement may be even more harmful if it occurs just before bargaining for a replacement agreement is about to begin. On 4 April ANZ anticipated that SFWU would shortly be initiating bargaining for a replacement of CEA, as the union did on 2 May 2007.

[108] The penalty is not aimed at the scale of any undermining proven to have occurred, but is aimed at the existence of bad faith intentions on the part of the employer towards those it was in an employment relationship with. The scale to which those intentions were present is relevant to the quantum of any penalties.

[109] As a matter of arithmetic, potentially the total penalties in this case may be considerable, given the number of letters distributed by ANZ. The fact that 24 of the letters were received by non members of the SFWU, does not wipe away the employers intentions in sending them.

Parties may be heard on penalties

[110] ANZ and the SFWU are now to have an opportunity, if they wish, to be heard further on the question of the amount of penalties, before the Authority decides that. Also, the Authority requires information from the SFWU as to how many members of the union there were employed by ANZ in ground handling work immediately prior to 4 April 2007.

[111] A Support Officer will shortly contact counsel to find out if the parties or either of them wish to be heard further. If so, a date will be fixed for resuming the investigation meeting as soon as possible for that purpose, before a final determination is issued.

Alastair Dumbleton
Member of the Employment Relations Authority