IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

Determination Number
WA 118/07
File Number 5040125

BETWEEN	Meat and Related Trades Workers Union of Aotearoa Inc Applicant
AND	Taylor Preston Limited Respondent

Member of Authority:	G J Wood
Representatives:	Peter Cranney for Applicant Peter Chemis for Respondent
Investigation Meeting:	24 April 2007
Submissions received:	By 31 July 2007
Determination:	23 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (the Meat Workers Union or the union) claims that the respondent (Taylor Preston) is in breach of its legal obligations by paying non-union workers 4% more than union workers at its Ngauranga Gorge processing site. It variously claims that this decision constitutes an unlawful preference, discrimination on the grounds of union membership and/or an unjustifiable action to the union workers' disadvantage.

[2] Taylor Preston denies that it has breached its legal obligations and states that it simply wants the union members to accept the same pay rates paid to non-union staff, but in the form of a collective agreement.

The Facts

[3] The basic facts are substantially agreed between the parties. Although not without a number of difficulties, the union and Taylor Preston had been able to negotiate collective agreements between 2000 and 2005. On 30 June 2005 the latest collective agreement expired. Bargaining on a new agreement had been initiated on 10 May 2005.

[4] Taylor Preston put forward a bargaining process agreement, which the parties appear to have adopted. It provided under the sub-heading "Proposals and Responses" at para.13 as follows:

> *As contemplated by s.32(2) of the Act, collective bargaining will be deemed to be completed at the point that one or both parties indicate that the process for considering and responding to proposals has been exhausted.*

[5] Despite a number of negotiation sessions and mediation assistance, no agreement had been reached by 29 November 2005. At that point Taylor Preston wanted a collective agreement with a three year term. It was prepared to pay a 4% wage rise in the first year, plus 3% in each of the two remaining years. The union wanted more. It was seeking pay parity with other meat processing workers such as those at Oringi.

[6] On around that date Taylor Preston's advocate, Mr Rod Lingard, told the union's advocate, Mr Roger Middlemass, that Taylor Preston was considering paying its other workers on individual employment agreements the 4% in any event. After discussions with Mr Middlemass he decided not to do so until after the union members had met on 15 December.

[7] At that meeting the union members rejected what had been put to them as Taylor Preston's final offer. Taylor Preston then got agreement from 171 non-union members to accept the 4% wage increase offered to them. I accept that Taylor Preston offered these increased rates to non-union members in order to be able to effectively recruit and retain non-union staff.

[8] Taylor Preston made it clear that this offer was only to be made to non-union members and that union members would not be made the offer, or communicated with in any way in relation to the offer, even if they resigned from the union. I accept that union members who asked for the pay rise were told by their supervisors that they could not get the pay rise as they were in the union. That is not to say that union members were told that to get the pay rise they had to leave the union. The union members did not, unsurprisingly, necessarily understand this fine legal distinction.

[9] Taylor Preston's reason for not offering the pay rise to union members who requested it individually was because the union members remained covered by the collective agreement for one year after its expiry, at least while collective bargaining was ongoing. Another reason, which became important when bargaining later ended, was that it did not want the union members to accept the pay rises as an individual agreement and then go on strike in support of even higher rates.

[10] The parties had another negotiating meeting on 24 January 2006, but were unable to resolve matters. During February 2006 union members took various types of industrial action, including a three day strike and an overtime ban.

[11] In accordance with the bargaining process agreement Mr David Walkinshaw, the Processing Manager at Taylor Preston, advised the union on 13 March that it had withdrawn from bargaining for a new collective agreement. Its concerns were that the union had rejected all its offers, failed to respond to correspondence and had rejected further mediation. It also believed that by showing a willingness to negotiate a collective agreement this was taken as a sign of weakness or not understood by the union.

[12] As well as stating that it was prepared to work with the union, Taylor Preston told all staff that union members would remain indefinitely on their existing terms and conditions of employment and that if any members had any concerns about that, they should discuss it with their union. It also noted that all non-union employees could still obtain the 4% wage increase if they had not already agreed to do so.

[13] While the parties met on 17 March, Mr Lingard made it clear that that meeting was not collective bargaining, as this had ended. Mr Middlemass told Mr Lingard that the union was going to advise members to accept the individual employment agreements. Mr Lingard replied he was uncertain that union members could legally do so.

[14] On 20 March the union wrote to Mr Walkinshaw advising that it was lifting all strike action. Since then a number of workers have left the union and gone on to individual employment agreements reflecting the pay rises.

[15] In fact several other members also left the union but were denied the pay rise. Following a discussion between the parties' representatives and the Authority in November 2006, Taylor Preston has agreed that all workers who left the union after 13 March 2006, being the conclusion of the bargaining, will be paid the new rate offered, even if they have subsequently re-joined the union. Leave is reserved for the parties to return to the Authority should there be any difficulties with applying this undertaking.

[16] Despite discussion between the parties' legal representatives, the situation has remained unresolved. While there has been no collective bargaining, Taylor Preston maintains that it will settle a collective agreement with the union on the basis of its previously notified final offer, except that there will be no back dating. The union will not agree to that.

[17] This stalemate has been in existence for so long that Taylor Preston was, at the time of the investigation meeting on 24 April 2007, considering unilaterally paying the Meat Workers Union's members the extra 4% because it is having such difficulty with staff numbers generally and (in particular) retaining union members in its employment. Clearly this is a most unsatisfactory situation, but whether Taylor Preston has breached its legal duties to the union members must be assessed strictly from a legal perspective.

The Law

[18] Sections 9 and 10 of the Act deal with prohibition on preference. They state:

> *9.* ***Prohibition on preference***
>
> *(1) A contract, agreement, or other arrangement between persons must not confer on a person, because the person is or is not a member of a union or a particular union, -*
>
> *(a) any preference in obtaining or retaining employment; or*
> *(b) any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.*
>
> *(2) Subsection (1) is not breached simply because an employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer*
>
> *(3) To avoid doubt, this Act does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits –*
>
> *(a) of a collective agreement:*
> *(b) arising out of the relationship on which a collective agreement is based.*
>
> *10.* ***Contracts, agreements, or other arrangements inconsistent with section 8 or section 9***
>
> *A contract, agreement, or other arrangement has no force or effect to the extent that it is inconsistent with section 8 or section 9.*

[19] Discrimination is defined for the purposes of this case in ss.104 and 107:

104 ***Discrimination***

(1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer,... by reason directly or indirectly of that employee's involvement in the activities of a union in terms of section 107, -

(a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances...

107. ***Definition of involvement in activities of union for purposes of section 104***

(1) For the purposes of section 104, involvement in the activities of a union means that, within 12 months before the action complained of, the employee –

(a) was an officer of a union or part of a union, or was a member of the committee of management of a union or part of a union, or was otherwise an official or representative of a union or part of a union; or
(b) had acted as a negotiator or representative of employees in collective bargaining; or
(ba) had participated in a strike lawfully; or
(c) was involved in the formation or the proposed formation of a union; or
(d) had made or caused to be made a claim for some benefit of an employment agreement either for that employee or any other employee, or had supported any such claim, whether by giving evidence or otherwise; or
(e) had submitted another person grievance to that employee's employer; or
(f) had been allocated, had applied to take, or had taken any employment relations education leave under this Act; or
(g) was a delegate of other employees in dealing with the employer on matters relating to the employment of those employees.

[20] As was held in *NUPE v. Asure NZ Limited and the PSA* unreported, Travis J, Colgan J, Shaw J, 8 October 2004, CC 18/04, motive is important in assessing whether a preference is unlawful and the conferring of different terms and conditions was not in and of itself an unlawful preference.

[21] In that case, in relation to remedies, the Full Court also noted that if NUPE had been successful in its claim, it could not have had the additional remuneration paid to PSA members it felt constituted an unlawful preference. This is because of the effect of s.10, which would have retrospectively deprived PSA members of the arrangements rather than increasing the remuneration

of NUPE members. *Postal Workers Inc v. NZ Post Limited* unreported, Goddard CJ, WEC65/96, 2 October 2006, can be distinguished. It was only decided in an interim setting and did not address the issues in question directly, as did the Full Court in *NUPE*. It was clear from the *NUPE* judgment that s.9 does not stand on its own but is clearly intertwined with s.10.

[22] *Transrail Limited v. RMTU* [1999] 1ERNZ 460 (CA) makes it clear that the previous version of the section on involvement in union activities covered examples only and thus it was not an exhaustive list. Under the Employment Relations Act, however, I conclude that the current equivalent section on involvement in union activities is not a deeming provision, but rather an exhaustive list, because of the words *means that*.

[23] I also note that the promotion of collective bargaining is at the heart of the Employment Relations Act 2000. The duty of good faith requires parties bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to. Under s.32(1)(d)(iii) parties must not undermine or do anything that is likely to undermine the bargaining or the authority of the other party in the bargaining process.

[24] In *Service and Food Workers Union v. Auckland District Health Board & Ors* unreported, Colgan CJ, Shaw J, Couch J, WC18/07, 1 August 2007, a full Court looked at the issue of cross or counter initiation. It noted that this may occur *where bargaining has run its course, that is as a circuit or game breaker tactic.*

[25] As an example, in that case counsel postulated that the Health Boards may feel it necessary and appropriate to counter-initiate for a multi-employer collective agreement involving only them as employers. However, the Court noted that the legislation now provides facilitated bargaining so the parties in these circumstances are not without a practical strategic remedy. This latter point may be of relevance here. Similarly, *Epic Packaging Limited v. EPMU* unreported, Colgan CJ, Shaw J, Couch JJ AC39/06, 21 July 2006, makes it clear that it is open to unions and employers to reach collective agreements without invoking the statutory process of bargaining for a collective agreement. It also makes it clear that while the statute promotes collective bargaining, it is not at all costs, because the integrity of individual choice must also be protected, with the ultimate end being of building productive employment relationships.

Determination

[26] I conclude that unless Taylor Preston is in breach of its legal duties in relation to preference and discrimination there can be no unjustified disadvantage in this case. That is because unless Taylor Preston has done something that it can not do to union members it is able to justify its non-payment to union members of the pay increase. There is nothing in the law that requires union members to be paid the same as non- union members, just as there is nothing in the law requiring the reverse. Rather the law provides unions with certain rights and protections that promote collective bargaining, but not at all costs (*Service and Food Workers Union*).

[27] There is no evidence before the Authority that union members had been involved in union activities in terms of the s.107 definition before pay rises were given to non-union workers. Therefore the claim for a personal grievance on the grounds of discrimination must fail.

[28] The final issue for determination is whether or not Taylor Preston entered into a contract, agreement or other arrangement between persons, conferring on those persons a preference, being higher pay, because those persons were not members of the Meat Workers Union.

[29] It is clear that the preference is one given to non-union members and it is that which would have to be removed. It follows that the result of this case, if there were an unlawful preference, would be the same as in the *NUPE* case, namely that the Authority would have to conclude that non-union employees would have to be retrospectively deprived of their additional remuneration.

[30] There is clearly a preference here. While Taylor Preston argues otherwise because the same conditions are available to union members by way of a collective agreement, that is wrong for three reasons. First, the union had not accepted the collective agreement and therefore the preference still exists. Second, Taylor Preston was insisting on a three year term, which was not something required of non union-members. Third, the situation between Taylor Preston and its non-union employees who accepted a wage rise clearly constitute a series of contracts, agreements or other arrangements. The pay rises have contractual force, even in the absence of any obvious consideration, as is well established law.

[31] The real issue for determination is that of motive. I find that Taylor Preston's motives in pursuing its strategy were three fold. First, it wanted to raise pay rates for recruitment and retention reasons. Second, it wanted to ensure that union members only got access to the same pay rates as non-union members if they were prepared to accept a collective agreement on Taylor Preston's terms, which were similar, but not identical, because they would have involved a collective agreement, which requires a term during which industrial action is prohibited. Third, Taylor

Preston wanted to limit the opportunity for union members to resign from the union to get the pay rises and then rejoin the union and go out on strike in favour of higher pay rates. Taylor Preston believed it could hold the line in this regard until June 2006, but later accepted the appropriate date was the date it ended bargaining, namely March 2006.

[32] I conclude that Taylor Preston acted in the way it did, not because of the Meat Workers Union members' union membership, but because it did not want the Meat Workers Union members to get a pay rise, not settle a collective agreement and be able to go on strike. That is not the same as the test of "because of union membership" in my view. Although the right to bargain collectively and go on a strike is a fundamental part of union membership and must be protected by the Act, Taylor Preston's concerns were bargaining concerns, not union membership concerns. At the time the preferences were entered into Tayler Preston was still trying to negotiate a collective agreement.

[33] After bargaining concluded the situation changed in that Tayler Preston now accepts that union members could resign from the union, take the pay rise and rejoin the union, allowing them to strike in support of a new collective if either party chose to negotiate for one. That most members have not done so speaks well of their commitment to the union. It is implicit, however, from the verb *confer* that the relevant time for assessment is at the time the preference was initiated and therefore what occurred later is irrelevant, unless a new preference is conferred.

[34] Even if I am wrong on that point, I find that the same principles apply in respect of preference thereafter. Because union members were and still are able to seek to negotiate a new collective agreement through their union that would substantially mirror the individual agreements, the preference in effect still exists as a result of the union's position on pay rates rather than the fact of union membership.

[35] If the above analysis were not accepted, the ramifications of Mr Cranney's arguments would be extremely widespread. They would mean that in any case where an employer wanted to raise the wages of its non-union staff, but it also employed union members, but not on a collective agreement, it could only do so after it had settled any collective bargaining with the union. That takes matters too far in terms of the provisions in the Act for the promotion of collective bargaining. Employees on individual employment agreements also have rights to independently bargain changes to their terms and conditions pursuant to ss.63A and 65.

[36] The corollary of the union's position may also mean that an employer could not offer better terms of employment to non-union staff compared with the terms of a collective agreement, as this

too could be said to constitute a preference on the ground of union membership. This would be because the union members could not take industrial action to "catch up" because they were covered by a current collective agreement, which could only happen to union members. Taken with the requirements of s.10, the above points are a further demonstration as to why this claim must fail.

[37] With the union adopting a strategy that seems simply to involve only pursuing its position by way of this application, it is currently difficult to see how the issues at Taylor Preston can be resolved. In my view the best way forward would be for the parties to return to bargaining, perhaps with mediation assistance and/or an application to the Authority for facilitation. Although there can be no certainty that the Authority would accept such an application the ending of collective bargaining in March 2006 should not prove a handicap, on the basis of the *Service and Food Workers Union* and *Epic* cases.

[38] In the meantime the Meat Workers Union members continue to fall behind the pay of their colleagues doing the same work. This is not a situation that either party should allow to continue. This situation does not just affect the union. Taylor Preston must be closely reassessing the merits of its strategy, which has not only divided its workforce, but runs the risk of de-motivating union members and giving them extremely good reasons not to remain in Taylor Preston's employ.

Costs

[39] Costs are reserved.

G J Wood
Member of the Employment Relations Authority