IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 314/07
5098512

	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:	9 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority has before it for resolution a problem that has arisen between the applicant Service and Food Workers' Union Nga Ringa Tota Inc (the SFWU) and the respondent Air New Zealand Limited (ANZ). Their dispute has its origins in the implementation of plans made to reorganise the ground handling services business unit of ANZ, at Auckland, Wellington and Christchurch airports.

[2] The broad objective of the reorganisation plan, known as the *in-house solution*, was the preservation of the jobs of most of the 1800 employees of ANZ who are carrying out the work, and the improvement of the financial performance of the business to make it more competitive.

In-house solution

[3] The in-house solution was formulated by ANZ and several unions representing the majority of ground handling employees. ANZ had reached an advanced stage towards securing new contracts with interested parties when it responded to union initiatives to consider alternatives to outsourcing. After discussions with the unions the company agreed on the in-house solution, although not as it wanted with all the unions involved. Reaching the solution averted the outsourcing of this work to other companies that had shown interest in providing the ground handling services on contract by using their own labour.

[4] Three unions had each negotiated a collective agreement with ANZ covering the work being performed by the ground handling employees. They were the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc (EPMU), the Aviation and Marine Engineers Association (AMEA) and the applicant SFWU. The effectiveness of the in-house solution was dependent upon changes being made to the terms and conditions of employment provided in the unions' collective agreements, and maximum effectiveness of the solution required all 3 of the unions to make the necessary changes. EPMU and AMEA made those changes but the SFWU was unable to get the consent of its members for it to do the same and consequently they have not become participants in the in-house solution.

[5] In respect of SFWU members employed in airport ground handling work, ANZ remains bound by the particular terms and conditions in the SFWU collective employment agreement for ground staff (the CEA) which was signed by the parties in April 2005. Because of the content of some of the terms and conditions of the CEA, it does do not deliver the costs savings, productivity and flexibility to be had from the in-house solution that EPMU and AMEA members are now participating in. This situation has prevented ANZ from gaining the full benefit of the in-house solution in return for its retreat from outsourcing the work and the lay-off of employees that would have resulted.

80 Hour Flexible Fortnight

[6] The arrangements for rostering employees on shift work are an aspect of the employment of ground staff where the 2/3 union participation in the solution has prevented ANZ from making the full cost savings the in-house solution is capable of

delivering to the company. Under the changed collective agreement conditions EPMU and AMEA members (and some employees who are on individual employment agreements) are now rostered to work on the basis of a new 80 hour flexible fortnight, whereas SFWU members have remained on a 6 days on – 3 days off roster under the CEA, which is more costly to operate for ANZ. Although ANZ has given notice of its intention to move to a 5 days on – 2 days off roster, even that change will not deliver the maximum benefits of the 80 hour flexible fortnight, as provided for in the collective agreements binding on members of the EPMU and AMEA.

[7] Naturally as an employer, ANZ wants to have greater uniformity of terms and conditions across the three collective agreements which cover the same work, particularly in respect of rostering for shift work and other matters which have a significant influence on labour costs and productivity. However the bargaining provisions of the Employment Relations Act 2000 make no requirement for the SFWU to align its CEA with those of other unions having collective agreements covering the same work. Only through further negotiation and bargaining between SFWU and ANZ will uniformity most likely be achieved. Bargaining for a replacement of the CEA was initiated by SFWU in May 2007 and is currently in progress.

[8] Reduction in the number of SFWU members for any reason, will also tend to flatten out the effect of having unaligned terms and conditions of employment applying across the airport ground handling work force. The implementation of the in-house solution from August this year has apparently, directly or indirectly, caused some drop-off of SFWU membership among ground handling staff, although part of that reduction may be attributable to voluntary severance and the consequent termination of employment by workers previously covered by the CEA.

[9] If newly employed ground handling services workers should become bound by the CEA of the SFWU that is currently in force, the objective of the in-house solution will not be achieved in respect of their work. This is the situation that understandably ANZ wants to avoid, if it can.

The dispute

[10] Against the above background the SFWU has challenged the way ANZ has been representing to new employees their rights and obligations in relation to becoming a member of the SFWU and thereby becoming employed under the CEA, a benefit conferred by SFWU membership. This dispute has arisen from actions of ANZ that the SFWU alleges have been carried out by the company to undermine the union, to sideline the CEA and to dissuade new employees from becoming covered by the CEA.

[11] In particular the SFWU has complained that ANZ has misstated to new airport services employees;

(i) their right to join the SFWU and,

(ii) the consequential coverage of their employment by the CEA, should they become SFWU members.

[12] To resolve the employment relationship problem the SFWU seeks a compliance order requiring ANZ to:

> *Meet its obligations to the Applicant in terms of new employees at Airport Services. This includes advising the new employees of the union* [the SFWU]*, of the agreement* [the CEA]*, providing a copy of the agreement, and employing those new employees who join the union on the terms and conditions of the SFWU Collective Employment Agreement.*

[13] The specific complaints made by the SFWU are that when new employees are employed by ANZ at Airport Services they are not advised of the existence of the CEA, they are not given a copy of the document itself and they are led to believe that the CEA has expired.

[14] A further complaint of the SFWU is that the new employees are being advised by ANZ that if they enter into terms and conditions of employment that are inconsistent with those in the individual employment agreement (which by law must apply at commencement of their employment for 30 days), they will be required to resign or accept that the company will be entitled to dismiss them from their employment. The new employees' individual agreements are comprised partly of the terms and conditions of the EPMU collective agreement. These are more favourable

to ANZ in material respects than those of the CEA which applies to SFWU members performing the same work.

[15] The SFWU complains that the conduct of ANZ is intended to dissuade or discourage new employees from seeking to have their employment covered by the terms and conditions of the CEA. Such coverage is a legal consequence of becoming a member of the SFWU.

[16] The response of ANZ to the applicant's challenge has been that there is no basis upon which the compliance order sought can be granted. This is because;

(i) ANZ has complied with all relevant lawful requirements, or,

(ii) the requirements contended by the SFWU do not exist as a matter of law.

[17] The parties have undertaken mediation and tried by that process to reach their own resolution of the employment relationship problem.

Coverage of work of Customer Service Assistant and Airline Assistant

[18] The investigation by the Authority has been concentrated on the recruitment and engagement of new employees offered the recently established positions of Customer Service Assistant and Airline Assistant.

[19] There is no dispute that although the titles have changed for these positions which were introduced as part of the implementation of the in-house solution, the work of a Customer Service Assistant and an Airline Assistant in airport services is covered by the CEA. The CEA is expressed to be effective from 1 July 2004 and to expire on 30 June 2007. There is also no dispute that before 30 June 2007 the SFWU initiated collective bargaining with ANZ for the purpose of replacing the CEA. Although the CEA would otherwise have expired at the end of June 2007, as a legal consequence of the SFWU initiating bargaining it continues in force for a further period not exceeding 12 months. Section 53 of the Employment Relations Act 2000 preserves its force while bargaining is in progress for a replacement agreement.

[20] There is also no dispute that as well as coverage by the CEA, the work of a Customer Services Assistant and an Airline Assistant is covered by separate collective employment agreements negotiated by EPMU and AMEA with ANZ.

[21] New employees who are employed by ANZ in airport services work may exercise their right under the Employment Relations Act to join a union by joining one or more of EPMU, AMEA and the SFWU, being the unions which have negotiated collective agreements with ANZ for this work. (New employees can also join any other union whose membership rules may cover their occupation, even if that union has no collective agreement for the work.) If a new employee joins the SFWU, by operation of s 56(1)(b) of the Act the employee will be bound by the CEA. So too at the same time will ANZ and the SFWU as parties to the CEA. If the new employees join EPMU or AMEA, they will be covered by the collective agreement of whichever of those 2 unions they have joined.

[22] Although nothing arises from it in this case, s 57 of the Act provides for the possibility that an employee is or becomes a member of more than one union. In that event the employee is bound by only one collective agreement, which will be the collective agreement that resulted from bargaining first initiated for the employee's work.

Initial 30 day period of employment under an IEA

[23] Under s 63 of the Act, where new employees are not a member of a union their terms and conditions of employment comprise the terms and conditions in the collective agreement that would bind the employees if they were members of the union. Under s 63(2) of the Act, new employees not a member of a union are to commence on an individual employment agreement and remain under it for the first 30 days of employment. Their terms and conditions may also include any additional terms and conditions mutually agreed to by employer and employee, as long as they are not inconsistent with the terms and conditions of the collective agreement. After the initial 30 day period, the new employees have options with regard to becoming covered by any collective agreement negotiated for the particular work by any union.

[24] In this case the work to be done by new employees is covered by more than one collective agreement. Under s 63(3) of the Act they are therefore to be offered by ANZ an individual employment agreement having the same terms and conditions of the collective agreement that binds more of the employer's employees in relation to the work to be performed than any other collective agreement.

[25] There is no dispute that the EPMU collective agreement binds many more of ANZ's ground handling employees than either the SFWU or the AMEA collective agreements.

[26] Although there are a number of possibilities that arise for a new employee who is or becomes a member of more than one union which provides a collective agreement covering the work, the present case is only concerned with a situation where the new employee joins the SFWU and as a consequence of continuing to work as either a Customer Service Assistant or an Airline Assistant, becomes bound by the terms and conditions of the CEA. This is a situation ANZ wishes to avoid, so that the in-house solution can be implemented for as many employees as possible and so that ANZ can obtain the benefits of the solution as fully as possible.

[27] ANZ wishes to have the 80 hour flexible fortnight applied to all of its airport services employees, to avoid having employees working under the terms and conditions of the CEA which are considered more costly and less productive to the company. It wishes to confine the application of the CEA rostering arrangements to existing employees who are members of the SFWU and who are therefore under coverage of its CEA for the time being. ANZ hopes to obtain the agreement of the SFWU to make change, either through the replacement CEA now under negotiation, or in any other way possible, that will lead to a universal application of the 80 hour flexible fortnight and other conditions more favourable to ANZ, to cover all ground handling staff or as many of them as agreement can be reached with.

Employment of new employees

[28] In the process of recruiting and engaging new employees, ANZ has distributed written material to them which includes a copy of the proposed terms and conditions of the employment the new employees are offered.

[29] The Authority has seen 2 examples of the covering letter which contains the offer of employment. They are dated 23 July 2007 and 10 August 2007. In construction and content they are identical in material respects.

[30] The letters advise new employees of the legal requirement for an individual employment agreement to apply to them for at least the first 30 days of their employment with the company. They are advised that the individual agreement will reflect the terms and conditions of the "dominant" collective agreement in place.

There is no dispute that the EPMU collective agreement is the dominant one of the three providing coverage, at least in the sense that it binds more employees performing the ground handling work than the collective agreement of either the AMEA or the SFWU.

[31] The letters go on to advise that the "work and position" of the new employees is covered by 2 ground staff collective agreements, being those of the EPMU and the AMEA. Only in a narrow literal sense is this statement correct, for the CEA of the SFWU is a collective agreement which also covers the "work" of the employees, although it does not classify a "position" having the nominal title of Customer Service Assistant or of Airline Assistant.

[32] The statement below then follows, on page 1 of the letters;

> *If you decide to join the EPMU or the AMEA at any time during or after this initial 30 day period, then the terms and conditions of their applicable Collective Agreement will automatically apply to you and govern the terms and conditions of employment with the Company. The terms and conditions contained in your Individual Employment Agreement will then cease to apply.*

[33] That statement is correct in all respects, although what is said is equally true of the SFWU, any reference to which is omitted in this part of the letter. The above statement is followed by the contact details for the EPMU and the AMEA. These are given to those new employees, ……*who may be interested in joining the EPMU or the AMEA and becoming party to their Collective Agreement.* Further reference is made, accurately, half way down the second page of the letter to the consequences of not joining the EPMU or the AMEA.

[34] The existence of the SFWU is only referred to cursorily in one short paragraph halfway down page 2 of the letter, as follows;

> *There is also a third Collective Agreement which does not contain provision for your position at present. It is with the Nga Ringa Tota Service and Food Workers Union Inc. It expires on 30 June 2007. It is currently being renegotiated and may contain provision for your position in the future.*

[35] Since all of the specimen letters produced to the Authority post-date 30 June 2007, "expires" seems an obvious typographical error and "expired" must have been the word intended in the third sentence of the paragraph. The 10 August 2007 letter for the position of Airline Assistant correctly used the past tense "expired."

[36] Whereas EPMU and AMEA are each referred to by name 6 times in the letter, the SFWU is referred to just once, in a separate part of the letter and in an off-handed way. A new employee reader might well wonder what the point was of referring to the SFWU at all, if that union's collective agreement had expired and did not cover the offered "position" anyway.

[37] The CEA of the SFWU also covered the "work" of the position of Customer Services Assistant and Airline Assistant, and under the Employment Relations Act it is "work" that is the principal determinant of coverage by a collective agreement.

[38] The Authority holds that in no way and in no sense did the CEA expire on 30 June 2007. Since that date the CEA has continued to apply to the airport ground handling services work with the full force it had prior to 30 June 2007. While the CEA document expressed it to have a nominal expiry date of 30 June 2007 the effect of s 53 of the Act is quite clear in this regard:

> ***53 Continuation of Collective Agreement after specified expiry date***
>
> *(1) A collective agreement that would otherwise expire as provided in s.52(3) continues in force –*
>
> *(a) If……*
>
> *……the union initiated collective bargaining before the collective agreement expired and for the purpose of replacing the collective agreement.*

[39] The representation made by ANZ to new employees in the letters sent to them was incorrect and, I find, is likely to mislead the average employee not possessed of any special skill or knowledge in matters of employment relations law, especially a new employee who has never been a member of a union before. When asked why he claimed in his evidence that the CEA had expired, the senior ANZ executive who approved the draft of the letter, Mr Bruce Parton, professed to be a layman in legal or technical matters relating to collective agreements. Mr Parton, who is the General

Manager Domestic Airline, based his claim that the CEA had expired on the fact that the document has an expiry date (20th June 2007) written on its cover.

[40] Mr Parton's state of knowledge is understandable, as employment relations law seems not to be his area of work with ANZ. New employees are unlikely to have any better grasp of the law including provisions such as s 53 of the Act. Mr Parton was in good company, as even lawyers acting for ANZ have claimed that the CEA has expired. This claim was repeated in the evidence of in-house counsel Mr Doak, it was made in the statement in reply filed by counsel Mr Caisley and it was also in written submissions presented by Mr Caisley. He submitted that ANZ's advice to new employees that the CEA has expired was "a simple statement of fact." Simple it may be, but I find it is an untrue statement and it should now be corrected.

[41] In final submissions Mr Caisley came to acknowledge that the statement was incorrect that the CEA has expired, and counsel indicated that he would give advice to ANZ to see that the statement is not repeated.

[42] The complaint of the SFWU that the union and its CEA have been misrepresented is I find justified. The status and role of the union as a party to a collective agreement currently in force and covering the work has been misstated. A collective agreement is the lifeblood of a union and its members. To represent incorrectly that the collective agreement is no longer effective is a serious and damaging misstatement.

[43] In their construction and content the letters sent to new employees fail to expressly acknowledge that new employees can join the SFWU, in the way that has been represented in relation to the EPMU and AMEA, and the letters also fail to provide the contact details and give the same information about the SFWU as provided in relation to the EPMU and AMEA.

[44] While submissions were made about the intent of the letters sent to new employees, the impression a reader will get from a letter is to be judged from the words of the letter itself. A distinction between "work" of the position and a name given to that "position" in my view is unlikely to be clearly seen by the lay reader of the letter. The distinction is a subtlety likely to escape new employees. The overall impression emerging from the words and layout of the letter I find is that ANZ is purporting to give advice about unions in the workplace that have a current collective

agreement and that can be joined by the new employee. Although in these respects the SFWU is on equal footing with EPMU and AMEA, the letter expressly states that the SFWU does not have a current collective agreement and gives the impression that the SFWU is not open to membership. I find that the impression likely to be given to new employees by the letter is that the SFWU is not a viable union able to effectively represent new employees by providing a current collective agreement, unlike the EPMU and the AMEA.

[45] If there was a need to refer at all to the SFWU, and the mention of the union in the letter acknowledges there was, then that union's status and role should not have been diminished by the scant (and wrong) information given about it in comparison to that given about EPMU and AMEA. The representations in the letter are likely to dissuade new employees from exercising their right to join the SFWU. The Employment Relations Act does not require ANZ to promote any union that is a party to an employment relationship, but the Act does require that ANZ is not to mislead or engage in conduct likely to mislead in what it says about the union.

[46] Under s 4 of the Act the parties to an employment relationship are required to deal with each other in good faith and must not, whether directly or indirectly, do anything that is likely to mislead or deceive each other. Although the statement about the expiry of the CEA is a statement about the SFWU it was not directed at the union but at new employees. In any event the statement is most unlikely to have misled the SFWU, which will be fully aware of the current live status of the CEA. Nevertheless the statement is likely to mislead new employees receiving the letter. Under s 4(b) of the Act the duty of good faith applies to any matter arising in relation to a collective agreement while the agreement is in force. The duty applies to any parties to an employment relationship, which an employer and union are by definition under the Act.

[47] Those provisions are in Part 1 of the Act which may be enforced by an order of compliance under s 137. The Authority may order compliance of its own motion or on the application of any party to the matter, under s 138(1) of the Act. I consider that ANZ should have an opportunity to correct the misrepresentation before any final order of compliance is made.

Fundamental term of new employment

[48] The SFWU takes serious issue with a particular term of employment that new employees are required by ANZ to accept. When they are offered a job as a Customer Service Assistant or Airline Assistant, new employees are provided with a copy of the terms and conditions of their proposed new individual employment agreement and told those provisions will apply during at least the initial 30 day period of the employment, as required by s 62(2) of the Act. The individual employment agreement is stated to be comprised of the terms and conditions of the EPMU collective agreement and additional terms which are set out in the letter. Those additional terms include the following:

> *It is a fundamental term of this agreement and of the new position you will be moving into that you are, and remain, ready willing and able to work under the new rostering arrangements and hours of work provisions and in the new organisation structure, as defined in the enclosed Collective Agreement* [the EPMU collective agreement]. *If at any time in the future you are unable to work under the new hours of work or rostering arrangements you will need to resign and/or accept that the Company will be entitled to terminate your employment.*

[49] The EPMU (and AMEA) collective agreement provides for the work to be done by a new employee under the new rostering arrangements and hours of work provisions in the new organisation structure. A new employee whose employment agreement is the EPMU agreement or one based on that agreement, will not for that reason alone be "unable to work" as required by the above fundamental term. The same is not true of new employees who join the SFWU. By operation of s 56(1) of the Act, upon joining they will become bound by the CEA terms and conditions and will not lawfully then be able to work the new rostering arrangements (the 80 hour flexible fortnight) and the hours of work which ANZ wishes to bind them to.

[50] It is accepted by ANZ that a new employee who becomes a member of the SFWU cannot agree to the 80 hour flexible fortnight becoming a term and condition of employment in addition to the terms and conditions in the CEA. This is because s 63(2)(b) requires that such additional terms and conditions must not be inconsistent with the terms and conditions of a binding collective agreement. ANZ accepts that the 80 hour flexible fortnight rostering system is not consistent with the terms and conditions of the CEA.

[51] ANZ contends that if a new employee becomes bound by the CEA (as a consequence of becoming a member of the SFWU) the company will be able to

invoke the "fundamental term" of the employment and require the new employee either to resign or to acquiesce in being dismissed by ANZ for failing to remain ready, willing and able to work as stipulated.

[52] This "fundamental term" of the individual agreement proposed to new employees that they remain ready, willing and able to work under the new rostering arrangements, cannot operate to bar a new employee from joining the SFWU. Neither can it operate to prevent the SFWU member, upon joining, becoming bound by the rostering provisions, hours of work and all other conditions under the CEA. It is not the purport of the provision that the fundamental term operates in either of those ways and ANZ does not contend it works in those ways.

[53] I find that the fundamental term is not effective in excluding new employees who become members of the SFWU, from performing work covered by the CEA and in return having all of the terms and conditions of the CEA apply to the new employee.

[54] If the new employee was required to resign in those circumstances or was dismissed for failing to remain "ready willing and able to work under the new rostering arrangements and hours of work provisions", any action taken by the employer to bring the employment to an end is unlikely to be justifiable as a matter of law. A determination is not required about that, because this case is not a grievance claim brought by any new employee as a result of termination of employment after joining the SFWU. There is no evidence that any new employee has had his or her employment terminated or has been threatened with that, as a consequence of joining the SFWU. The union has however advised the Authority that there are a number of new employees who have joined it. What the consequences of that may be for them is outside the scope of resolution of the immediate employment relationship problem.

[55] For ANZ, counsel Mr Caisley argued that the fundamental term expressed in the individual employment agreement is effective and can be enforced by the company. Mr Caisley acknowledged that it was unusual to have two different organisational structures in the same work area, as currently exist in the ground services business unit, but he submitted that an employer can offer a role to a new employee as a shift worker which is clearly different to offering a role as a day worker, even though the same physical work is being performed. Similarly, he submitted that an employer is entitled to offer a part time position working Saturday,

Sunday and Monday, and make it a fundamental term that the employee be available to work those particular days of the week.

[56] In my view, in the majority of cases, those examples given by Mr Caisley will not lead to a situation where the fundamental term of shift work or part time work on certain days of the week, is inconsistent with the terms and conditions of an applicable collective agreement. Such arrangements are likely to be permissible under s 61 of the Act.

[57] The situation before the Authority in the present case is that the SFWU has negotiated and agreed with ANZ to have particular rostering arrangements and other conditions apply to SFWU members covered by the ground handling CEA. ANZ now, for understandable reasons, wishes to promote the application of the 80 hour flexible fortnight and other conditions to apply to all or as many as possible of its employees.

[58] For the fundamental term to be applied in the way suggested by ANZ would simply detract from the rationale and purpose of collective bargaining by a union for its members to obtain minimum terms and conditions of employment for them. New employees of ANZ have a right to join the SFWU or any other union they may wish to. If they join the SFWU, by operation of law under s 56(1)(b) of the Act the new employees will become bound by the CEA. It is enforceable by them against ANZ, which gave its agreement to being a party to the CEA.

[59] In my view it is tantamount to contracting out of the Act to impose the fundamental term in the proposed individual employment agreement offered to new employees by ANZ. Section 238 of the Act forbids contracting out and requires that the provisions of the Act are to have effect despite any provision to the contrary in any contract or agreement.

[60] I agree with the submission of counsel Mr Mitchell for the SFWU that the fundamental term also purports to be a contract, agreement, or other arrangement which confers on new employees a preference in retaining employment for so long as they do not become a member of a union, the SFWU. That implicitly is the purport of the fundamental term, I find. Under s 10 of the Act, a contract, agreement or other arrangement that is inconsistent with s 9 has no force or effect, to the extent of the inconsistency.

[61] It could not have been intended that the operation of a collective agreement such as the CEA in this case, could be defeated or avoided by a provision purporting to limit the duration of employment to the period of time during which an employee does not exercise the legal right to join a union covering the employee's work (or to join any union at all). That is the real intent of the fundamental term in my view, and for that reason I find that the term is ineffective and unenforceable.

[62] While I consider that the fundamental term is ineffective and should not be proposed to new employees as a term or condition of their employment agreement, compliance as the remedy sought by the SFWU is not in my view available, at least at this stage. The order sought, in this part, is to require ANZ to employ new employees who join the union on the terms and conditions of the CEA. There is as yet no indication that any new employee who has joined the SFWU has not been employed or continued to be employed, on the terms and conditions of the CEA. If that situation arises then at that time compliance is likely to be the appropriate remedy, and of course new employees may have a remedy through a claim of personal grievance if they are compelled to resign or are dismissed or have other disadvantageous action taken against them, as warned of by ANZ in its letter.

[63] As to the other specific conduct of ANZ in respect of which SFWU seeks a remedy, I find there is no basis for an order of compliance. In particular, new employees have been advised of the existence of the SFWU, although its role has been diminished by incorrectly referring to it as having an expired CEA, and a copy of the dominant collective agreement, being the EPMU agreement, has been supplied to new employees as required by the Act.

Determination

[64] The grounds of the challenge made by the SFWU are upheld in respect of the misleading information supplied to new employees about the expiry of the CEA and access to membership of the union. In this regard I consider the actions of ANZ to be undermining of the SFWU and its members.

[65] I also find that the fundamental term has no effect in preventing new employees from joining the SFWU and having the terms and conditions of the CEA applied to their work in full.

Investigation suspended for report from ANZ

[66] This investigation will now be suspended to give ANZ an opportunity to take corrective action in relation to the misrepresentation of the SFWU and the CEA made to new employees. ANZ shall now have an opportunity to consider what corrective statements it should publish to new employees who have already received a copy of the contentious letter central to this case and who are also subject to the "fundamental term" contained in the employment contract sent with it. At the same time ANZ should consider what changes need to be made to that letter and that contract before they are sent to anyone in future.

[67] No orders are made at this time by the Authority about any corrective action to be taken, but I direct ANZ to provide a written report to the Authority within 7 days of the date of this determination advising of the action it has taken or has decided to take, if any. Once the Authority has that report it will consider whether a compliance order should be made requiring ANZ to comply with the either or both of the Employment Relations Act and the CEA, to prevent any further breach in any respect. Injunction may provide an alternative remedy (on notice), under s 160(3) and s 162 of the Act.

[68] At the same time that ANZ's report is sent to the Authority, a copy is to be sent to the SFWU counsel Mr Mitchell.

Costs

[69] Costs are reserved.

Alastair Dumbleton
Member of the Employment Relations Authority