Attention is drawn to paragraph 57 prohibiting publication of certain information contained in this determination

Determination Number: CA 32/07
File Number: 5044445

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE

BETWEEN	NZ Engineering Printing & Manufacturing Union Inc (Applicant)
AND	Terry Young Limited (t/a Yunca Heating & Gas) (Respondent)
REPRESENTATIVES	Tony Wilton, counsel for the applicant Janet Copeland, counsel for the respondent
MEMBER OF AUTHORITY	Philip Cheyne
INVESTIGATION MEETING	Invercargill, Thursday 8 February 2007 Invercargill, Friday 9 February 2007 Invercargill, Tuesday 20 February 2007 Invercargill, Thursday 8 March 2007
DATE OF DETERMINATION	28 March 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Terry Young Limited ("Yunca") owns and operates a manufacturing business located principally in Invercargill that manufactures Yunca heating products. It also manufactures other products and refurbishes anodes and dog magics which are used in the smelter at Tiwai. It is a successful enterprise driven by its founder (Terry Young). Mr Young's role in the business is now a more strategic one with management of the business in the hands of John Fry, the general manager. The two men are the company's directors. The manufacturing operation in Invercargill is overseen by Tim Mulligan, the factory manager.

[2] At its Invercargill factory, Yunca employs on individual employment agreements around 25 factory workers in its manufacturing work. Two of those employees had been members of the NZ Engineers, Printers & Manufacturing Union Inc for some time. In May 2006, most of the other factory workers also joined the union. Later, some resigned. Trevor Hobbs is EPMU's local organiser and was involved in the recruitment process which included visiting the factory. The relationship between Mr Young and Mr Fry on the one hand and Mr Hobbs on the other soon became very difficult. Later, EPMU initiated bargaining for a collective employment agreement but no settlement has yet been reached. EPMU lodged a statement of problem claiming that the company advised and attempted to induce EPMU members not to be involved in collective bargaining; that the company has denigrated EPMU representatives; and that Yunca has at various times breached the Employment Relations Act 2000 provisions permitting

union representatives access to the workplace. In its statement in reply, Yunca denies advising and attempting to induce EPMU members not to bargaining collectively; it denies denigrating EPMU representatives; and it denies breaching the Act's provisions permitting union access to the worksite. Many of the facts are in dispute.

[3] To resolve the problem, it is necessary to more carefully explain the events since May 2006 such as the sudden increase in union membership, a meeting held by Mr Fry in response on 23 May 2006, meetings held by Mr Young with several employees, the circumstances in which several union members resigned and the circumstances of Mr Hobbs' visits to the workplace. In the process of doing that it will be necessary to resolve evidential disputes. Once findings of fact have been made I will need to refer to the Act and its interpretation in previous cases to assess whether there is any substance to the complaints by EPMU. If there is any substance, appropriate remedies will need to be assessed.

[4] This is a difficult situation because nearly all the people giving evidence about disputed events continue to work together day by day. Some are in the position of having given evidence perceived to be supportive of their employer while others have given evidence perceived to be against the employer's interests. What I will do is to state my findings of fact based on assessing all the evidence without dwelling on issues of credibility: see section 174 (b) of the Employment Relations Act 2000. I should not be taken as doubting the truthfulness of any evidence unless that is specifically said. I will also determine the disputes of fact necessary to resolve the problem rather than spend time on all the points of disagreement.

Employees join the union

[5] Rua Kamaru is currently in his second spell of employment by Yunca as a welder. He is one of the long standing EPMU members mentioned above. He and Mr Hobbs have known one another for a long time. There was some dissatisfaction amongst Yunca's workforce about several issues which led to Mr Kamaru telling Mr Hobbs that a number of workers were interested in joining the union. Mr Hobbs visited the factory early in the week commencing 15 May 2006. There is a dispute about whether Mr Hobbs was introduced to Mr Mulligan during this visit but it is not necessary to resolve that. I accept the evidence of Mr Hobbs that he first asked for Mr Young and introduced himself to the receptionist before asking to see Mr Kamaru. The receptionist took him through to Mr Kamaru with whom he left the forms. These forms were distributed around the factory and by Friday 19 May 16 workers had filled in application forms.

[6] Mr Hobbs next phoned Mr Young to arrange a time to come and talk to the factory staff. Mr Young referred Mr Hobbs to Mr Fry as general manager. Mr Hobbs had not previously known about the breadth of Mr Fry's responsibilities in the business. Mr Hobbs and Mr Fry spoke on the Friday. Mr Fry initially declined Mr Hobbs' request to meet collectively with factory staff who were interested in joining the union but later phoned again to approve the request.

[7] Mr Hobbs arrived at the factory at about 1.45 pm on Friday 19 May 2006 and asked for Mr Fry. The two men had a brief discussion then Mr Hobbs went through to the factory where he first spoke to Mr Kamaru, then to Malcolm Thomas who had asked to see him and then to a group of workers assembled in the smoko room. Mr Thomas signed a membership form for Mr Hobbs while Mr Kamaru gave him the other 16 forms. Following the meeting in the smoko room, Mr Hobbs spoke again with Mr Fry and gave him the membership forms to initiate union fee deductions. Mr Fry's evidence (which I accept) is that Mr Hobbs told him they were the forms of those who had joined the union *today* but all but one of the forms were dated earlier in the week. That caused Mr Fry to question the reason given by Mr Hobbs for the workplace visit and it emerged that Mr Hobbs had been at the workplace earlier in the week. Mr Fry had not previously known this. Mr Hobbs said he would return in a week or so to discuss further with members the prospects of collective bargaining.

[8] Mr Fry later spoke with his factory manager (Tim Mulligan) and decided to convene his own meeting of the factory staff held on Wednesday 23 May 2006. The fact of the meeting is controversial, EPMU saying that it is part of Yunca's attempts to persuade the staff not to join

the union and not to negotiate a collective agreement. Mr Fry's evidence is that he was shocked by the *mass signing of union forms* and wanted to find out what was the problem. Mr Mulligan's evidence is to similar effect and I accept that as an accurate description of Mr Fry's initial reaction to the news. There is also controversy about what happened at the meeting. Terry Manson is one of the employees who joined the union shortly before the 19 May meeting. He was later elected as a union delegate but has recently been dismissed. Despite that, I accept as generally accurate his account of what was said by Mr Fry at the 23 May meeting. Mr Fry said that he felt like he had been *kicked in the guts* when he heard about the men joining the union. He said that the men would be better off investing or saving the union fees to be shared out at Christmas time. He said that the union would do nothing for them. In response, Mr Manson said that he felt as if he had been *kicked in the guts* to find out two recent employees had started on $12.50 per hour when it had taken him three years to reach $12.00 per hour. Mr Fry said that he had new individual employment agreements and he asked the men to hold off paying union fees for two weeks to allow an opportunity for them to consider these new agreements. Mr Fry learnt from comments at the meeting that the men felt strongly about the recent dismissal of a long serving employee and he told them that he could not discuss the details of that dismissal. Mr Fry's evidence is that the meeting finished with an agreement that he had two weeks to do something about the new individual employment agreements. That reflects something of a misunderstanding. I find that what was conveyed was that the men would discuss Mr Fry's suggestion of deferring the union fee deductions. They also wanted to see the proposed individual agreements.

[9] Shortly after the meeting, Mr Kamaru and Mr Manson went to Mr Fry's office to collect the proposed new employment agreements. However, they had to be printed off so there was a delay. Mr Manson took some down to the waiting group but some staff had left by then, it having gone past knock-off time. Mr Kamaru got the rest of the agreements and they were distributed to the staff that afternoon and the next day. Mr Kamaru also spoke to Mr Hobbs on 23 May. He gave Mr Hobbs a copy of the proposed agreement and told him about events at Mr Fry's meeting.

[10] As it turned out, the agreements printed by Mr Fry included some details of a recent employee (George West) but the bulk of the individual agreement was in standard form intended to be applicable to the factory staff generally. The result of the discussion by the men having seen the proposed standard form individual agreement was a decision not to hold off union fee deductions. Mr Kamaru and Mr Manson reported that to Mr Fry during the morning on 24 May 2006 and Mr Fry arranged for deductions to be commenced for the pay period ending 23 May 2006.

[11] Mr Hobbs visited the factory at midday on 24 May 2006. He delivered a letter for Mr Fry and gave copies to at least some of the union members. The letter was also posted on the staff notice board. Whether Mr Hobbs complied with the conditions relating to access set out in the Employment Relations Act 2000 is in dispute. Mr Hobbs did sign Yunca's visitors' book and he delivered the letter for Mr Fry so it is probable that he spoke to a receptionist. Mr Hobbs cannot recall if he asked for Mr Fry but it is common ground that he did not see any manger during this visit. Mr Fry's evidence which I accept is that he was available that day so it is likely that Mr Hobbs did not ask for Mr Fry before proceeding into the factory area despite being asked by Mr Fry on 19 May to do that on future visits. In any event, the 24 May letter canvassed recent events; requested an electronic copy of the proposed individual agreement because Mr Hobbs had been asked to advise members about it; referred to Mr Fry's suggestion about deferring union fees and investing an equivalent sum; cautioned Mr Fry that *it is an offence to subject any person to "undue influence" in relation to membership or non membership of a union*; advised that Mr Hobbs would be asking EPMU to take appropriate action about the 23 May meeting; and requested a meeting with members on *Friday the 25th May 2006* to give advice about the proposed agreements and to discuss options.

[12] Mr Fry responded by email and also by letter, both received by Mr Hobbs on Thursday 25 May 2006. Regarding the proposed meeting, Mr Fry referred to the confusion in the date and required Mr Hobbs to give 14 days notice of any meeting in accordance with section 26 of the Act. The letter refers to a discussion between Mr Hobbs and Mr Fry on 19 May when Mr Hobbs was told to contact Mr Fry or other management of his intention to visit and to complete the

visitors' book at reception; there is a complaint that Mr Hobbs did not make a reasonable effort to contact management during his 24 May visit; and it recounts Mr Fry's then recollection of his statements during the 23 May 2006 meeting. Mr Hobbs responded to the communications with his own email and letter both dated 25 May. The email repeats the request to visit and refers to section 20 (1) (c) of the Act rather than section 26. The letter responds to Mr Fry's suggestion that the 19 May meeting was a *Union meeting held under false pretences*. It says that Mr Fry had only requested Mr Hobbs to *sign in at reception* during their exchange on 19 May (although I do not accept that is all that was said by Mr Fry at that time). The letter refers to steps taken by Mr Hobbs to comply with the Act's conditions regarding workplace access during his recent visits and repeats the request in respect of Friday 26 May.

[13] Mr Hobbs' communications drew a response from Mr Fry by email at 7.14 pm on 25 May. It says that Mr Hobbs cannot rely on section 20 access rights to hold a meeting but that he may meet individually with potential members if they are interested in seeing Mr Hobbs. It also says that a meeting can only be held under section 26 upon 14 days notice. A second email from Mr Fry timed at 7.21 pm on 25 May advises that George West, one of the union recruits, had verbally advised Mr Fry that he wanted to rescind his union membership. More will be said later about the reasons for this resignation.

[14] Mr Hobbs responded in turn. His email refers to the *James Cook Centra* case and principles of statutory construction to support his claim that he is entitled to exercise the right of access to talk with members collectively not just individually. It makes it clear that Mr Hobbs intends to visit the workplace at 2pm that afternoon. Mr Fry's response asks for a copy of the *James Cook Centra* case to be faxed through but Mr Hobbs replied saying that he was not able to do that as the union lawyer was out of his office.

[15] Mr Hobbs arrived at Yunca on Friday afternoon (26 May) after these exchanges. He spoke to Mr Fry who insisted that he could only speak with the men individually despite Mr Hobbs' again referring to the *James Cook Centra* case. Mr Hobbs calls it *a debate* while Mr Fry says that Mr Hobbs was *rude, arrogant* and *totally aggressive*. After this exchange, Mr Hobbs went through to the factory and spoke individually to members about the proposed individual agreements. He also recruited another member (David Levett) and spoke to George West about his resignation. As he was leaving, Mr Hobbs became engaged in a discussion with Mr Fry and Mr Young initially at reception but then in Mr Fry's office. There are a couple of aspects of this exchange which are in dispute. Mr Fry says that Mr Hobbs was *threatening*, *playing the bully* and *intimidatory*. Mr Hobbs' manner and speech was no doubt robust (as it was upon arrival) and he was disagreeing strongly with Yunca on several points but I do not accept that there was anything improper in his conduct. There was discussion about George West's resignation. The evidence of Mr West makes it clear that Mr Hobbs was sympathetic to his situation and was willing to ignore the formal requirement for 2 week's written notice of resignation in his case. Mr Fry says that Mr Hobbs was annoyed about his earlier email about Mr West's resignation but I find that Mr Hobbs simply communicated a willingness to accept the resignation as proffered while advising that the usual requirement is for two week's written notice. Mr Fry and Mr Young say that Mr Hobbs told them that they could no longer speak to union members. Mr Hobbs denies saying this and said in evidence that it would be ludicrous to suggest that an employer could not talk with their employees. I find it unlikely that Mr Hobbs would have said something of this sort when he knows it to be ludicrous especially when he knew that Yunca was then getting legal advice. Mr Young's evidence is that he told Mr Hobbs that he wanted to talk to some of the men about alternatives to give them a balanced view. The context was collective or individual agreements. The discussion between the men ended without any resolution of the issues in dispute.

Further Resignations

[16] Mr Young decided to speak personally with several of the men *[b]ecause of [his] concerns about so many guys joining the union*. On 31 May 2006, he got Mr Mulligan to bring Greig Peterson and Tim Hodges up to his office. His evidence is that he spoke to these two in particular because they were young and recent employees. Both men had joined the union shortly before the 19 May meeting. They later resigned. For Mr Peterson, there is a signed fax dated 23 June 2006 and for Mr Hodges, a signed fax dated 13 November 2006. Their union

fee deductions stopped around those same dates. Both men were summonsed by EPMU to give evidence although Mr Hodge had actually provided a statement of evidence with other witnesses for Yunca. There is some controversy about what happened at their meeting with Mr Young.

[17] Shortly after the meeting with Mr Young, they spoke with Mr Kamaru who asked them to write down what had been said at their meeting. Early on 1 June 2006, Mr Hobbs visited Yunca, spoke to Mr Kamaru and collected a typed note created by Mr Petersen. The note reads:

> *Tim M had asked Greg and Tim H to go with him. Then Tim M said that Terry Young is having a meeting with two workers at a time. Terry Young asked Greg and Tim H why we had joined the union. Terry Young said he did not like the Union. Terry said if there was a strike that Tiwai would pull their work from Yunca. Also that we will be giving up our right to negotiate with John with that we should be save our money and not paying it to the union. Terry said that Trevor Hobbs would not give a shit about us because that Terry look out for number one himself and that Trevor Hobbs is doing the same and that we should be look out for number one ourselves. Terry said if we wanted out of the union to go and see John.*

[18] There is also a note written for Mr Hodges. It reads:

> *To whom it may concern.*
>
> *Tim M came to myself (Tim H) & Greg and told us to go with him to go see Terry. Terry wanted to tell us his opinion of the union & how much he didn't like the union because we are giving up our right to negotiate our employment at Yunca. Terry also stated that the union does not care about us and they (union) are only after our money.*
>
> *[Signed]*

[19] In evidence, Mr Peterson told me that Mr Young said what is written in his note but also said some other things as well. Mr Hodges on the other hand sought to distance himself from his note by saying that the first sentence was true but that he did not remember all that was said and in particular did not remember Mr Young saying that the union just wanted their money.

[20] Mr Young made some notes in preparation for his meeting with the two men. He also made some additional notes afterwards but not in a style to record what words were actually used by him. I find that Mr Peterson's note accurately captures what was said by Mr Young relevant to the present proceedings.

[21] On 1 June 2006, Mr Hobbs sent an email to Mr Young saying that he had spoken to Mr Young and written to Mr Fry about *undue influence*, that he was aware of the meeting with two members the day before and that the unacceptable behaviour had to cease immediately. Mr Young responded several hours later saying that he understood the reference to *undue influence*, that his introduction stated that the choice whether to belong or not to a union was *theirs alone* and that his mission was to explain the benefits of an individual contract to all the staff to ensure they have a balanced view on the subject. Later the same day, Mr Fry sent an email to Mr Hobbs complaining about his visit to the workplace earlier that morning which *again …breached our basic Security and Health and Safety Rules*. Mr Hobbs had visited before reception was open and no manager knew he was on site until he was seen in the factory by Mr Mulligan. The email sets out company requirements for future visits: visits must be during office hours, Mr Hobbs must fill in the visitors' book, he must be accompanied to the relevant person (but without impeding ensuing discussions) and he must make reasonable efforts to contact one of four nominated managers. In his reply, Mr Hobbs says that he complied with the Act by reporting to Mr Mulligan on entry and could not sign the visitors' book because reception was closed. It also says that Mr Hobbs is entitled to enter when EMPU members are working which they were at 7.30am, the time of his visit.

[22] Other employees also resigned form the union. There are signed written resignation forms from Malcolm Thomas (26 June), Richard O'Brien (29 June) and Nicholas Mitchell (3 July). More will be said below about the circumstances of these resignations.

Further Workplace Visits

[23] Mr Hobbs visited the factory again on 21 June 2006. He had another discussion with Mr Fry about access, in particular the disagreement about whether he could speak with members collectively during their working day pursuant to section 20 of the Act. The point remained unresolved and Mr Fry showed Mr Hobbs through to Mr Kamaru. Mr Hobbs arranged with Mr Kamaru to ensure members were assembled next day at smoko time (2.30pm) for a delegate election and discussion about collective bargaining. Mr Fry was not made aware of these arrangements.

[24] Mr Hobbs returned to the factory on 22 June 2006. The receptionist (Wendy Harding) says that Mr Hobbs asked directly for Rex Perkins (3rd in order of management staff listed in Mr Fry's earlier instruction) and did not ask for either Mr Fry or Mr Young. There is a note typed by her dated 22 June 2006 that records that information. Her evidence is that she typed the note probably on 23 June 2006. There is also a note made by Mr Fry dated 23 June 2006 as follows: *FOUND OUT T HOBBS HAD HELD MTG WITH STAFF YESTERDAY ASKED WENDY HOW HE GOT IN – HE HAD ASKED FOR REX.* Mr Hobbs says that he asked for Mr Young and Mr Fry and then for Mr Perkins when told that the first two were out of town. While Ms Harding is critical of Mr Hobbs' manners, I see no reason why she would deliberately mislead the Authority on this point and I am satisfied that her recollection about who Mr Hobbs asked for at reception is accurate. Mr Hobbs then met with members who elected delegates and decided to initiate bargaining for a collective employment agreement. Mr Hobbs gave Mr Perkins a bargaining initiation notice and told him of the delegate elections and left the factory. The bargaining was for the employer to become a subsequent party to the Metals and Manufacturing Industries Collective Agreement 2006 – 2007.

[25] Mr Hobbs visited the factory again on 27 June 2006 to deliver material to the two delegates. He first had a brief discussion with Mr Fry and they arranged to meet the following day. Mr Hobbs then spoke to Mr Manson and Mr Kamaru. Mr Manson said that he believed that two members (Nicholas Mitchell and Richard O'Brien) had resigned following meetings with Mr Fry. Mr Manson had approached Nicholas Mitchell who told him *it was my decision alone, and that's that*. There are faxed letters of resignation for the two men dated 3 July 2006 and 29 June 2006 respectively. More will be said about the resignations below. Mr Hobbs was also told of the delegates' concern for two other members who they thought were potentially vulnerable to pressure to resign (Tony Gentle and Malcolm Thomas) and that two others (Ian Braithwaite and Mathew Stevens) had been spoken to by Mr Fry prior to 22 June and given new individual agreements with fifty cents per hour pay rises to sign. Mr Hobbs then spoke to Mr Braithwaite and Mr Stevens.

[26] There was a meeting involving Mr Hobbs, Mr Manson, Mr Kamaru, Mr Fry, Mr Young and Mr Mulligan at Yunca on 29 June 2006. There, Mr Hobbs gave Yunca a corrected bargaining notice and told Yunca that they had to deal through the union and could not talk to union members directly about bargaining issues. In evidence, Mr Young say that he understood from their last meeting (26 May 2006) that he was not to talk to union members at all so had been trying to steer clear of union members. The difficulty with this evidence is that Mr Young did not steer clear of union members but met on 31 May 20065 with Greig Peterson and Tim Hodges both of whom were union members at the time. I find it unlikely that Mr Hobbs would have said on either 26 May or 29 June that Yunca could not speak to union members. However, Mr Hobbs did say that if the company wanted to speak to any of three men in particular there should be a union delegate present. Hr Hobbs' evidence is that this request was refused but I do not accept that there was a direct refusal. There was also further discussion about the dispute whether Mr Hobbs was entitled to speak to more than one member at a time under section 21 of the Act. There was no agreement on the point which remains for determination. There was also discussion about the resignations of several union

members but it is not necessary to outline the content of the discussion. It is fair to say that the exchange principally between Mr Hobbs and Mr Fry was robust and involved some swearing probably on the part of both men. There are a number of other disputes about the conduct of this meeting which need not be resolved.

[27] There are signed written resignations dated 29 June 2006 for Richard O'Brien and 3 July 2006 for Nicholas Mitchell. It is now known that the last union fee deductions for Mr O'Brien and Mr Mitchell were made for the pay period ending 23 May 2006 as a result of an email on 7 June 2006 from Mr Fry to Yunca's accountants who do the payroll. Mr Mitchell and Mr O'Brien both spoke to Mr Fry about resigning from the union sometime after 23 May but before the email. This was probably after Mr Fry's similar discussion with George West, it being likely that he would have prevented any deductions (as he had for Mr West) if the discussion had been before the payroll cut-off. In evidence Mr Fry says that he would have known of the requirement for written resignations at the time of his discussions with Mr O'Brien and Mr Mitchell but was remiss in not communicating that to them. In any event, following the 29 June meeting with Mr Hobbs, Mr Fry got both men to sign the resignation form he had created and which was first used by Malcolm Thomas on 26 June 2006.

[28] Mr Hobbs visited Yunca again on 10 July when he had a brief discussion with Mr Fry. By that time, Yunca had met with their solicitor so Mr Fry indicated that Mr Hobbs could expect some communication from the solicitor. Mr Hobbs was then escorted to Mr Kamaru and also spoke with Mr Manson. There was a subsequent discussion between Mr Hobbs and the solicitor about use of section 21 to meet with members collectively about the forthcoming bargaining. Yunca proposed a limit to the number of such meetings but that was not agreed by Mr Hobbs. He wrote a letter dated 11 July 2006 confirming this and received a response dated 17 July 2006. By that time, the present proceedings had been initiated. Mr Hobbs again visited Yunca to deliver to the delegates copies of the correspondence between himself and the solicitor. This was on 17 July 2006.

[29] Subsequently, following the release by the Employment Court of its decision in *Epic Packaging Ltd v New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc* unreported, Colgan CJ, Shaw, Couch JJ, 21 July 2006, AC 39/06 Mr Hobbs visited Yunca on 31 July 2006 and spoke with the delegates about the need to reinitiate collective bargaining for a company specific agreement. They also decided to convene a meeting off site outside work time to deal with approving claims, setting a ratification procedure and endorsing a negotiating team. This meeting was held on 3 August 2006. Mr Hobbs visited Yunca on 1 August and 2 August in advance of this meeting but also spoke with Mr Fry about some matters which need not be canvassed.

[30] Following the 3 August meeting off site, Mr Hobbs visited Yunca on 7 August to initiate bargaining for a Yunca collective agreement. He also spoke with the union delegates and learnt about the *Yunca Credit Union* proposal being circulated in the workplace by the company which was apparently not available to union members. I will return to this point later. There have subsequently been some negotiations about a collective employment agreement but the parties have not been able to reach agreement.

Breach of Good Faith

[31] Counsel for EPMU made it clear that the union did not seek the imposition of a penalty pursuant to section 11 (2) of the Employment Relations Act 2000 in respect of the actions by Mr Young, Mr Fry and Mr Mulligan even though there are allegations of undue influence. Rather, what is sought is the imposition of a penalty for the breach of good faith pursuant to section 4A of the Act. Under that section, there must first be established a breach of good faith then that breach must either be *deliberate, serious and sustained* or it must be intended to undermine either bargaining for an agreement or an agreement itself or the employment relationship. The starting point then is to determine whether any of the impugned conduct amounts to a breach of good faith. EPMU relies on section 4 (6) in particular which says that it is a breach of good faith for an employer to advise, or to do anything with the intention of inducing, an employee not to be involved in bargaining for a collective agreement or not to be covered by a collective agreement.

[32] In part, Yunca relies on section 4 (3) of the Act which says that the duty of good faith does not prevent a party to the relationship communicating to another person a statement of fact or of opinion reasonably held about an employer's business or a union's affairs. The application of section 4 (3) to any communications on or after the valid initiation of bargaining is now resolved. The Court of Appeal in *Christchurch City Council v Southern Local Government Officers Union Inc* Unreported, Chambers, O'Reagan and Robertson JJ, 16 February 2007, CA276/05 held that section 4 (3) is modified where it is conflict with section 32 of the Act dealing with good faith in bargaining for a collective agreement. In the present case however, almost all the impugned conduct occurred before the valid initiation of bargaining. There remains the question whether section 4 (3) permits conduct that would otherwise be a breach of section 4 (6). The answer to that question must be no for similar reasons as in the *Christchurch City Council* case: rendering section 4 (6) subject to section 4 (3) would emasculate the former provision. I also observe that section 4 (6) was introduced into the Act as an amendment in 2004 and must be seen as modifying section 4 (3) to the extent there is any inconsistency. It follows that a party to an employment relationship may communicate a reasonably held opinion about (say) an employer's business but that must not amount to advising an employee not to be involved in bargaining for a collective agreement. Nor can it amount to doing anything with the intention of advising an employee not to be involved in bargaining for a collective agreement. I turn then to considering whether there is a breach of section 4 (6).

[33] EPMU says that there were a series of actions intended to induce employees not to be involved in bargaining. They are the 23 May meeting, Mr Young's meeting with Greig Peterson and Tim Hodges, the dissemination of the Yunca Credit Union proposal, the posting on the notice board by Mr Fry of a notice about union fee increases, moving Mr Kamaru from one work area to another, and preventing access by Mr Hobbs to speak collectively to members. It is convenient first to deal with those last two points.

[34] The dispute about Mr Hobbs' ability to speak with members collectively when visiting Yunca pursuant to section 21 of the Act arose squarely from Mr Fry's reading of the Act. Mr Fry's position is tenable if one simply reads the words of the Act so he cannot be accused of adopting an untenable interpretation for the purpose of achieving an ulterior motive such as inducing employees not to be involved in bargaining. Accordingly, I do not accept that Mr Fry adopted his position on the point with the intention of inducing employees not to be involved in bargaining for or to be covered by a collective agreement. I will return to the proper interpretation of the Act later.

[35] There is a tension between Mr Fry's evidence and Mr Mulligan's evidence about the reasons for moving Mr Kamaru from one area of the factory working on anodes to another area working on dog magics. Mr Fry's evidence better captures the reasons which were to do with Yunca's dissatisfaction with the amount of time being spent by Mr Kamaru in discussions with workmates apparently about the unionisation of the workplace. No-one explained to Mr Kamaru that he was being moved because of this dissatisfaction but this is not a personal grievance claim. I make no comment whether Yunca did or did not have good reason for its dissatisfaction but it is clear that both Mr Mulligan and Mr Fry formed the view that Mr Kamaru was spending too much time on union activities and they wanted him to maintain productive work. In the light of that evidence, I do not accept that Mr Kamaru was moved with the intention of inducing him or any other employee not to be involved in bargaining for or to be covered by a collective agreement.

[36] More must be said about the credit union proposal and the union fee memo. In early August 2006, Mr Mulligan distributed to some staff a notice that read *For selected staff we are to trial a "Yunca Credit Union"*. The notice set out the details of the proposal. Participants could contribute up to $10.00 per fortnight which would be matched by an equal contribution

from Yunca. Participants could access short term loans up to $500.00 maximum, repayable at a rate of at least $40.00 per fortnight. Accumulated savings could be withdrawn at any time. Both debit and credit balances would be interest free. The notice included space at the bottom for the employee to specify their contribution *commencing next payday* before signing and returning the form. Although no union member was included amongst the *selected staff* to whom the form was circulated, they quickly learnt of its existence and obtained a copy from other staff. Michael Naaroa and David Levett (both union members) completed and returned the forms to test whether they would be permitted to join. Neither received any response. The form was given to at least 3 employees who had never joined the union and 3 others who had by that time resigned from the union. These six all signed and returned a form between 3 August and 17 August 2006. However, no deductions were actually made and the scheme did not proceed. Yunca sought to explain its decision not to proceed with the scheme by referring to the opening phrase on the form where it is described as a *trial*. EPMU says that the scheme was proposed with the intention of influencing employees not to be involved in bargaining and undermining union membership.

[37] I accept Mr Fry's evidence that he had been concerned for some time about ad hoc wage advances and wanted to formalise or establish rules around the practice. However, the timing of the proposal, its design and description, its limited circulation and its sudden and unexplained withdrawal support EPMU's contention. At the 23 May meeting, Mr Fry had told those assembled that they would be better off pooling their resources for investment rather than paying union subscriptions to achieve a guaranteed return. That advice did not meet with favour. The *Yunca Credit Union* was intended as an alternative for employees to contribute at a level similar to the union fee. The message intended for the recipients was that they did not need to join the union or bargain collectively. Mr Fry must have known that the information about the scheme would be passed on to union members and he intended the scheme's existence to influence them as well in their wish to engage in collective bargaining. The scheme did not proceed because the applications from the two union members caused Yunca to reconsider its lawfulness given its restricted circulation to non and former union members.

[38] EPMU wrote to all its members at the end of September 2006 advising of a nationwide increase in union fees to take effect from 1 November. Mr Fry was unaware of this. By letter dated 12 October 2006, EPMU wrote to Yunca (and other employers who deduct union fees) similarly advising of the increase. Mr Fry became aware of this letter on or about 3 November 2006. He wrote a memo dated 3 November and put it up on the notice board alongside where staff clock in and out. This memo says

> ***Notification of Union Fee Increase*** *The New Zealand Amalgamated Printing and Manufacturing Union have advised us that union fees are to increase by 18% from $5.50 per week to $6.50 per week …Should you have any concerns please advise. Regards [John]*.

The letter from EPMU to Yunca did not advise that union fees would increase by 18%. Mr Fry calculated and published the rate of increase to make the point about its magnitude. That could only be for the intention of encouraging existing members to resign from the union and dissuading non members from joining in the context of the early stages of bargaining for a collective agreement. That too is the context of the invitation to advise of any concerns. Mr Fry's evidence is that this was not an invitation to contact him specifically, but I do not accept that. It was known at Yunca that Mr Fry had assisted others with resigning from the union. Anyone reading the memo would know to advise *John* for that assistance and Mr Fry knew and intended that at the time.

[39] That leaves Mr Fry's 23 May meeting and Mr Young's meeting with Greig Peterson and Tim Hodges on 31 May 2006. Both Mr Fry and Mr Young say their meetings were about putting the other side or the alternative view. That was in respect of union membership and the desire on the part of those members to bargaining collectively. Both men thought and still believe that pressure was exerted by those that initiated or facilitated the union membership campaign to achieve the dramatic increase in membership numbers. For example, Mr Fry says that his suspicions were reinforced by Mr Kamaru feeling *a need to involve others in his personal crusade for a pay increase*. They saw and still see themselves as providing balance to counter

this pressure. Even if one accepts at face value the evidence of Mr Fry and Mr Young, in their respective meetings their communications amount to advice to the attendees not to be involved in bargaining for a collective agreement and not to join the union. I further find that these messages were intended to induce employees not to be involved in bargaining for a collective agreement.

[40] Bargaining to have Yunca join as a subsequent party to the Metals and Manufacturing Industries Collective Agreement 2006-2007 agreement was initiated on 22 June 2006, before the release of the Employment Court's decision in *Epic Packaging Ltd*. That case decided that the statutory process commenced by notice under section 42 of the Employment Relations Act 2000 could not be used for the purpose of coercing an unwilling employer to join as a subsequent party to an existing collective agreement. Accordingly, the 22 June notice (and the amended notice a week later) must be regarded as invalid. That is why the EPMU gave Yunca on 7 August 2006 a notice under section 42 to commence bargaining for a company collective agreement employment. It is clear that conduct on or after 7 August 2006 is caught by section 4 (6) but what of conduct on or after the June notices or conduct before the purported invocation of the statutory bargaining process?

[41] Section 4 (4) of the Act stipulates that the duty of good faith applies to *bargaining for a collective agreement …, including matters relating to the initiation of bargaining*. If the application of section 4 (1) and 4 (6) was restricted to events occurring after the date of a notice under section 42 of the Act, it would have been unnecessary to include that last phrase. The application of section 4 to matters relating to the initiation of bargaining but occurring before the date of a section 42 notice better achieves the object of the Act of promoting good faith in all aspects of the employment environment and of the employment relationship *by acknowledging and addressing the inherent inequality of power in employment relationships* and *by promoting collective bargaining*. In the present matter, it was clear to Yunca from as early as 19 May 2006 that union members and EPMU were preparing to initiate bargaining for a collective agreement. Mr Fry and Mr Young in their respective meetings advised and intended to induce employees not to be involved in that bargaining.

[42] I find that Yunca breached its duty of good faith in respect of the meetings convened by Mr Fry and Mr Young, its circulation of the *Yunca Credit Union* proposal and the display of the *Notification of Union Fee Increase* memo.

Jurisdiction of the Authority

[43] Section 133 (1) (b) of the Act states that the Authority has full and exclusive jurisdiction to deal with all actions for recovery of a penalty under the Act for a breach of any provision for which a penalty in the Authority is provided in the particular section. Section 4A renders a party to an employment relationship liable to a penalty under the Act in certain situations but it does not say that the action lies in the Authority. Other sections of the Act which provide for penalties specifically say whether the penalty can be imposed by the Authority or the Court: see for example section 130 (4) and section 95 (1). The omission in section 4A appears to be a drafting error. However, I am satisfied that section 4A creates a liability for a penalty under the Act. The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally including matters about whether good faith obligations imposed by the Act have been complied with and any other action (not directly within the Court's jurisdiction) arising from the employment relationship. From that I am satisfied that jurisdiction for the recovery of penalties for breach of section 4A does not lie in the Court and does lie in the Authority.

Penalty for breach of good faith

[44] Not every breach of good faith renders a party to an employment relationship liable to a penalty. However, I am satisfied that the breaches of the duty of good faith were intended to undermine bargaining for a collective agreement and the employment relationship between Yunca and EPMU. That is a finding contrary to the evidence of Mr Fry and Mr Young. However, it is the proper inference in the circumstances. Both men sought to dissuade workers from involvement in the union and collective bargaining by extolling the virtues of individual

bargaining and explaining what they see as disadvantages of collective bargaining. Their actions were also deliberate and serious. To an extent they have succeeded with these goals.

[45] A controversial aspect of the problem is whether any of those who resigned did so as a result of Yunca's breaches of good faith. All those employees gave evidence to the effect that they were not influenced in their resignation decisions by any of Yunca's actions. Despite that, I am satisfied that Mr Mitchell and Mr O'Brien both resigned as a result of what was said by Mr Fry during his 23 May meeting. Shortly after the meeting they both went to see Mr Fry as a result of which he arranged for their union fee deductions to cease. Mr Mitchell explained that he did not like having anyone (ie; the union) between him and Mr Fry. He came to that view within a week or so of joining. It was part of the message delivered by Mr Fry at the 23 May meeting. Richard O'Brien says that he resigned because he did not like contracts or the way that the union was going. However, just a week or so before telling Mr Fry to cease union fee deductions, he had joined the union in order to progress employment contract issues. The only event of any significance between times was Mr Fry's meeting. The timing of the resignation following Mr Fry's meeting was even closer for Mr West. Inevitably, his decision to resign was significantly influenced by Mr Fry's message. Mr Peterson resigned nearly a month after his meeting with Mr Young while Mr Hodges resigned in the lead up to these proceedings. I do not accept that either man was not influenced in their decisions by the message delivered by Mr Young in particular although I do accept that other factors they referred to in their evidence were also part of the reasons for their decisions. I conclude also that Mr Thomas was influenced in his decision by the message delivered by Mr Fry.

[46] In summary, about a third of the new union members have resigned and were influenced to a greater or lesser extent in doing so by the actions of Mr Fry and/or Mr Young. The resignations have made a significant difference to the prospects for collective bargaining. Mr Fry's and Mr Young's actions have also contributed to, but not been the exclusive cause of the difficult relationship between Yunca and the union. Yunca's breaches are inimical to the objects of the Employment Relations Act 2000 so there must be an element of condemnation and deterrence in the level of the penalty, the maximum for which is $10,000.00. The conduct should be treated as a whole rather than assessed on a breach by breach basis. Assessing this, I impose a penalty of $6,000.00 on Yunca for its breaches of good faith.

Access dispute

[47] The main point in dispute is whether section 20 of the Act permits Mr Hobbs access to the workplace to talk with more than one employee at a time. He seeks to do this as part of the bargaining that has been initiated. Mr Fry's reading of the Act is that Mr Hobbs may speak only to one employee at a time during working hours. *Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corporation (NZ) Ltd* [1993] 2 ERNZ 513 addressed a similar point in respect of the provisions of the Employment Contracts Act 1991. Counsel argued that the case is no longer relevant because of the different statutory regime and in particular the right under section 26 to convene paid union meetings.

[48] The *Service Workers Union* case demonstrates the approach to interpretation of statutes and it is at least to that extent still relevant. The Interpretation Act 1999 provides at section 5 (1) that the meaning of an enactment must be ascertained from its text and in light of its purpose. One of its purposes is to state principles and rules for the interpretation of legislation. Section 33 declares that words in the singular include the plural. The corresponding provision from the Acts Interpretation Act 1924 referred to in the *Service Workers Union* case set up a rebuttable presumption that words importing the singular include the plural. The short answer to the point raised by Mr Fry and argued by counsel is that the law now declares that the singular includes the plural.

[49] Counsel argued that section 4 (1) (b) of the Interpretation Act 1999 applies. That states that *This Act applies unless …The context of the enactment requires a different interpretation*. I do not accept that the context of the Employment Relations Act 2000 requires a different interpretation from that which is derived by applying the Interpretation Act 1999. That context includes the object of the Employment Relations Act 2000 Act of building productive employment relationships through good faith by acknowledging and addressing the inherent

inequality of bargaining power and promoting collective bargaining. The object of Part 4 dealing with the recognition and operation of unions is to recognise the role of unions in promoting members' collective interests and to provide reasonable workplace access for purposes related to employment and union business. Many of the purposes of entry listed in section 20 (1) and 20 (2) can only be dealt with sensibly in a collective manner by talking with groups of employees rather than individuals. It follows that the context of the Employment Relations Act 2000 does not require any departure from the principles of interpretation set out in the Interpretation Act 1999.

[50] Counsel referred to the report of the Transport and Industrial Relations Select Committee on the Employment Relations Law Reform Bill which preceded the enactment of section 20 (4) and section 20 (5) of the Employment Relations Act 2000, both subsections that refer to a singular employee. The following passage is extracted from the report at pages 8 and 9:

> *The majority recommends an amendment to clause 9, proposed new section 20(4), to limit the duration of paid workplace discussions (as distinct from formal paid union meetings) between employees and union representatives. The majority considers this addresses submitters' concern that union discussion-rights in the workplace must be limited and should not interfere unreasonably with business operations. The majority notes that the existing requirements in section 21 of the principal Act also place conditions on the exercise of union rights of entry.*

51. It is clear from this passage that Parliament was aware of an existing practice that allowed discussions with groups of employees and intended to respond to submitters' concerns by limiting the duration of the group discussions rather than preventing them.

52. For the foregoing reasons I find that Mr Hobbs is not limited to discussions with one employee at a time when exercising rights of access under section 20 of the Employment Relations Act 2000. It follows that Yunca has not complied with the Act when insisting to the contrary.

53. This does not create an unfettered right to union meetings at the Yunca factory. First, entry must be only at reasonable times during the period when employees are employed and the right to enter must be exercised in a reasonable way. By the 2004 amendments, Parliament also provided that any discussion must not exceed a reasonable duration.

Remedies

54. In a number of instances, Mr Hobbs was careless in complying with the conditions relating to access and to a modest extent that has contributed to or at least exacerbated the existing relationship difficulties. I also accept that Mr Fry genuinely believed that Mr Hobbs had to utilise section 26 of the Act to have discussions with more than one employee at a time on the worksite. With the determination that this position is wrong, Yunca should now comply with the law. For these reasons, I do not find it appropriate to impose a penalty in respect of the access difficulties. A compliance order is sought but that too is probably unnecessary.

Summary

55. Yunca has failed to comply with the duty of good faith and is liable under section 4A to a penalty which is set at $6,000.00. The penalty is to be paid to the Authority then into the Crown Bank Account in accordance with section 136 (1) of the Act. I was not asked to exercise the discretion under section 136 (2) to order payment of the penalty to any other person.

56. A representative entering a workplace under section 20 of the Act is not limited to discussions with one employee at a time. Having determined that point of difference between Yunca and EMPU in favour of EPMU it should not be necessary to order compliance. Although Yunca has sometimes breached section 25 of the Act it is not appropriate to impose a penalty.

Costs are reserved

57. I confirm the order made during the investigation meeting prohibiting publication of certain information in respect of some of the men. The information does not appear in the text of the determination. Anyone who seeks to publish material related to this matter beyond what is set out above should first check with the Authority to ensure that they do not breach the non-publication order.

Philip Cheyne
Member of Employment Relations Authority