

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 288/08  
5123102

BETWEEN

NATIONAL DISTRIBUTION  
UNION INC  
Applicant

AND

THE WAREHOUSE LIMITED  
First Respondent

AND

THE WAREHOUSE  
CELLARS LIMITED  
Second Respondent

AND

THE WAREHOUSE PEOPLES  
UNION INC  
Third Respondent

Member of Authority: Marija Urlich

Representatives: Greg Lloyd, Counsel for Applicant  
Penny Swarbrick, Counsel for First and Second  
Respondent  
Blair Edwards, Counsel for Third Respondent

Investigation Meeting: Consideration on the papers

Submissions received: 19 June, 16 and 23 July 2008

Determination: 12 August 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This determination deals with a preliminary issue as to standing. The issue for determination is whether the applicant has a sufficient interest in the collective agreement it seeks to challenge.

[2] The applicant union says a collective employment agreement (“the WPU collective agreement”) entered between the first, second and third respondents was

not lawfully entered and is therefore not binding and enforceable. It says whether or not the WPU collective agreement is lawful, and therefore binding on its affected its members, has a direct bearing on the application of the collective agreement between it and the first respondent.

[3] The first, second and third respondents say the agreement was lawfully entered and is enforceable but that, in any event, the applicant does not have standing to challenge the lawfulness or enforceability of the agreement.

[4] I have received submissions from the applicant and the first and second respondents. The third respondent has not filed any formal submissions and advises it will abide by the Authority's determination on this preliminary issue.

### **Background**

[5] The applicant is a registered union representing workers in the retail industry and distribution centres. The applicant has approximately 150 members employed in distribution centres operated by the first respondent.

[6] A number of these workers were members of the third respondent, Warehouse People's Union, at the time the WPU collective agreement was entered. The applicant and the first respondent have subsequently entered a collective employment agreement.

### **The union's submissions**

[7] The applicant submits the following employment relationships (section 4(2) of the Act) are relevant to the question of standing:

- (i) The first respondent and its employees who are members of the applicant, section 4(2)(a) of the Act;
- (ii) the applicant and the first respondent, section 4(2)(b) of the Act;
- (iii) the third respondent and affected members of the applicant, section 4(2)(c) of the Act.

[8] The submission continues that these employment relationships evidence sufficient interest in the matters before the Authority to give the applicant standing.

[9] The applicant submits that it is contrary to the plain meaning of section 4 and contrary to public policy, as well as an unnecessary complication, to say the applicant cannot bring these proceedings in its own name when its members' interests are affected.

[10] The applicant submits that in any event, it is its intention to amend the application to include the affected members as applicant parties.

### **The Warehouse's submissions**

[11] The first and second respondents submit the applicant does not have sufficient, or any interest, to support its claims that the WPU collective agreement is unlawful because:

- (i) the applicant is not a party to the collective agreement;
- (ii) the applicant was not involved in the bargaining for the collective agreement;
- (iii) for the purposes of the Collective Agreement there is no employment relationship between the applicant and the respondents;
- (iv) the applicant is not prevented from bargaining to conclude a collective agreement with the first and/or second respondents;
- (v) there is no evidential basis for a finding that the Applicant has sufficient connection or interest in the collective agreement to bring these proceedings; and
- (vi) the issue before the Authority can and should be brought by a person other than the applicant.

### **Discussion**

[12] Section 4 of the Act provides that parties to employment relationships must deal with each other in good faith. Section 4(2) of the Act provides a non-exhaustive list of employment relationships:

- (a) an employer and an employee employed by the employer:
- (b) a union and an employer:
- (c) a union and a member of the union:
- (d) a union and another union that are parties bargaining for the same collective agreement:
- (e) a union and another union that are parties to the same collective agreement:
- (f) a union and a member of another union where both unions are bargaining for the same collective agreement:
- (g) a union and a member of another union where both unions are parties to the same collective agreement:
- (h) an employer and another employer where both employers are bargaining for the same collective agreement.

[13] Section 5 of the Act defines an employment relationship problem as:

Includ[ing] a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship...

[14] The statement of problem describes this dispute as:

*A dispute as to whether or not a collective agreement between the first, second and third respondents was lawfully entered into and therefore binding and enforceable.*

[15] The applicant seeks the following declarations to resolve this employment relationship problem:

*A declaration that the collective agreement between the first, second and third respondents is unlawful and it therefore not binding or enforceable;*

*A declaration that those employees of the first respondent who are members of the WPU, or who were members of the WPU as at 1 August 2007, and have subsequently joined the NDU are parties to the bargaining for a collective agreement initiated by the NDU, and will be covered by that collective agreement when it comes into force.*

[16] The applicant seeks, through this application, to represent its members' collective interests. Section 18 of the Act entitles it to do so. However, section 18 does not give rise to an entitlement to issue proceedings in its own name when it does not have standing in those proceedings<sup>1</sup>.

[17] It is not apparent that this employment relationship problem *relat[es] to or aris[es] out of* an employment relationship between the parties to these proceedings. The employment relationship problem arises out of or relates to the employment relationship between members of the applicant union and the respondents.

[18] There is no evidence that the existence of the collective agreement prejudices the applicant. This is not a situation where the applicant says the collective agreement undermines its own collective agreement with the first respondent<sup>2</sup>.

### **Determination**

[19] For the above reasons standing is denied.

[20] As discussed with the parties during the teleconference call this issue could be resolved by the application being bought by affected worker parties. The lodging of such an application is advised in Mr Lloyd's submissions.

### **Costs**

[21] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If not, Ms Swarbrick may file a costs memorandum within 21 days of the date of this determination, and Mr Lloyd a reply within a further 14 days.

Marija Urlich

Member of the Employment Relations Authority

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<sup>1</sup> *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Limited* 23/8/07, Colgan CJ, AC50/07.

<sup>2</sup> Such was the situation in *NZ Tramways & Public Passenger Transport Authorities Employees IUOW (Wellington Branch) v Cityline (NZ) Ltd, (t/a Cityline Hutt Valley)*, 19/9/07, Shaw J, WC23/07.