

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 217/08  
5111060

BETWEEN	NORTHERN AMALGAMATED WORKERS UNION Applicant
AND	STEVENSON PRECAST SYSTEMS LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Ray Bianchi and Phil Graham for Applicant Shan Wilson for Respondent
Submissions received:	16 April 2008 from Applicant 7 and 23 April 2008 from Respondent
Determination:	23 June 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This determination concerns an application from the Northern Amalgamated Workers Union (“the Union”) for a declaration that terms for renewal of a collective employment agreement were concluded on a certain and enforceable basis with the Respondent.

[2] Stevenson Precast Systems Limited (“the Company”) denies such agreement was reached and questions the Authority’s jurisdiction to determine the matter as it relates to bargaining that it says has not yet resulted in a concluded agreement.

[3] There are limited differences between the parties about the facts of what happened during bargaining between July and September 2007, in terms of who said and wrote what and when. By consent the matter is determined on the papers.

[4] The issues for resolution are:

- (i) does the Authority have jurisdiction to determine this matter; and
- (ii) if so, was there an accepted offer and concluded agreement on the basis alleged by the Union or rather, as alleged by the Company, has no agreement yet been reached?

### **Sequence of events**

[5] On 4 July 2007 the Union initiated bargaining for renewal of a collective employment agreement (“the CEA”) covering a group of members working in the Company’s concrete products business.

[6] The parties agreed on a bargaining process, recorded in writing, and met to begin bargaining on 9 August 2007.

[7] On 24 August the Company tabled a “*final offer*” including a new clause providing an overtime rate for hours worked in excess of 50 between Monday and Saturday.

[8] The Union’s lead negotiator, Phil Graham, questioned how this would be applied in light of a clause in the existing agreement that included approved paid and unpaid leave in the calculation of hours worked in any given week (“clause 7(d)”).

[9] The Company’s lead negotiator, Les Lohrentz, provided the Company’s view of how the hours of approved paid and unpaid leave would be included in the calculation on when overtime would be paid. Mr Graham did not agree with the Company’s proposed method of calculation but agreed to seek ratification of the Company’s final offer on that basis.

[10] At a Union meeting on 29 August 2007 the Union members indicated they would accept the Company’s terms of settlement but wanted further discussion and meetings between the parties on how hours of paid and unpaid leave would be assigned in any calculation of hours for overtime purposes.

[11] Mr Graham advised Mr Lohrentz of the Union members' position and a further bargaining meeting was held on 14 September 2007.

[12] At that meeting the Company tabled a proposed change to the existing wording of clause 7(d). This reinforced the Company's position that only eight hours of any paid or unpaid leave taken would be included in the calculation of hours for overtime purposes.

[13] The Union would not agree to that proposed wording and the Company then changed its position on the proposed clause included in its 24 August final offer for overtime rates to apply after 50 hours worked during Monday to Saturday.

[14] On 18 September 2007 Mr Graham spoke with Mr Lohrentz and asked whether the Company would agree to settle on the terms of its final offer of 24 August and to have the issue of how leave was included in the calculation of hours for overtime purposes dealt with on an individual basis during the term of the new CEA. Mr Lohrentz said the Company would not settle on that basis.

[15] On 21 September 2007 the Union wrote to the Company saying it had now consulted members about the Company's position and accepted the final offer of 24 August. It stated that "*if any dispute arises out of the interpretation of clause 7d we will deal with it through the disputes procedure in the agreement*". It asked for copies of the CEA, amended on the basis of the Company's 24 August offer, to be sent to the Union for signature.

[16] The Company, by letter of 1 October 2007, outlined its view of the sequence of events in bargaining and concluded that:

*... no agreement has been reached between the Company and Union and therefore no agreed document can be sent to you for signature and implementation. The terms of a collective employment agreement between us is still a matter for negotiation. The terms offered originally on 24 August were reopened for negotiation when you came back to us on 29 August with a new claim. We therefore consider the parties need to meet again to resolve on what terms agreement could be reached.*

[17] The parties have since met in mediation but have not been able to agree on either whether the Union members had in fact ratified a CEA on 29 August on the

basis of the Company's 24 August final offer or whether the outstanding issue of calculating overtime hours meant bargaining had not concluded.

[18] The Union lodged a statement of problem in the Authority on 3 January 2008 and the Company lodged a statement in reply on 7 February 2008.

### **Jurisdiction**

[19] The Company submits that the Authority has no jurisdiction to consider the dispute raised by the Union.

[20] It rightly points to the provisions of s161(2) of the Employment Relations Act 2000 ("the Act") that, apart from the special procedures for facilitation and specified categories of workers, the Authority does not have jurisdiction to determine "*any matter relating to bargaining or the fixing of new terms and conditions of employment*".

[21] However, I find, those provisions do not exclude the Authority's jurisdiction to answer the essential or necessary preliminary question raised by the Union's application.

[22] The Union does not seek the Authority's intervention in bargaining or the fixing of new terms and conditions. It alleges that the bargaining process is over and that new (and renewed) terms and conditions have already been agreed between the parties. If the Union's argument is correct, the Authority would not be interfering in that process of bargaining and fixing terms.

[23] On that basis I accept that the Authority has jurisdiction to investigate and determine at least the preliminary question raised by the Union's application. What must be determined is not a matter of bargaining but a simple question of fact as a vital first step: is there or is there not agreement between these parties on terms for a renewed CEA? If the answer is 'no', there can be no dispute as alleged by the Union as to interpretation and operation of such terms. If the answer is 'yes', there are further issues to investigate because – on that construction – it cannot be a matter of bargaining or fixing new terms when the parties have already completed that process.

[24] The Company's case rests, really, not on a matter of jurisdiction but on a matter of fact – whether or not an agreement was reached between the parties on the terms for renewing the CEA. I turn to that issue.

### **No concluded agreement**

[25] When the Union members met on 29 August to consider the Company's final offer of 24 August, they had before them proposed terms of settlement which they could either ratify or reject.

[26] Their particular bargaining agreement says that ratification would be achieved by “50% *plus one*” of Union members agreeing to the Company's final offer. There is no information before the Authority that such a vote was held or carried on that basis.

[27] Rather, in considering their options, the Union members had – through Mr Graham – some information about how the Company believed the proposed new overtime clause would operate. It is clear from the Union's subsequent communication that the Company's intended approach was not acceptable to the Union members. There was, at that point, no sufficient ‘meeting of the minds’ between the Company and the Union on the terms on overtime and hours of work to be included in a renewed CEA. The Union members wanted their negotiators to keep on working on this issue and to persuade the Company negotiators to a more acceptable position. That is, they wanted the bargaining to continue.

[28] The Company's final offer was rejected and the Union continued to pursue what was a counter offer. In the subsequent bargaining the Company moved from its original position. It was entitled to do so because, in light of the Union's position, it had become aware that a new overtime provision might not operate as it may have initially envisaged.

[29] The Union members took a risk that all parties to bargaining take when they do not accept the ‘final’ position of the other party. A party whose offer has been

rejected is not – subject only to the general obligations of good faith – precluded from changing its position in subsequent negotiations.

[30] Having rejected the Company's final offer of 24 August by the stance it took following the 29 August Union members' meeting, and then participated in further bargaining, the Union could not properly, I find, insist on 21 September that its members had already ratified the 24 August offer.

[31] In short, I accept the Company's submissions that there were no concluded terms and consequently no agreed revised CEA for the Union to pursue a dispute as to its interpretation and operation.

[32] Because of the conclusion reached on this initial point arising out of the facts of the exchanges between the parties, I have not needed to consider the more detailed and technical points raised in the Company's submissions about:

- (i) whether the procedure for ratification set out in the bargaining process agreement between the parties had been followed; and
- (ii) whether the allegedly agreed terms would have amounted to a collective agreement as contemplated in sections 51, 52 and 54 of the Act.

[33] Neither have I considered the Union's submission that the Authority should deal with this matter under the facilitation provisions of s50A, 50B and 50C of the Act. That was not the basis on which the Union had lodged its statement of problem or on which this matter was to be determined on the papers.

[34] If the Union wishes to apply for the Authority to facilitate collective bargaining with the Company, the Union would need to apply for a reference to facilitation and satisfy the Authority that the thresholds set by s50C of the Act had been crossed in the course of bargaining to date.

### **Determination**

[35] For the reasons given I find that the Authority has jurisdiction to consider the matter raised by the Union but decline to make the declaration sought by the Union

because the terms alleged to have been agreed were not ratified by the Union members before bargaining continued.

### **Costs**

[36] The parties seek to be heard on costs. My initial view would be that costs should lie where they fall in a matter of this kind but there may be persuasive arguments against that approach. If any issue of costs cannot be agreed between the parties and either party wishes the Authority to resolve the matter, it may lodge and serve a memorandum within 14 days of the date of this determination. In that case the other party shall then have a further 14 days to file a memorandum in response.

Robin Arthur  
Member of the Employment Relations Authority