

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 198/08
5120050

BETWEEN SERVICE AND FOOD
WORKERS UNION NGA
RINGA TOTA
INCORPORATED Applicant

AND SPOTLESS SERVICES (NZ)
LIMITED Respondent

Member of Authority: Yvonne Oldfield

Representatives: Tim Oldfield for Applicant
Shan Wilson and Kathryn Burson for Respondent

Investigation Meeting: 5 May, 9 May 2008

Submissions received: 15 May, 19 May 2008 from Applicant
15 May, 19 May 2008 from Respondent

Determination: 3 June 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In March of this year, after the initiation of multi-employer bargaining involving the parties but before a bargaining process had been agreed, Spotless Services Limited took steps to increase the wages of staff on individual employment agreements. The applicant union (SFWU) says that it accepts that as the law currently stands there is no absolute requirement that an employer should wait until collective bargaining is completed to bargain with non-union employees. However it argues that in this instance, Spotless Services went about doing so in a manner which breached its obligations of good faith to the union. It also says that the resulting wage differentials between union and non-union employees amount to an unlawful preference.

Issues

[2] The union alleges three specific breaches of the Employment Relations Act 2000, as follows:

- i. In breach of s 4 (6) (a) the respondent has attempted to induce employees not to be involved in bargaining for a collective agreement;
- ii. In breach of s 9 (1) (b) the respondent has conferred an unlawful preference on employees who are not members of a union, and
- iii. In breach of s32 (1) (d) (iii) the respondent has undermined or done something that is likely to undermine collective bargaining between the applicant and the respondent.

[3] The union seeks declarations that these alleged breaches occurred as well as penalties in respect of each of them.¹ Each of the allegations arises out of the same set of circumstances. Before dealing with each of the issues in turn, therefore, I begin by outlining those circumstances including relevant background to the bargaining for the MECA in question.

The facts

[4] The respondent is a member of an industry organisation called the Building Service Contractors of New Zealand (Inc) (BSCNZ.) The membership of BSCNZ has approximately 50% of the cleaning service market.

[5] I was given varying estimates of union density amongst the respondent's employees. It is safe for me to conclude only that between 7% and 13% of those employees are members of SFWU.

[6] For several years now the SFWU and the cleaning service providers belonging to BSCNZ have been parties to a series of industry wide multi employer collective agreements (MECA), the most recent of which was the *NZ Cleaning Contractors*

¹ Initially the applicant union also sought a compliance order however this request was withdrawn during the investigation meeting.

Multi-Employer Collective Employment Agreement dated 1 January 2006 which expired on 21 December 2007. On 20 November 2007 the SFWU initiated bargaining with the members of BCSNZ to replace that MECA with three new MECAs for different sections of the industry. A draft Bargaining Process Agreement was attached to the notices initiating bargaining. It contained the following provision:

“Until the conclusion of the bargaining the employer parties shall not:

...bargain with any other person or party employed in the occupational groups covered by the proposed agreement.”

[7] Meanwhile SFWU and BCSNZ (along with the New Zealand Government and the Property Council of New Zealand, which represents building owners) had been engaged in discussions relating to the development of a document entitled *“Principles for a Sustainable Property Services Industry”* and often referred to as “the principles document.” Agreement on this set of principles was reached in December 2007 and the document was signed by all four parties in March 2008. Principle [1] of the document provides:

“[1] THE VISION

- A better cleaning industry will ensure that all parties collectively receive quality property services.*
- The deliverer and recipient of quality property services stand to benefit from this document.*
- A better cleaning industry will mean that building owners can plan on certainty in the labour costs underpinning service contracts if they know that sudden increases in costs will be avoided.”*

[8] Principle [3] of this document goes on to say:

“WORKERS IN THE INDUSTRY NEED TO BE TREATED FAIRLY

Employees will enjoy secure employment with fair pay for reasonable work rates and safe working conditions.’

[9] Elsewhere in the document there are further references to the employment related responsibilities of Service Providers and of SFWU. The document also foreshadows the involvement of property owners in the wage fixing process for the sector (a strategy used by the union with success elsewhere.) At page 7 the document provides:

“Owners, wanting to promote and protect best practice standards and being conscious of the needs of the industry to maintain its financial viability, will:

...

Support a fair labour market, pay and workplace conditions for employees...”

[10] SFWU National Secretary John Ryall told BSCNZ members at a “pre-bargaining” meeting on 10 December that:

- the union saw the “Principles document” (above) as providing opportunities for the union to recruit new members and obtain higher pay rates;
- the union’s reasons for seeking to split the MECA into three arose out of a view that certain sections of the industry had an ability to pay more than others;
- the union did not want to see the bargaining process rushed, wanted confirmation of the proposed increase to the statutory minimum wage before proceeding further with bargaining, and *“could not see anything happening between now and February.”*

[11] The reference to the proposed increase in the minimum wage related to the expectation that in 2008 it would move above the base rate in the expired MECA. On that issue BSCNZ members responded to the union by noting that *“we have traditionally gone to clients with a single increase at the beginning of the year. We are now potentially looking at two increases in 2008.”*

[12] Representatives of the parties to the MECA had a further “informal” meeting on 30 January but BSCNZ advocate Paul Weaver was not present at this meeting and it was not until 8 February that the parties met (with Mr Weaver present) for the

specific purpose of progressing bargaining. By this time it was known that the statutory minimum wage would be increasing to \$12.00 per hour on 1 April 2008. As expected, this was higher than the base rate in the existing MECA.

[13] At the 8 February meeting the SFWU tabled a “*Draft Memorandum of Understanding*” which set out as follows:

“...having developed and signed to the Principles for the Cleaning Industry it is in the interests of all parties to work towards a workforce environment which delivers quality jobs within quality pay and quality product. As a practical step towards meeting those aims and the aims of the Principles document, parties agree to the following:

- 1. The parties agree that it is not in the best interests of the industry to pay minimum wage.*
- 2. the parties agree to recommend to their members that the paid rate for workers covered by the expired MECA be raised to not less than \$12.55 effective 1 April 2008*
- 3. That notwithstanding the initiation by the SFWU for new collective agreements, neither party nor their members, shall make claims for changes to the present MECA or the proposed MECA's [sic] earlier than June 2008.*
- 4. That the parties acknowledge the impediments in the employers directly funding further increases in the absence of ability for owners and or clients to fund same....*
- 5. In consideration of 4. above the BSCNZ members will, consistent with the principles, use all lawful means to promote a wider industry funding for the sector.*
- 6. In consideration of 5. above the SFWU members will, consistent with the principles, use all lawful means to promote a wider industry funding for the sector.*

This agreement may be voided by either party giving 72 hours notice of same...”

[14] On 16 February, after the employer parties had talked over the proposed Memorandum, their representative Paul Weaver emailed SFWU advocate Alastair Duncan to reject it. Mr Weaver reiterated what he had said at the meeting concerning: *“the need to implement initiatives, in order for total labour cost recovery to be implemented prior to the legislative increase of 1 April 2008”* and noted that *“one increase in the financial/calendar year was all that was achievable.”* He advised that the BCSNZ preference was *“to commence bargaining...[which] should be based upon the expired MECA...a roll over arrangement for a 12 month term is also a possibility...any rate increase can only be delivered through the MECA negotiation process.”* He concluded by suggesting that *“given the lead time necessary to advise clients of any rate increase it is imperative that negotiations conclude during February”* and proposed meeting on 22 February.

[15] Mr Weaver told me that these comments reflected the consensus amongst members of BCSNZ. Feedback he had received from Spotless Services specifically had included the following further comments:

“If bargaining with the SFWU is not concluded well prior to 29 February 2008, Spotless can give no assurances of any funding for union members increased wages for the 12-month period commencing 1 April 2008.

Spotless will not want non-union staff to be financially disadvantaged by the MECA bargaining processes and will wish to conduct wage reviews for these employees in a timely fashion.”

[16] Mr Weavers told me that he did not pass this specific feedback on to the union because he was not authorised to do anything other than convey the collective view of the employers he represented. He stressed to me that he represented BCSNZ, not Spotless Services Ltd.

[17] During February and the early part of March communication between Mr Weavers and Mr Duncan was restricted to brief exchanges of emails in which they canvassed possible meeting dates and the need to agree a bargaining process. The

content of the bargaining process agreement was not discussed. Mr Duncan also noted (28 February 2008):

“As previously raised with your clients it is also extremely important to us to engage on just what steps the industry may be proposing to take around wage adjustments to non union members. Noting our concerns about the need to ensure our members are not disadvantaged by any such steps, and ever mindful that those workers on an IEA are not bound by expiry dates, it is important to us to understand your clients intentions.

What would assist and be seen as a most constructive move is an undertaking from your clients that SFWU members will not be disadvantaged relative to any initiatives your clients might wish to exercise in regard to those workers on IEA’s [sic.] Past practices have presented some very real problems and we would be most concerned if they were to be repeated.”

[18] Mr Duncan told me that when he said the issue was “*previously raised*” he meant at the meetings of 10 December and 30 January. Mr Weaver’s knowledge of the first of these meetings was limited to having seen the notes of the meeting. On 3 March Mr Weavers told Mr Duncan that he would respond when BCSNZ had considered what Mr Duncan had said.

[19] Meanwhile, unbeknown to either Mr Weavers or Mr Duncan, Spotless Services Ltd had decided that it would offer non-union employees a pay increase (over and above the new minimum wage) from 1 April, the date that new minimum came into effect.

[20] Peter Jennings Spotless Services Employment Relations Manager, told me that this decision was made for the following reasons:

- i. non-union staff expected (and usually got) a rise in about February of each year and were now overdue for this;
- ii. payroll had to adjust wages on 1 April anyway and there were obvious economies in doing this once only;

- iii. during February the increases needed to offset the additional payroll cost had been negotiated with clients (building owners) and needed to be passed on to staff.

[21] On 10 March the respondent's Auckland branch manager sent out a memo to "All Auckland Team Members" which reads in part as follows:

"After many months of deliberations I am pleased to inform you that the base rate of our front line staff will be reviewed on 1 April 08. To comply with the terms of the Meca... it is important that this process is followed:

1) *Existing staff*

- a. *On this date payroll will move all non union staff on...11.30 to 12.55;*
- b. *Union members ...11.30 moves to 12.00;*
- c. ...
 - i. *All staff moving to this rate of 12.55 will need to sign a letter accepting this increase...*
 - ii. *Union members must not be given or asked to sign a letter*

2) *New Starters*

- a. ...
- b. *After 30 days, if they chose not to join the union their rate will move to the default of 12.55...*

[22] Mr Jennings told me that he was not responsible for drafting this document and he accepts that in suggesting that those new employees who did not join the SFWU would receive an automatic pay increase to \$12.55 an hour, its wording is unfortunate. He told me that as soon as he became aware of the content of the memo he corrected this.

[23] Over the next few days all staff who were understood not to be union members were sent "standard form" letters which set out:

"Our records show that you are not a member of a union and therefore not covered by a Collective Employment Agreement. If we are mistaken and you are a union member, please advise me accordingly and disregard this letter.

I am writing to you regarding a proposal to increase your base rate of pay.

Following Spotless' analysis of the current regional labour market, the proposed movements in the minimum wage and other relevant factors, I am proposing to increase your current rate of pay to \$12.55 gross per hour from 1 April 2008...

Under this proposal, the terms & conditions of your individual agreement shall cease to apply if, at any time, you become a member of a union party to a collective employment agreement covering the work you are engaged to undertake. In that case, your terms and conditions of employment shall be solely those documented in the collective agreement.

In order to accept this variation, please sign in the space provided below & return one copy to me. If you accept this variation, the effective date of this change will be 1 April 2008."

[24] Two members of the union, Mr Tupuna and Ms Anaelafo, both employed by the respondent at the airport, gave evidence at my investigation meeting. They told me that one morning in March, at the end of their night shift, their manager called the staff together and announced:

"Spotless agreed to pay the union members \$12.00 per hour from 1 April 2008 but that non-union employees would be paid \$12.55 from 1 April 2008. She thanked us for listening and told us we could go. She didn't say much more than that. I was quite shocked."

[25] These witnesses told me that they understood that after this, some of their workmates left the union in order to get the increase. However the respondent challenged this evidence, saying that its records show that the number of resignations in March was the same or less than for each of the previous three months. I received no other evidence on this point.

[26] As the wording of the letter to staff indicates, Spotless Services was not entirely sure who were members of the union. It appears that some letters did indeed

go out to union members. By 13 March a copy of one had been passed to Mr Duncan who emailed Mr Weavers and after confirming that a date had been pencilled in for a meeting, went on to say that he had received:

“a copy of a memo from SSL (attached) about a \$12.55 rate for non members that appears, to our reading, to cut across the goals of ensuring that there was no discrimination as previously identified. Are you aware of any similar actions by other BSC employers?”

[27] Mr Weavers replied to this part of the email by saying:

“As you would be aware I am not in a position to respond in respect to individual employers and what they may or may not be up to!”

[28] Still on the same day, Mr Duncan emailed again about arrangements to meet but noted that they were:

“predicated upon us not being in a position where SFWU members have already been disadvantaged”

[29] Mr Weavers replied:

“I am not sure about the disadvantage argument you mention and I am not sure what your expectations of the BCSNZ are on this matter, as opposed to individual employers themselves.”

[30] By 20 March Mr Duncan and Mr Weavers still had not settled on a mutually convenient date to meet. Mr Duncan emailed regarding this issue and went on to say:

“In terms of ...your response ...on “disadvantage” our expectations are that BSC members are obliged to be keeping you informed of their...activities. This would certainly include the SSL offers to non members. In turn we would expect that advocate/s would be working to ensure that there was little or no possibilities that BSC members could undermine the process.

Noting that the “good faith” obligations extend to and between employers; and given the SSL initiative this now presents all parties with a live issue we need to try and resolve this matter... at the earliest opportunity. Our preference would be that BSC members agree that effective from an agreed [date] the rates paid to union members should be not less than \$12.55 – a view we have previously put to you...

We see it as appropriate to continue...addressing the concerns about the disadvantage to our members to you rather than to SSL. If this is not the case please advise.”

[31] Before Mr Weavers had responded regarding the extent of his authority, there was a further development regarding differential rates of pay at Spotless Services. On the evening of 25 March, John Ryall, National Secretary of the union, received a report from a Hutt Valley member (who already worked for a different contractor) that a Spotless Services manager had offered her work but told her that “*her pay rate would depend on whether she was a union member*”: \$12.00 per hour if she was, \$12.55 if not.

[32] Mr Ryall immediately rang Peter Jennings. Mr Jennings was at a concert with his wife and went outside to take the call. He told me that he understood Mr Ryall to be asserting that a prospective employee had been told her rate of pay would be \$12.55 provided she did not join the union. He said he was concerned to hear of this and told Mr Ryall that there was no “national strategy” for this to happen. He told Mr Ryall that he would investigate and get back to him.

[33] Mr Ryall says that what he actually put to Mr Jennings was that non-members were being offered pay rises that were not being extended to members. This proposition (which Mr Ryall says was complete news to him) was of course true, and Mr Ryall now construes Mr Jennings’s denial as a deliberate attempt to mislead him, and hence the union, about what was going on.

[34] Mr Jennings’s assertion that he thought Mr Ryall was talking about new workers is consistent with Mr Ryall’s own file note of the conversation, which focuses on the incident with the Hutt Valley worker. In addition I note that by 25 March two weeks had passed since managers and staff had been advised of the pay

proposal for non-members. It was 12 days since the union advocate, Mr Duncan, had learnt of it and raised the issue with Mr Weaver. In short, the proposal to increase the wages of non-members was not recent, there was no evidence that the company had been trying to hide it during the intervening fortnight, and the union (through Mr Duncan) already knew of it. Finally, in his role as National Secretary of the union Mr Ryall had (as he told me in his evidence) “*oversight of all national bargaining with cleaning contractors*” and might have been expected to know of it also.

[35] Given this background I do not find likely that Mr Jennings was attempting some sort of belated cover up when Mr Ryall called him that night. I am satisfied that there was nothing more than a miscommunication between the two men. Given that Mr Jennings took the call in his own time when out for the evening with his wife, I do not hold him any more accountable for this miscommunication than Mr Ryall. In these circumstances, he was entitled simply to say, as he did, that he would investigate and get back to Mr Ryall.

[36] On 17 April 2008 a formal bargaining meeting was convened at which BCSNZ tabled an offer of \$12.55 per hour to settle the MECA. There was no offer to backdate this to 1 April.

[37] The final relevant piece of background information is that on or about 1 April a representative of another member of BCSNZ advised Mr Duncan that he intended to make a direct offer to all his staff (union and non union members alike and outside the MECA process) of \$12.50 per hour. I heard no evidence about whether this did in fact occur and was told that SFWU has raised no objection to the proposal. Mr Duncan told me that the union does not regard the MECA as a “paid rate” document and understands that members of BCSNZ have historically paid varying rates.

(i) Has the respondent attempted to induce employees not to be involved in bargaining for a collective agreement?

[38] Section 4 (6) of the Employment Relations Act provides that it is a breach of good faith for an employer to:

“...do anything with the intention of inducing, an employee-

- a. *Not to be involved in bargaining for a collective agreement; or*
- b. *Not to be covered by a collective agreement.*

[39] As the submissions of both representatives have acknowledged, intent is the critical element in establishing a breach of s.4 (6) (a).

[40] Mr Oldfield argues that the “standard form letters” offering a pay rise to staff, taken together with the March 10 Memo to managers, evince an intention to automatically increase non-union employee’s wages to \$12.55 (together with a proviso that their wage rate will return to \$12.00 if they join the union) as an inducement not to participate in collective bargaining.

[41] It is not in dispute that the intended recipients of the “standard form letters” were non-members (although some found their way to union members.) The union’s allegation is essentially that Spotless Services Ltd sent out these letters with the purpose of dissuading non-members from joining the union and becoming involved in collective bargaining.

[42] Mr Oldfield relies on *Service and Food Workers Union Nga Ringa Rota Inc. v Air New Zealand Ltd* AA 338/07 A Dumbleton and in particular paragraph [45] in which it was noted that the employer’s intentions were best ascertained from the words and construction of the impugned letter viewed against the material circumstances as they existed in the workplace at the time the letter was written.

[43] Mr Oldfield says in the present case, intent is apparent from:

- i. The absence of any genuine bargaining or contractual obligation to increase non-union employees’ wages, and
- ii. The advice that if the employee joins the union the terms and conditions of the IEA shall “cease to apply.”

[44] For the respondent it is argued:

- i. that there is no evidence to show any intention on the part of Spotless Services Ltd to induce employees not to be involved in bargaining or not to be covered by a collective agreement;
- ii. the evidence shows that Spotless Services Ltd had other, genuine reasons for making the offer to non-employees at this time, and
- iii. there is a high threshold to be met in showing an intention to induce employees not to be involved in bargaining, and it has not been met in this case.

[45] In *Service and Food Workers Union Nga Ringa Rota Inc. v Air New Zealand Ltd* (above) a crucial part of the material circumstances was Air New Zealand's openly expressed agenda to get SFWU members out of the current CEA and into a new set of terms and conditions. As the determination set out at paragraph [18]:

"In relation to the CEA currently in force, ANZ strongly wishes for the number of employees covered by it to be reduced as much as possible, so as to optimise for the company the In-house Solution."

[46] The sort of background circumstances that reinforced the inference to be taken from the letter in the *Air New Zealand* case do not exist here. There is no evidence before me to suggest that Spotless Services Ltd was opposed to participating in bargaining for a new MECA alongside its fellow members of BCSNZ. Indeed, the evidence indicates that the respondent wished to proceed without delay to negotiations for a new MECA. If the respondent has a live agenda to reduce the number of its employees who are covered by a collective agreement, it has given no overt sign of this.

[47] On the other hand, there is evidence that the employer has other valid reasons for offering non-members a pay rise at that time: they were overdue for one, and it was convenient to do it in one payroll adjustment when the new minimum wage came in to force.

[48] Turning to the words and construction of the documents themselves, I find nothing inconsistent with the respondent's purported intention of giving non-members an overdue pay rise at an administratively convenient time. The letter does not identify the rate in the collective, or the state of progress for a new MECA, or in any way hold out the offer to non-members as being better than what is or will be offered to members. There is nothing to suggest that non-members will be better off if they do not join the union. In short (unlike the *Air New Zealand* case, above) there is nothing that could be construed as a deliberate attempt to induce employees not to be involved in bargaining or covered by a collective agreement.

[49] Mr Oldfield has drawn my attention to the fact that the offer in the standard form letter contains a rider that "*if...you become a member of a union party to the collective employment agreement covering the work you are engaged to undertake...your terms and conditions of employment shall solely be those documented in the collective agreement...*" Mr Oldfield argues that this statement was misleading because the rates in the CEA are minimum rates and there would be no inconsistency in continuing to pay \$12.55 to someone who had ceased to be a union member. He asserts that the statement demonstrates that the employer's motive was to induce non-members to remain non-members.

[50] Mr Oldfield is correct in saying that there is no impediment to the payment of additional individual benefits over and above collective terms and conditions. It is not uncommon however for the Authority to encounter individual agreements which contain provisions designed to ensure that employees who join the collective after first being on an individual agreement cannot then get the best of both. Because I have heard nothing to support a contrary view, I infer that this is the employer's objective here, rather than to induce non-members not to join the union.²

[51] In conclusion, the evidence does not establish that the employer intended to induce employees not to be involved in bargaining for a collective agreement. There has been no breach of s 4 (6) (a).

² If it is Mr Oldfield's submission that such arrangements are not legal he did not develop this and it is beyond the scope of this matter for me to determine the issue here.

(ii) Has the respondent conferred an unlawful preference on employees who are not members of a union?

[52] Section 9 provides:

“Prohibition on preference

(1) A contract, agreement, or other arrangement between persons must not confer on a person, because the person is or is not a member of a union or a particular union,-

a. Any preference in obtaining or retaining employment; or

b. Any preference in relation to terms or conditions of employment...

(2) Subsection (1) is not breached simply because an employee’s employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer”

[53] Mr Oldfield acknowledged that even if it determines that there is a preference the Authority must also consider whether there is a causal link between that preference and (in this case) not being a member of the union, and what the motive for affording the preference is.³ He says that here there is a causal link because the higher rate of pay is only available to non-union employees, and they provide no consideration additional to what members provide. He says they are being paid more simply because they are not in the union.

[54] The respondent’s submission also identified motive or intent as the key issue for determination here. It says that in this case, like *Taylor Preston (below)* the respondent offered non-members a rise not simply because they were not members of the union but because:

- It had good faith obligations to those non-union employees;
- It had to pass on fee increases which had been negotiated with clients;
- It was already adjusting payroll to meet the rise in the minimum wage, and

³ *National Union of Public Employees (Inc) v Asure New Zealand Ltd and NZPSA [2004] 2 ERNZ 487, and Meat & Related Trades Workers Union of Aotearoa Incorporated v Taylor Preston Limited (Employment Relations Authority Wellington, G Wood, WA 118/07, 23 August 2007.*

- It was concerned about recruitment and retention.

[55] The respondent also reiterates that because bargaining had been initiated it did not consider it appropriate to deal directly with the union about pay rates for members. Whether and when union members would get a rise was, the respondent asserted, a matter to be negotiated in the collective bargaining process, and a matter which the respondent, like its fellow BCSNZ members, wished to progress.

[56] The respondent also notes that it had good faith obligations to the other employer parties to the MECA and argues that to have made an independent offer to SFWU members on its staff at this time would have amounted to a breach of its obligations of good faith to them.

[57] Finally the respondent notes that a finding of unlawful preference will lead to a need to retrospectively remove a pay increase for non-union employees. The respondent submits:

“it would be a most unfair result that non-union employees would be faced with retrospective removal of their pay increase in circumstances where a pay review was due to them and where this increase was timed to coincide with the change to the minimum wage. It would also be an unfair result given that the SFWU, on behalf of its members, had ample opportunity to progress bargaining before 1 April and conclude an agreement on pay rates. It chose not to do so for its own reasons.”

[58] I do not accept this last submission in its entirety. A finding of breach of this provision would have serious consequences for the beneficiaries of an unlawful preference, but that cannot be a reason to avoid such a finding if it is indicated by the evidence. What I do accept, however, is the related proposition that the threshold for such a finding is high.

[59] I find that this threshold has not been met. The reasons for this finding are similar to those for my finding that there was no breach of s. 4 (6) (a) or (b). The evidence does not support a conclusion that the respondent intended to confer a benefit on non-members simply because they were non-members. Rather it did so

because they were due for a pay-rise, it was a convenient time to do it, and it needed to remain competitive in a tight labour market.

[60] It is true that the last two of these factors apply equally to union members. Crucially however the respondent did not consider itself free at that point to discuss pay with union members or their union. This was a reasonable position to take given that bargaining had been initiated, and the respondent (as part of BCSNZ) had demonstrated a willingness to progress that bargaining.

[61] The respondent has not conferred an unlawful preference on employees who are not members of a union. There has been no breach of s.9 (1) (b).

(iii) Has the respondent undermined or done something that is likely to undermine collective bargaining between the applicant and the respondent?

[62] The applicant's allegation of breach of this section is based on the following:

- i.* The respondent offered the rate of \$12.55 to non-members without advising the union that this would also be a claim it would make in collective bargaining;
- ii.* It rejected the proposal in the draft Memorandum of Understanding of 8 February and instead made an offer to non-union employees without being prepared to extend the same offer to union members. The recent offer of \$12.55 has not been backdated to 1 April which leaves an *“insurmountable disparity between the terms and conditions of union and non-union members”* and is likely to cause a loss of faith in the collective bargaining process, and
- iii.* It did not advise the applicant of its intentions to bargain with non-union employees in spite of direct questions from Mr Duncan about this. In particular, Mr Weavers did not pass on to the union feedback he had received on this issue from Spotless Services Ltd. This meant the union had no opportunity to *“talk to its membership about what would occur and assuage any concerns its membership had about the fact that they would receive inferior terms and conditions of employment.”*

[63] Mr Oldfield argues in submissions that there is no requirement to prove intent in establishing a breach of s 32 (1) (d) (iii). Mr Oldfield also asserts that the level of union density and the existence of the principles document are relevant background factors. He says that where union density is low, the manner in which the union bargains with non-members is particularly critical, and that as a signatory to the principles document the respondent should not have been surprised that the union was adopting a new bargaining strategy.

[64] For the respondent it is argued, once again, that there was no ulterior motive on the part of the respondent: its reasons for offering a rise to non-members (as set out already) were genuine, and it acted in good faith. It says that (as part of BCSNZ) it openly signalled the need to address pay rates for non-union employees in the pre-bargaining meetings in December and January and in the response to the draft Memorandum of Understanding (MOU.) It is also argued that, in any event, the respondent is not under an obligation to give prior notice of offers to non-members.

[65] The respondent further submits that the proposed MOU was not an offer to settle the MECA and it was reasonable for BCSNZ to want to negotiate within the bargaining that had been initiated. BCSNZ responded with a roll over proposal as a means of dealing with the interim situation but for its own reasons, SFWU preferred to pursue the suggestion that claims should not be tabled until June. The respondent says it could not continue to wait. Meanwhile it endeavoured to meet its good faith obligations to all parties and to preserve the integrity of bargaining by ensuring that individual offers were not issued to SFWU members. This was the purpose of the Memo to managers.

[66] Once again, also, the respondent argues that the evidence must meet a high threshold for breach to be established. It is submitted that for conduct to be “likely to” undermine there needs to be a real probability or significant risk of undermining. Here it says there was no substantial risk, and no evidence that the bargaining process has been damaged. Bargaining continues and union membership levels remain steady.

[67] The respondent also notes the evidence that the SFWU made no objection when another employer proposed to increase its rates.

Determination

[68] I have already, during the course of the investigation meeting, given the parties an indication of some of my conclusions in relation to issues raised in this part of the problem. I begin by reiterating and explaining those.

[69] For the respondent, it is accepted that once the union had initiated for a MECA and the respondent had committed to having BCSNZ bargain on its behalf it was not appropriate for the two to negotiate directly. To do so would itself risk undermining the bargaining and potentially amount to a breach of the respondent's good faith obligations to other members of BCSNZ. Offers made to BCSNZ (such as the draft MOU) are properly responded to by the group, and not by individual employers, and representations made by BCSNZ are made on behalf of all its members. No representations can be made on behalf of the group without the agreement of the group.

[70] For this reason, Mr Weavers was rightly cautious about what he said on behalf of the members of BCSNZ, and in noting that BCSNZ could not speak for Spotless Services individually.

[71] For the respondent it is also accepted that, having been initiated, bargaining needed to be progressed. If interim arrangements were needed in the period until the union tabled claims for its proposed new agreements, those arrangements could themselves have been addressed in collective bargaining. Informal negotiations of the type represented by the tabling of the draft MOU may be acceptable (as Mr Oldfield asserts) but where a party has opted to initiate bargaining under s. 42 of the Employment Relations Act, as SFWU had done, with all its attendant consequences, it must progress that process in a timely fashion. This did not happen in this case.

[72] Finally it is accepted that the respondent had good and genuine reasons for reviewing the pay rates of the majority of its workforce, and could not be expected to hold off doing so indefinitely.

[73] I must also record the conclusion that a major contributor to this employment relationship problem was the delay in addressing the bargaining process agreement. This should have been the first priority after bargaining was initiated and is something for which all parties must take responsibility.⁴ The bargaining framework in the Employment Relations Act 2000 provides very little in the way of structure to assist parties to multi party bargaining. In these circumstances the importance of a comprehensive bargaining process agreement cannot be overstated. It was critical in particular for Mr Weavers' role, and the extent of his authority, to be clarified. It was clear from the evidence of Mr Jennings and Mr Duncan that both the union and Spotless Services Ltd understood Mr Weaver's role to be wider than he did and expected him to relay information from one to the other in a way that he did not consider himself authorised to do.

[74] For the applicant it is accepted that certain conduct by the respondent was not acceptable:

- i. The terms of the Memo which went out to the respondent's managers were as Mr Jennings has acknowledged, "unfortunate" in that they indicated an automatic pay rise for those who opted not to join the union;
- ii. The report Mr Ryall received on 25 March (although not confirmed by direct evidence) indicated similar potential breaches of obligations towards new members, and
- iii. The statements made to staff at the airport left the witnesses with the impression that the pay rises were being offered solely on the basis of union membership.

[75] I accept that this conduct risked undermining the bargaining (and indeed, although the union has not relied on that limb, undermining the authority of the union.) However, the level of risk was not high. Once it was drawn to his attention Mr Jennings personally undertook to rectify what was happening in relation to new workers. As for what happened at the airport, there was no evidence to suggest that

⁴ *Association of University Staff v The Vice-Chancellor of the University of Auckland* [2005] 1 ERNZ 224.

this approach was repeated elsewhere. It would appear that the conduct complained of was contained.

[76] I have given much thought as to whether the level of risk was “significant.” I have concluded that while there was not a high level of risk, neither was it insignificant. Breaches have been made out in respect of s. 32 (1) (d) (iii).

[77] Against all the background circumstances however I am not prepared to order a penalty against the respondent. Witnesses for the union told me that they considered non-members could wait for a rise for as long as it took to conclude a new collective. That is, quite simply, unreasonable. The SFWU must share some responsibility for the way in which this employment relationship problem has arisen and in particular, after initiating bargaining, for the slow progress in discussing a bargaining process agreement and in the bargaining itself.

[78] I can do nothing more to assist the parties in the resolution of this employment relationship problem. The issue of costs is reserved and the parties have a period of 28 days from the date of this determination to make submissions in relation to this issue.

Yvonne Oldfield

Member of the Employment Relations Authority