

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 79/08  
5094883

BETWEEN EASTERN BAY  
INDEPENDENT  
INDUSTRIAL WORKERS  
UNION INC.  
Applicant

AND ABB  
Respondent

Member of Authority: Vicki Campbell

Representatives: Lou Yukich for Applicant  
Gillian Service for Respondent

Investigation Meeting 29 October and 4 December at Hamilton

Submissions Received 7 December 2007

Determination: 7 March 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] ABB was party to two collective employment agreements. The parties to the first collective agreement are ABB and the Eastern Bay Independent Industrial Workers Union Inc, (“EBIIWU”) and the Northern Boilermakers Industrial Council of the Manufacturing & Construction Workers Union (“NBIC”). The parties to the second collective agreement are ABB and the New Zealand Engineering, Printing and Manufacturing Union Inc (EMPU).

[2] Both documents were due to expire at or about 30 August 2006. On 2 June 2006 ABB wrote to EBIIWU and EPMU and invited both unions to enter into preliminary discussions to seek each union’s views on consolidating the bargaining for a new collective agreement. ABB’s purpose for consolidating the bargaining was to achieve one collective agreement.

[3] Bargaining was initiated by EBIIWU on 1 July 2006 and for the EPMU on 14 July 2006. The EPMU initiation followed correspondence from EPMU to EBIIWU suggesting the two unions should bargain together, but provide separate claims.

[4] Mr Tony Teesdale, the authorised representative for ABB in respect of the bargaining process for both collective agreements, contacted both unions by letter on 3 August 2006 and requested the unions' responses to the discussions they had had about consolidating the bargaining process. Mr Teesdale advised that ABB was keen to commence negotiations and that proposed bargaining process agreements would be forwarded for consideration in the near future.

[5] As events transpired, the request to consolidate bargaining was declined by both unions. It was common ground that the relationship between the EBIIWU and the EPMU was not great and that both unions preferred to do their own thing during the negotiations.

[6] It was also common ground that the list of claims from EBIIWU and EPMU were exchanged between the two unions and discussed prior to the negotiations. Ultimately the negotiations with EBIIWU were settled first.

[7] ABB did not provide to either union, a written list of claims from the outset, but instead, raised and negotiated over issues throughout the bargaining relating to both collective agreements.

[8] EBIIWU seeks an order from the Authority requiring ABB Limited to comply with clause 1.5 of the collective agreement. EBIIWU also contends ABB is in breach of section 4 of the Employment Relations Act 2000 for failing to act in good faith and, pursuant to section 59C of the Act, EBIIWU claims ABB has passed on to the EPMU the same terms and conditions as settled with EBIIWU with an intention of undermining the EBIIWU collective agreement and that it has undermined the collective agreement. EBIIWU seeks penalties in relation to the contended breaches of the Act.

[9] The issues for determination are:

- Was there an automatic passing on of terms and conditions of employment?
- If so, was the passing on done in breach of clause 1.5 of the applicable collective agreement?
- Has there been a breach of section 4 obligations of good faith?
- Has there been a breach of section 59C of the Act?

**Was there been a passing on of terms and conditions of employment from the collective agreement reached between EBIIUW and ABB to the collective agreement reached between EPMU and ABB?**

[10] It is not a breach of the employment agreement to pass on benefits arrived at through the collective bargaining.

[11] The 2006 bargaining process between ABB and the EBIIWU was concluded in December 2006. The term of the collective agreement is 1 September 2006 to 31 August 2008. The agreement provides for “free riders” at clause 1.5 in the following terms:

Unless agreed otherwise by the union/s party to this agreement, any benefit for members of the union/s party to this agreement arrived at by way of collective bargaining and provided in this agreement shall not be passed on;

- i. automatically, in part or in whole, to any employee/s that are not covered by this agreement without the remittance of a bargaining fee by the employer to the union, or
- ii. automatically, in part or in whole to the members of any union/s not party to the collective bargaining without the prior agreement of the union/s party to this agreement; or
- iii. to any employee/s covered by this agreement that have agreed alternative lesser provisions on a personal to holder basis.

[12] This clause is an historical one and was negotiated and agreed prior to the statutory amendment to the Employment Relations Act in 2004 which saw the enactment of section 59C. It was common ground that this clause was not revisited during the 2006 bargaining process.

[13] ABB submits that the clause is at odds with the Employment Relations Act. I agree with that submission. The clause at 1.5(ii) requires the agreement of EBIIWU before passing on can occur. The requirement is inconsistent with section 59C of the Act to the extent that it disregards that passing on is prima facie lawful and does not require the agreement of any parties before such passing on can occur.

[14] However, the key issue for determination is whether any passing on was done automatically. Automatically, as defined by the New Zealand Oxford Dictionary (2005), means something done spontaneously without conscious thought or intention.

*The terms of settlement*

[15] Bargaining between ABB and EBIIWU concluded in December. For various reasons the bargaining between EPMU and ABB did not occur concurrently with that between ABB and EBIIWU. EPMU met for bargaining twice in December 2006, and then in February 2007.

[16] On 22 December 2006 the EBIIWU signed a document entitled “Terms of Settlement for the ABB Limited and EBIIWU & NBIC Tasman Mill Collective Employment Agreement”. On 28 February 2007 the EPMU signed a very similar document entitled “Terms of Settlement for the ABB Limited and EMPU Tasman Mill Collective Employment Agreement”.

[17] These documents set out the terms agreed to during the bargaining for both collective agreements. At a glance both documents seem identical. An analysis of the documents shows that there are some variations in the wording used to express the benefits contained in the settlement document, however these are few and the variations minimal. The variations do not detract from the fact that the terms set out in both documents provide essentially the same benefits.

[18] Mr Yukich, on behalf of the EBIIWU says there were 14 terms and conditions of employment which his union negotiated with ABB and which were either passed on to EPMU or included in the EPMU collective agreement, which were not claims raised by EPMU at the outset of its negotiations with ABB.

[19] Examples of the terms EBIIWU contend were automatically passed on were provided to the Authority. For example both unions ended up with the exactly the same deal in relation to an additional one-off payment for public holidays.

[20] Having reviewed the evidence with regard to this claim I am satisfied that the deal struck with EBIIWU, relating to public holidays, included a one off payment to EBIIWU members to resolve a prior employment relationship problem.

[21] The one-off payment was offered to EPMU. However I am equally satisfied that the offer of a one off payment to EPMU with respect to the public holidays provision was in the exchange for the EPMU withdrawing a bargaining claim for an additional shift fitter on public holidays.

[22] Also given as an example of passing on was the agreement reached with EBIIWU for the appointment of a tradesman to an oilerman role. This issue was a specific claim for EBIIWU but not EPMU however, both terms of settlement documents refer to an oilerman role being established. Mr Juergen Link, who was on the ABB bargaining team, says the issue regarding the oilerman role was raised by the EPMU during their negotiations. This evidence was corroborated by Mr Raymond Wheeler, an EPMU delegate on the bargaining team for the EPMU, who told me that the oilerman role was one of a number of issues that came up during the course of the bargaining process, although he could not recall who raised it.

[23] Mr Wheeler was not privy to the evidence provided at the first investigation meeting. He attended a hearing on 4 December 2007 specifically to enable the Authority to investigate the robustness or otherwise of the EPMU negotiations. I found Mr Wheeler's evidence to be credible and given without fear or favour.

[24] Both Mr Link and Mr Wheeler say that during the negotiations with EPMU, as with any bargaining, proposals and counter-proposals were made in an attempt to find common ground and ABB compromised on certain matters that were less important in order to focus on the issues that were the bigger issues for the EPMU. Equally, the EPMU did the same.

[25] Mr Yukich also drew the Authority's attention to various terms not previously included in the EPMU collective agreement and not part of the terms of settlement document signed by EPMU and ABB in February 2007. These were put to Mr Wheeler during the investigation meeting with the implication that these terms had simply been included in the agreement without any negotiations and were indeed, provisions passed on from the EBIIWU collective agreement.

[26] I accept the evidence from Mr Wheeler that the EPMU terms of settlement were drafted after the negotiations had completed and where drafted in consultation with both the union delegates and ABB's representative. I also accept that the ABB representative used the previously prepared EBIIWU document as the template for drafting the EPMU Terms of Settlement. This accounts for the wording differences in some of the provisions. Further, the two terms of settlement documents contain clauses that were not similar or the same.

[27] I have also reviewed the two collective agreements and accept Mr Wheeler's evidence that the EPMU collective agreement was finalised, following ratification of the terms of settlement and after discussions between Mr Teesdale (ABB's representative) and members of the EMPU bargaining team.

[28] I am satisfied that while the outcomes of the bargaining for the two collective agreements were similar, the outcomes for the EPMU collective agreement were reached as a result of a genuine and robust bargaining process. As part of that robust process agreements were reached either in response to the EPMU's log of claims or issues that arose orally during the bargaining process.

[29] I find that the terms and conditions set out in the EPMU collective agreement were reached after a genuine robust bargaining process and were not automatically passed on.

**Has there been a breach of section 4 obligations of good faith?**

[30] The evidence available to the Authority under this heading does not support a finding that ABB has breached its obligations under section 4 of the Employment Relations Act.

**Has there been a breach of section 59C of the Act?**

[31] Pursuant to section 59C, it is not a breach of the duty of good faith in section 4 for an employer to conclude a collective agreement that contains one or more provisions that are the same or substantially the same as a term or condition in a collective agreement that binds the employer.

[32] Section 59C(2) makes it a breach of the duty of good faith if the provisions which are the same or substantially the same are passed on with the intention to undermine the other collective and the effect of the passing on does undermine the other collective.

[33] In determining whether there has been a breach of the Act, the Authority must take into account the following matters:

- (a) Whether the employer and union bargained before agreeing on the provision;
- (b) Whether the employer and union consulted, in good faith, the parties to the other collective agreement or collective bargaining;
- (c) The number of the employers employees bound by the collective agreement covered by the collective bargaining compared to the number of the employer's employees bound by the other collective agreement or covered by the other collective bargaining;
- (d) How long the other collective agreement has been in force.

[34] In this case, there are clearly provisions in the two collective agreements which are the same or substantially the same, albeit, as I have already found, they were arrived at following a genuine and robust bargaining process. Historically both the EBIIWU collective and the EPMU collectives have had similar provisions.

[35] The EBIIWU has about 34 members subject to its collective agreement, while the EPMU has about 23. At the time of signing the EPMU collective the EBIIWU collective had been in force for less than two months (albeit the commencement date was backdated to September).

[36] I am satisfied the passing on of the provisions from the EBIIWU to the EPMU was not intended to undermine the EBIIWU's collective and neither did the action of the employer undermine the collective (see *National Distribution Union v General Distributors Ltd*, [2007] 1 ERNZ 120).

[37] It follows that EBIIWU's claims against ABB fail.

**Costs**

[38] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell  
Member of Employment Relations Authority