IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 134/09
5140749

	BETWEEN	THE MANUFACTURING & CONSTRUCTION WORKERS UNION Applicant
	AND	INDUSTRIAL SERVICES CHRISTCHURCH LIMITED, INTERCLEAN LIMITED, INERCLEAN INDUSTRIAL SERVICES LIMITED and INTERCLEAN INDUSTRIAL LIMITED Respondents

Member of Authority:	Helen Doyle
Representatives:	Phil Yarrall, Advocate for Applicant Mark Ryan (Counsel) and Allan Gray (Advocate) for Respondents
Investigation Meeting:	22 June 2009
Submissions received:	3 July 2009 from Applicant 1 July 2009 from Respondent
Determination:	21 August 2009

DETERMINATION OF THE AUTHORITY

Introduction

[1] The respondent was named in the proceedings lodged with the Employment Relations Authority as Industrial Services Christchurch Limited trading as Interclean. Mr Ryan raised no issue as to the identity of the respondent in the statement of problem lodged with the Authority on 11 March 2009 but did not for reasons I will come to shortly, attend at the investigation meeting. Although timetabled during a telephone conference with the Authority, no statements of evidence were lodged on behalf of the respondent. Mr Ryan did arrange for a representative of the company to

attend the investigation meeting. At that representative's request I timetabled for written submissions from Mr Ryan to be provided after the investigation meeting.

[2] Industrial Services Christchurch Limited was incorporated on 20 September 2004. The Director of that company is Alan Hill. There is attached to the statement of problem, a draft individual employment agreement and the evidence was that this was given to a Union delegate on 23 April 2008. The individual employment agreement is in the name of Industrial Services Christchurch Limited trading as Interclean.

[3] The signed collective agreement, the enforceability of which is central to the issues that I am required to determine, is in the name of Interclean Limited, as was the notice to initiate bargaining. A company called Interclean Limited was incorporated on 8 May 2007 and the Director of that company is also Alan Hill. Both Industrial Services Christchurch Limited and Interclean Limited have the same address for service.

[4] There is also reference in the two written briefs I received from the applicant's witnesses, to the employer being Interclean Industrial Services. There is a company called Interclean Industrial Limited that was incorporated on 9 May 2007 and another company called Interclean Industrial Services Limited which was also incorporated on 9 May 2007. Both of these companies have Alan Hill as their Director.

[5] Three companies therefore with Mr Hill as Director were incorporated within days of each other with Interclean in their company name. They all have the same address for service.

[6] There is a measure of confusion about who should be the respondent in all the circumstances.

[7] I intend to name all four companies as respondents. If I get to the point of making orders then they will be made jointly and/or severally against the four named companies. The respondent is in the best position to decide if there is a question of liability on which company it should fall.

[8] I shall refer to the respondent from hereon as *Interclean* or *the Company*.

The employment relationship problem

[9] The Manufacturing & Construction Workers Union (*the Union*) say that Interclean refused to abide by the terms of a collective agreement that it had negotiated with Interclean and induced its members to leave the Union and enter individual employment agreements while there was a collective agreement in force.

[10] The Union says that Interclean breached obligations of good faith under the Employment Relations Act 2000. The Union claimed by way of remedy:

- That the collective agreement and all provisions therein be enforced under s.52 of the Employment Relations Act 2000 from 3 March 2008.
- An order for a compensatory payment under s.123(1)(c)(i) of the Employment Relations Act 2000 for humiliation, loss of dignity and injury to feelings in the sum of $2,000 for each employee who was a member of the Union at the time of ratification.
- An order for payment of damages of $1,560 for loss of fee income for 12 months as a result of six members leaving the Union.
- A declaration that Interclean is in breach of s.59(b) of the Employment Relations Act 2000 and offering individual employment agreements and an award of a penalty under s.59(b).
- A declaration that Interclean did not act in good faith and the imposition of a penalty under s.4A of the Employment Relations Act 2000.

[11] Interclean say in reply that they did not breach good faith obligations, that they did not fail to abide by the terms of the collective agreement as neither Manager who negotiated and/or the manager who signed the collective agreement on behalf of the Company had authority to do so and further that it did not induce members to leave the Union and enter into individual employment agreements.

The investigation meeting

[12] Mr Ryan provided the Authority on 18 June 2009 with a memorandum of counsel. The memorandum of counsel set out, amongst other matters, that he had made numerous attempts to obtain instructions from his client but to date had not been

provided with sufficient information to enable him to prepare and lodge statements of evidence in accordance with the Authority's directions following the telephone conference on 16 April 2009. Mr Ryan said that he would be advising his client that someone from Industrial Services Limited should attend at the investigation meeting.

[13] On the day of the investigation meeting Interclean was represented by its Christchurch Operations Manager, Allan Gray.

[14] For the Union, I heard from Mark Broadhead who was employed by Interclean from February 2008 through to May 2009 and was elected Union Delegate in March 2008.

[15] I also heard from Chris Giddens who was employed as the South Island and Christchurch Branch Manager for Interclean from approximately June 2007 through to April 2008.

The issues

- Was there a collective agreement in force between the Union and Interclean;
- If there was a collective agreement in force between the Union and Interclean, then were its provisions adhered to by Interclean;
- If there was a collective agreement in force between the Union and Interclean, then did Interclean attempt after the collective agreement came into force, to induce members to leave the Union and enter into individual employment agreements;
- Were any actions of Interclean in breach of its obligations under s.59B of the Employment Relations Act 2000;
- Were the actions of Interclean a breach of its obligations of good faith under s.4(1) of the Employment Relations Act 2000;
- Should there be penalties imposed on Interclean and/or compensation awarded?

Was there a collective agreement in force between the Union and Interclean?

[16] On 13 September 2007 the Union advised Interclean by facsimile of the names of the employees who had authorised the Union and for whom fees should be deducted and paid to the Union.

[17] On 28 September 2007 the Union initiated bargaining by notice under ss.42 and 45 of the Employment Relations Act 2000 for a collective agreement with Interclean.

[18] The South Island and Christchurch Branch Manager, Chris Giddens, said in his evidence that when he received the notice he contacted the General Manager and Financial Controller, Mr Anil Singh, and informed him of the initiation notice. He was advised by Mr Singh to meet with the Union and enter into negotiations on behalf of Interclean. His instructions were to negotiate an agreement that did not impact on the Company's profitability and was cost effective.

[19] The first meeting was held on 10 December 2007. Mr Yarrall represented the Union together with the Site Delegate at the time, Wilba Kanara. Mr Giddens attended the negotiations with the Nelson Branch Manager, Neil Borlase. The Union tabled a draft collective agreement for discussion at the meeting.

[20] Bargaining took place between December 2007 and March 2008 and eventually the parties left the table with a proposed collective agreement in early March 2008. The Union took the proposed collective agreement to the membership for ratification and it was ratified on 18 March 2008 and signed on that date on behalf of the Union by Mr Yarrall.

[21] Mr Yarrall then took two signed copies of the collective agreement to Mr Giddens who duly signed the collective agreement on behalf of the Company on 19 March 2008 and sent a copy of the collective agreement to the Auckland office of Interclean.

[22] Mr Giddens was then contacted by Mr Singh who advised him that the Company would not be abiding by the collective agreement. Mr Giddens gave evidence that he believed he had authority to sign-off the collective agreement on Interclean's behalf. Mr Giddens said that the agreement, having duly been ratified, was signed by him and that he was shocked to be told by Mr Singh that the Company

would not be abiding by the agreement. He said in his evidence that the agreement negotiated with the Union did not impact on company profitability and was cost effective.

[23] Mr Giddens gave evidence that he had authority on behalf of Interclean in terms of his Branch Manager role to hire and dismiss employees, make purchases on behalf of the Company and spend capital.

[24] I find that Mr Giddens signed the collective agreement within the scope of his actual authority with the Company. Implied authority and apparent authority often coexist but considering the matter from the viewpoint of a reasonable person dealing with Mr Giddens, it would have appeared to the Union that he had the authority to enter into the collective agreement on behalf of Interclean. The collective agreement was expressed to be for the period 3 March 2008 until 2 March 2009. I find in conclusion that there was an enforceable collective agreement entered into between Interclean and the Union from the date of Mr Giddens's signature on 19 March 2008 under s. 52(1) of the Employment Relations Act 2000.

[25] The answer to the first question is that there was a collective agreement in force between the Union and Interclean.

Were the provisions of the collective agreement adhered to by Interclean?

[26] The short answer is that the provisions in the collective agreement were not, and have not, been adhered to. It was clear to the Union that they would not be in late March 2008 when in a letter to Mr Hill dated 31 March 2008 Mr Yarrell said, amongst other matters:

> *It was with some surprise when Mr A Singh then informed me on 28th March that the CEA was void and of no value and that it would have to be totally renegotiated with a new team of senior managers from Auckland. Mr Singh was not forthcoming about what was deficient in the CEA apart from general comments about the overnight allowance and some of the rates, we have asked for more specifics in that regard, it was also mentioned that the co had a CEA with the Northern AWUNZ, we would like to see a copy of that with advice on the number of employees covered by it.*

[27] The Union communicated further in an attempt to resolve the issues and there was a mediation. Whilst the Union were open to making a concession or agreement

to some changes ultimately, I am satisfied there was no variation or alteration to the collective agreement in force between the parties and the matter remained unresolved.

[28] Most of the members who were employed at Interclean resigned from the Union because the Union believe they entered into individual employment agreements with the Company after March 2008. In his final written submissions, Mr Ryan states that there are no employees who are members of the Union at Interclean at the current time. This means it is difficult for Mr Yarrall to give the Authority any indication as to what under the provisions of the collective agreement is owing and to whom.

[29] On that basis therefore given that I have found that there is a collective agreement between the Union and Interclean then I will leave any further action in terms of the enforcement of the provisions of the collective agreement to the Union.

Did Interclean attempt, after the collective agreement came into force, to induce members to leave the Union and enter into individual employment agreements?

[30] There was a meeting on 23 April 2008, which was attended by Mr Hill and Mr Gray on behalf of Interclean, and three Union members including the Union Delegate Mark Broadhead. Mr Broadhead gave evidence that he took notes at the end of the meeting. I find that they are the notes attached to the statement of problem as attachment "10" although they are incorrectly dated as 23 May 2008, I accept that they were the notes taken just after the meeting on 23 April 2008.

[31] Mr Broadhead gave evidence, that I accept, that Mr Hill made clear at the meeting that he would not be complying with the Christchurch collective agreement. Mr Broadhead recalled the concern was about the pay scales being too complicated and there was no mention of the lack of authority on behalf of Mr Giddens.

[32] The notes taken record that Mr Hill stated that employees of Interclean in Christchurch were welcome to be in the collective, but they would be offered the same as the Auckland branch who had negotiated their own collective agreement, or were in the process of doing so. Mr Broadhead gave evidence and it was not challenged by Mr Gray who was also present at that meeting that Mr Hill offered individual employment agreements at the meeting. The notes reflect that Mr Hill advised the Union members present that anyone who signed to an individual employment agreement would be entitled to the same allowances that had been negotiated in the collective agreement in Auckland once it was signed.

[33] Mr Ryan in final submissions states that the discussion on the meeting of 23 April 2008 falls short of an inducement to enter into an individual employment agreement. The notes taken at the meeting reflect that Mr Hill said to the union members present that employees of Interclean would only be entitled to the same allowances negotiated in the Auckland collective agreement if they signed an individual employment agreement. I do find that the offering of individual employment agreement was an inducement to union members not to be covered by the Christchurch collective agreement. If there had been a genuine concern about whether Mr Giddens had authority to sign the agreement then that should have been resolved before individual employment agreements were offered by Interclean.

[34] Offering the individual employment agreements could not have been said to have been done in an honest and open way without ulterior purpose or motivation. It was not an action done in good faith. It was an action that was intended to undermine the Christchurch collective agreement and any benefit thereunder to members of the Union. Most members then resigned from the union and although there was no direct evidence about their reasons for doing it is clear from correspondence from Mr Yarrall to Mr Hill that he was aware as late as 16 May 2008 that union members were being offered individual employment agreements (see attachment 11).

Were any actions of Interclean in breach of its obligations under s.59B of the Employment Relations Act 2000?

[35] The evidence that I heard did not satisfy me that the actions of Interclean through Mr Hill could properly establish a breach of s.59B which section deals with good faith issues with respect to the passing on of terms and conditions of a collective agreement.

Were the actions of Interclean in breach of its obligation of good faith in s.4(1) of the Employment Relations Act 2000?

[36] Section 4(1) of the Employment Relations Act 2000 provides that the parties to an employment relationship must deal with each other in good faith and, without limiting that, must not, whether directly or indirectly, do anything to mislead and deceive each other or that is likely to mislead and deceive each other.

[37] The employment relationships that require parties to deal with each other in good faith, includes those between a Union and an employer. The duty of good faith

in subsection (1) applies, amongst other matters, to any matter arising under or in relation to a collective agreement while the agreement is in force.

[38] Section 4(6) provides that it is a breach of subsection (1) for an employer to advise or do anything with the intention of inducing an employee not to be covered by a collective agreement.

[39] I am satisfied that the actions of Interclean were designed to induce Union members to not be covered by the Christchurch collective agreement by simply ignoring its existence or dealing in an other than open and honest manner with its existence. The Union had in good faith over a period of months negotiated a collective agreement. The agreement was then signed by Mr Giddens on behalf of Interclean and the behaviour of the Company in terms of that collective agreement in offering individual employment agreements to members, was a breach of its obligations of good faith and designed to induce employees not to be covered by it.

Should there be penalties imposed on Interclean?

[40] Section 4A provides that a party to an employment relationship who fails to comply with the duty of good faith in s.4(1) is liable to a penalty if

> *(b) The failure was intended to undermine –*
>
> *(ii) An individual employment agreement or a collective agreement.*

[41] I am satisfied that the breach of good faith that I have found was one where the failure was intended to undermine the collective agreement for reasons outlined earlier in this determination.

[42] I am satisfied that it is appropriate in the circumstances to impose a penalty on the respondent companies for them to meet either jointly or severally. I am of the view that the breaches in this case were serious and that the failure to abide by the collective agreement and offering of individual employment agreements completely undermined the collective agreement negotiated by the Union with Interclean.

[43] I intend to impose a penalty on Interclean at the higher end of the scale for a penalty in the sum of $7,000.

[44] I order that $2000 of that penalty is to be paid by Industrial Services Christchurch Limited, Interclean Limited, Interclean Industrial Services Limited and Interclean Industrial Limited into the Authority and then it will be paid by the Authority into the Crown Bank Account.

[45] I order that $5000 of that penalty be paid to The Manufacturing & Construction Workers Union by Industrial Services Christchurch Limited, Interclean Limited, Interclean Industrial Services Limited and Interclean Industrial Limited.

Should there be compensatory payments ordered or an award of general damages in terms of lost membership fees?

[46] I am not satisfied that this is a case where there should be an award of compensation or general damages in terms of membership fee loss.

[47] I am not satisfied those claims have been made out in terms of the evidence.

Costs

[48] I reserve the issue of costs.

[49] The Union was represented by Mr Yarrall and it may be that there is no claim for costs in the circumstances aside from the filing fee, but I will give Mr Yarrall an opportunity to make submissions if he so wishes by 11 September 2009 and Mr Ryan to respond by 25 September 2009.

Helen Doyle
Member of the Employment Relations Authority