

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 360/09
5163744

BETWEEN

ELECTRICAL UNION
INCORPORATED
First Applicant

PAUL CROFT & Or's
Second Applicants

AND

TRANSFIELD SERVICES
(NEW ZEALAND) LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Lou Yukich, advocate for Applicants
Gillian Service and Bridget Kight, counsel for
Respondent

Investigation Meeting: 16 September and 6 October 2009

Determination: 12 October 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Following mediation held since commencement of the claims in May 2009, the number of various matters brought by the applicants to the Authority for investigation and determination has been reduced.

[2] Only two issues are left unresolved between the parties. As set out by the applicants' advocate Mr Yukich in his memorandum of 10 September 2009, they are:

- i. *Unreasonable refusal of paid release of the Delegate, and*
- ii. *Disabling of GPS until consultation with employees including their union is concluded.*

[3] To resolve those issues the applicants seek compliance orders against the respondent Transfield Services (New Zealand) Ltd under s 137 of the Employment Relations Act 2000.

[4] Evidence from or on behalf of the applicants and the respondent was taken at an investigation meeting on 16 September, and submissions were presented by Mr Yukich and counsel for Transfield, Ms Service, on 6 October 2009.

Unreasonable refusal of paid release of the Delegate

[5] On 10 May 2009 the Electrical Workers Union Inc. (the EU) wrote to Transfield to initiate bargaining for a collective agreement. Mr Yukich was named in the letter as the union's advocate for that purpose.

[6] The coverage proposed for the collective agreement was all work performed by employees of Transfield who were or became members of the EU and who were engaged in activities associated with Transfield's business. The EU had about 50 members then employed by Transfield.

[7] On 18 May the EU wrote to Transfield requesting the release on pay of the second applicant Mr Paul Croft on 22 May 2009, so that he could assist the union on that day to prepare for bargaining. Mr Croft has been a telecommunication technician for 35 years and is employed by Transfield in that work.

[8] The request for his release was declined on 19 May by Ms Carole Moodie, Transfield's employee relations manager. She advised Mr Yukich that as the EU did not have a collective agreement with Transfield covering Mr Croft, the company could see no legal basis on which the request had been made.

[9] The union responded by lodging a statement of problem with the Authority on 27 May 2009, making application for the following order:

... that the employer comply with clause 50 of the Collective Agreement and release the Union's Delegate [Mr Croft] on pay and an order that the employer cease being unreasonable.

[10] The collective agreement referred to was the Transfield Services Collective Agreement negotiated between the company and the New Zealand Engineering,

Printing & Manufacturing Union (the EPMU) in 2008. Mr Croft had been a member of the EPMU when that collective agreement was negotiated.

[11] When the request was made by the EU for Mr Croft to be released he had only a few days earlier applied for membership of that union. By doing so he had expressly revoked his membership of any other employee organisation or bargaining agent. Accordingly he ceased to belong to the EPMU.

[12] By revoking his EPMU membership Mr Croft took himself outside the coverage of the Transfield Collective Agreement. This is a legal consequence made clear by s 56 and s 61(2)(a) of the Employment Relations Act and clause 2 of the agreement itself.

[13] As the EU did not have a collective agreement with Transfield, Mr Croft became employed under an individual employment agreement whose terms and conditions were based on the Transfield Collective Agreement.

[14] Clause 50, with which compliance is sought by the EU, provides for workplace representation by delegates who have been elected by co-workers and endorsed by their union.

[15] Clause 50 also provides that with the agreement of Transfield delegates may be released without loss of ordinary earnings for “*off-site Union business.*” The provision requires that Transfield is not to unreasonably withhold its agreement.

[16] Expressly under clause 1 of the collective agreement, the term “*Union*” wherever used in the document refers to the EPMU. Clause 50 therefore refers to the EPMU, not the EU.

[17] The EPMU has not asked Transfield to release Mr Croft and it should be obvious that that union will no longer endorse him as a Delegate since his departure to join the EU. The only order the Authority could make in relation to clause 50 would be one requiring Transfield to release Mr Croft on pay for off-site EPMU business. Mr Croft however has separated from the EPMU and has no desire to engage in its bargaining or other business.

[18] The Authority must reject the claim for compliance which has been based on a proposition that the content of clause 50 migrated from the collective agreement to Mr

Croft's individual employment agreement, which replaced the former when he resigned from the EPMU. The applicants argue that the name of Mr Croft's current union, the EU (of which he has also become a delegate) must be substituted for the EPMU.

[19] In its nature and purpose Clause 50 is a provision peculiar to a collective agreement negotiated between a specific union and an employer and is therefore not to be regarded as term kept on in the individual agreement Mr Croft is now covered by. Clause 50 cannot simply be plucked out of the collective agreement and transported around by Mr Croft to be applied to his membership, and election as a delegate, of whatever union or unions he may subsequently join.

[20] I disagree that the provision is generic, as contended on behalf of Mr Croft. Clause 50 pertains to a particular union of which a Transfield employee may be a member and delegate for; the EPMU. It expressly refers to a particular union and not to unions generally. Clearly by the words they chose to use in the document itself the parties did not intend the provision to apply in the way Mr Yukich has argued.

[21] For the Authority to delete the reference in clause 50 to the EPMU and substitute EU would amount to fixing new terms and conditions of employment for Transfield and Mr Croft, something the Authority expressly may not do; see s 161(2)(b) of the Act.

[22] A more fundamental reason why the application for a compliance order must be declined is that currently there is no live issue about Transfield declining to release Mr Croft so that he can assist the EU or any other union with its business. The rejection by Transfield on 19 May of the request for Mr Croft to be released on pay was an action fully carried out and completed at that time. If it amounted to a breach of clause 50 the situation was not one giving rise to a continuing state of breach that is able to be the subject of a compliance order to prevent "*further*" non-observance of the breached provision; see s 137(2) of the Act.

[23] As it happened Mr Croft was released from work by Transfield, but not on pay. Had there been any breach of clause 50, his remedies would have been a penalty and a claim for the pay he did not receive for the time off.

[24] Since the May request, and the declining of it by Transfield, a further request for release under Mr Croft's current terms and conditions has not been made and has

therefore not been declined. No issue as to reasonableness on the part of Transfield arises. As there is no present or current situation of non-compliance to be addressed by the remedy of compliance order, this issue must be regarded as entirely moot. Neither can the threat of a breach at a future time found a compliance order made before the breach has occurred.

[25] Mr Yukich presented an argument that a failure by Transfield to allow Mr Croft the same terms and conditions as provided by clause 50 under the collective agreement amounts to conferring a preference because of membership or non-membership of a union. He argued that such treatment excluding Mr Croft from recognition under clause 50 was a breach of s 9 of the Act.

[26] I find that s 9 has no application in the circumstances of this case. Transfield has not treated Mr Croft or anyone else preferentially but has simply acknowledged, tacitly, the operation of statute law (s 61(2)(a) of the Act) and also the proper construction or correct application of clause 50 of the collective agreement. It is not a situation of preference at all.

[27] Mr Croft is a now stranger to the collective agreement provisions and cannot enforce them, except to the extent that any were imported by law into his individual agreement. While based on the terms of the collective, the individual agreement does not mirror exactly those terms. Of the cases relied upon by Mr Yukich in this regard, I refer to three in particular.

[28] *United Food Workers v Talley* [1993] 2 ERNZ 360: At page 370 of its judgment the Court of Appeal expressed clearly the rationale behind the modification required when there is a transition from a collective agreement to an individual agreement “*based on*” the former. The modification is to recognise that the union is not a party to the individual agreement. ‘The’ union is specifically the particular union which negotiated the collective agreement and not some other union the employee may subsequently join.

[29] *Castle v Rongotai College Board of Trustees* [1997] ERNZ 505: The provision in question related to consultation with a union in a redundancy/redeployment situation. As the Employment Court observed at page 513 of its judgment, even without the provision in the collective agreement the employee retained the ordinary rights of consultation enjoyed by all employees under any form

of employment agreement. The case is not on point, as without clause 50 there is no general express or implied right Mr Croft has to be released on pay during work time to give his union assistance.

[30] The case can also be distinguished because the right to be consulted is ultimately for the benefit of the employee rather than his or her union, whereas obtaining assistance with the organisation or management of collective bargaining is something done for the direct benefit of the union, although employees who are members may also be advantaged indirectly.

[31] *NZ Dairy Workers v NZMP* [2002] 1 ERNZ 361: Obviously paragraph [52] of the Employment Court's judgment as quoted by Mr Yukich must be read in conjunction with the passages before it, including paragraph [51] in which it is stated;

.....the terms of the CEA will be the terms of a new employee's IEA except.....such an employee is not a member of the union and therefore not liable to have union subscription payments deducted from his or her remuneration.

[32] Again, as in the *Talley* case (above), it is clear that modification is required to recognise that the union which negotiated the CEC is not a party to the IEC that is based on it.

[33] Mr Yukich accepted that in this case there is a dispute about the interpretation, application or operation of clause 50 of the Transfield collective agreement in relation to Mr Croft's employment. The existence of that situation can in itself be a reason not to exercise the Authority's discretion to order compliance.

[34] The dispute underlying this case is therefore to be determined with a declaration by the Authority that clause 50 ceased to apply to Mr Croft's employment after he left the EPMU on or about 15 May 2009. Clause 50 was a provision included in the collective agreement for the benefit a particular union and its members, the EPMU. It applied to Mr Croft, or operated in respect of him, only while he remained a member of the EPMU and was covered by the collective agreement as a consequence.

[35] For the above reasons Mr Croft's application for a compliance order in relation to clause 50 is declined by the Authority.

Disabling of GPS until consultation with employees has been concluded

[36] With regard to the GPS technology that Transfield has installed in Mr Croft's work vehicle and in the vehicles used by other telecommunication technicians employed by the company, orders are sought on the following terms:

... that the employer comply with clause 8 and clause 9 of the Collective Agreement as well as s.4 Employment Relations Act and consult the Union [the EU] and its members over the implementation of GPS and address health and safety concerns.

An order that the employer desist in implementation of GPS until meaningful consultation is concluded and that equipment installed to date be rendered inoperative until that time.

[37] Clauses 8 and 9 of Transfield's collective agreement provided generally for consultation and for the application of good faith. In particular at clause 8 the "joint objectives" of the EPMU and Transfield are expressed to include:

(iv).....develop more effective communication and consultation between management, the Union and Employees.

and

(v).....improve the productivity and efficiency of the Company by the most effective use of new and existing technology.

[38] Clause 9 begins with an express acknowledgement by Transfield, the EPMU and the employees, that consultative arrangements are to be encouraged in the workplace. Clause 9 provides that the objectives of consultation include the joint objectives expressed in clause 8. They are also expressed to include the general development of a cooperative work environment and the recognition of increased competitiveness, productivity and effectiveness in Transfield's business.

[39] The overall effect of clauses 8 and 9 is, I find, that consultation was required with the EPMU and its members employed by Transfield before the company finally decided to use the new or existing technology of GPS as a means of improving productivity and efficiency. In presentations made to employees the company explained the introduction of GPS as being for those purposes as well as others.

[40] I find that the point of no return in the Transfield's thinking about whether to use GPS in its telecommunications business was no later than the time at which it decided to take the distinct step of installing the GPS device in Mr Croft's vehicle as

well as those of other employees. No doubt there were earlier steps such as ordering the equipment, and there were also later steps such as installing it, turning it on and supplying the log-on to the staff who were to monitor the information relayed from the devices. I consider it was inevitable, or a foregone conclusion of Transfield's, that once it had ordered the devices and installed them it would use the technology to full capability.

[41] From the evidence of Mr Ross Lockwood, Executive General Manager, Telecommunications, of Transfield, I find that the decision made by the company to install GPS tracking in vehicles, such as the one driven by Mr Croft, followed on from (although was not contractually required by) an agreement entered into at the end of 2008 by Transfield to centralise its dispatch functions.

[42] The introduction of GPS was seen as a logical or natural progression from the centralisation of dispatch. Mr Lockwood said it would have been extremely difficult for the company to remain competitive if he had not introduced GPS into the company's telecommunications business.

[43] I find that Transfield had decided to install GPS in January at the latest and proceeded to do so without adequate consultation with Mr Croft or the six other employees who gave evidence in support of his application for a compliance order.

[44] I find that the consultation given the EPMU was the same as that with Mr Croft, who was a delegate of the union, and therefore was inadequate too. I note in this regard the letter of 19 May 2009 to Transfield from the National Secretary of the EPMU, Mr Andrew Little, stating that GPS had been introduced with no consultation or effective dialogue with EPMU members. Mr Little in his letter referred to clauses 8 and 9 of the collective agreement and requested a review of the GPS introduction, to look in particular at how the data collected as a result of it was being used. Mr Lockwood's evidence was that the request has not been acted upon by Transfield to date.

[45] The approach taken by Transfield was to advise or notify its employees that GPS would be introduced over the first few months of 2009 and to invite them to provide "*feedback*" about that decision, which had already been made.

[46] Mr Lockwood communicated the company's decision at roadshows he routinely held nationally and had been doing so for some three years. He regarded a

major inducement to employees to attend was the prospect of free breakfast and paid time off work. Mr Lockwood said it was unusual for staff to miss these meetings for those reasons. He said that the purpose of the roadshows was to meet with the staff from each branch, speak to them about the performance of the business over the previous months and about areas for improvement, and also speak about:

... what I expect from them going forward and what they can expect going forward in terms of changes or improvements to the business.

[47] One of those expectations spoken about he said was the introduction and use of GPS. Mr Croft and six other employees gave evidence of attending some of those roadshows at which the decision to introduce GPS was announced and their feedback sought.

[48] I find that GPS as one of the subjects of the roadshows was not announced or advised to employees in advance. The witnesses confirmed there was no agenda provided for the meetings they had attended.

[49] Mr Lockwood described the 28 January 2009 roadshow at Hamilton, which Mr Croft attended, and at which there were large numbers of staff present for his address. Mr Lockwood screened to the audience a summary of the company's plans which included under the heading *Moving Forward*:

- *Introduction of GPS in Restoration & Provisioning*

[50] He said that he had explained Field Force Automation as including the introduction of GPS which "*was going to be introduced into the business some time in the near future.*"

[51] In a presentation lasting one hour or more Mr Lockwood explained in detail the need for GPS. He said that at the end of every roadshow he normally opened the floor for questions and comments and invited staff to email or call him if they had any thing to raise. He also said:

I invited feedback and gave the opportunity for discussion on this occasion but there were minimal questions raised or feedback received at the meeting or subsequently in relation to GPS.

[52] Mr Lockwood's further evidence was:

As the use of GPS had been shown to be an effective tool to drive productivity in the Auckland branch, I decided to roll GPS out through the rest of the Telco business across the country.

[53] Mr Lockwood said that there had been no issue raised by the EPMU with the consultation process in relation to the introduction of GPS. He said that there had been further consultation with the EPMU and a request for feedback on the GPS Policy.

[54] After GPS was introduced by installation into vehicles Transfield developed and published a GPS Policy. Mr Lockwood said that feedback on this too had been sought from the EPMU but none had been received. He said he was therefore surprised that the EU had brought this claim.

[55] From the outset of the investigation meeting Mr Yukich said that the applicants had no issue over Transfield's business case for the introduction of GPS. The issue was the requirement for the employer to consult its employees before bringing about that change.

[56] Mr Croft and six others employed as telecommunications technicians by Transfield gave evidence of the communication from their employer to them about the introduction of GPS. Mr Croft had been a member of the EPMU and an elected workplace Delegate of that union up until his resignation in mid May 2009. Following that he joined the EU, the first applicant.

[57] Mr Croft said he had attended with many others the meeting on 28 January 2009 and heard a general presentation from Mr Lockwood on Transfield's business performance. It was then he said that those present were made aware of Transfield's intention to introduce GPS by fitting the tracking devices to their work vehicles. Mr Croft said there was no consultation or opportunity for consultation and that they were merely addressed by Mr Lockwood who told them what was going to happen. There was no 'might be' or 'may be' about it.

[58] It is clear from his evidence that Mr Croft's dislike of being monitored by GPS has arisen from his belief that he was not consulted about the introduction of that technology. He views Transfield's behaviour as arrogant and dismissive and says it has not promoted mutual trust and co-operation, contrary to the joint objectives expressed in clause 8 of the collective agreement.

[59] It is also clear from Mr Croft's evidence and that of the other six employees that they feel devalued by their employer because of its failure to seek and try and accommodate, their views before finally deciding upon whether to introduce GPS. It is fully understandable that employees will feel they are seen by their employer as having low or lower worth, when the employer has failed to comply with contractual obligations.

Meaning of consultation

[60] In its judgment in *Communication & Energy Workers v. Telecom* [1993] 2 ERNZ 429, at page 455 the Employment Court extracted from High Court and Court of Appeal decisions the following principles to be applied:

1. *The word consultation does not require that there be agreement.*
2. *On the other hand it clearly requires more than mere prior notification.*
3. *If there is a proposal to make a change, and such change requires to be preceded by consultation, it must not be made until after consultation with those required to be consulted. They must know what is proposed before they can be expected to give their views.*
4. *This does not involve a right to demand assurances but there must be sufficiently precise information given to enable the person to be consulted to state a view together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.*
5. *The requirement for consultation is never to be treated perfunctorily or as a mere formality. The person or body to be consulted must be given a reasonably ample and sufficient opportunity to express views or to point to problems or difficulties: they must be free to say what they think.*
6. *Consultation must be allowed sufficient time.*
7. *Genuine effort must be made to accommodate the views of those being consulted; consultation is to be a reality, not a charade.*
8. *Consultation does not necessarily involve negotiation towards an agreement although this not uncommonly can follow as the tendency in consultation is to seek at least consensus.*
9. *Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses, and then deciding what will be done.*

10. *The party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh.*
11. *There are no universal requirements as to form or as to duration of consultation.*
12. *Consultation cannot be equated with negotiation in the sense of a process which has, as its object, arriving at a agreement.*

[61] I find from the evidence that Transfield failed to consult with Mr Croft and the six other employees who gave evidence, before it decided to introduce GPS. I also find that it failed to consult their union such as the EPMU was at the time. For completeness I make it clear that there was no additional requirement to consult the EU as a separate entity, as it has the status of being only a representative of Mr Croft and the employees rather than being a party to any employment agreement.

[62] In particular principles 9 and 10 as set out above were not observed by Transfield. The proposal announced by Mr Lockwood had been finally decided upon and his invitation for feedback was after the event. Transfield had decided what it was going to do and invited feedback, but that was to put things back to front as required under principle 9. In the way Transfield went about things it cannot be said that there was any appearance of it keeping its mind open and being ready to change, and even start afresh, as contemplated under principle 10 above.

[63] I therefore consider that Transfield breached its obligation to Mr Croft and the six other employees who gave evidence, by failing to consult them. That was a breach of clauses 8 and 9 of the collective agreement which applied to those seven employees in January 2009. I find this is an appropriate case to order compliance under s 137.

[64] The introduction of GPS can be partially undone by disarming it and suspending the operation of the technology until there has been consultation.

[65] I will therefore make an order of compliance in favour of Mr Croft as an applicant party in this case.

[66] The other six employee witnesses who gave evidence are not to be regarded as applicant parties. The EU is not a party to any employment agreement between the six witnesses and Transfield. They are all apparently now under individual

employment agreements which include the terms and conditions formerly found in the EPMU document.

[67] I will however exercise the power of the Authority to order compliance of its own motion in relation to persons who are not parties to a claim. I do this only in respect of the six employees who gave evidence to support Mr Croft's application. It is clear from their evidence that although they too are employed under individual employment agreements their circumstances are similar to Mr Croft's and they too were not consulted.

[68] The six employees are;

Perepe Haretuku	Neil Douglas
David Derby	Mark Simson
Desmond Hanham	James Dallas

[69] Under s 138(1)(a) the power to order compliance may be exercised by the Authority of its own motion and where that is done in relation to a person who is not a party to the matter the Authority must give that person an opportunity to appear or be represented before the Authority. The six additional witnesses have all had and taken that opportunity.

[70] As to other employees, the reference to "*ors*" in the statement of problem was insufficient to join them in the claim and their names were not given until after the investigation had begun. Also, they gave no evidence to show whether they supported the application. I do not consider Mr Croft was able to bring a representative action on their behalf as co-applicants when they are all apparently on individual employment agreements. Their common membership of the EU does not overcome the difficulties as there is currently no collective employment agreement between that union and Transfield.

[71] The orders now to be given by the Authority include a direction under s 159 of the Act, requiring a further attempt to be made in good faith to resolve this matter in mediation, as well as the order under s 137 requiring Transfield to comply with clauses 8 and 9 which are now part of Mr Croft's individual employment agreement, although with necessary modifications excising reference to the EPMU.

[72] The six employees who gave evidence are to be regarded as parties for the purposes of the direction to mediation. The seven employees including Mr Croft are of course entitled to have the EU as their representative for any purposes under the Act including mediation.

[73] In determining this particular application I have taken into account the memorandum of understanding between the parties dated 1 July 2009 under which Transfield has agreed to consult with the EU and its membership about the GPS Policy Document. The Policy Document about how GPS is to be used is a significant aspect of the parties' GPS debate and I consider a further attempt should be made to reach some understanding or accord in relation to the introduction of GPS as well as the policy in relation to it.

[74] The parties may wish to address both matters – the introduction of GPS and the GPS Policy Document – together.

[75] The compliance order now made is suspended in its operation until 5pm on Wednesday 21 October 2009, to allow urgent mediation, as directed above, to take place in the interim. After that time if the parties have not resolved this matter, or agreed to continue mediation on a later date, the compliance order will take effect and require Transfield to cease monitoring and storing any information sent or received from the GPS devices installed in Mr Croft's vehicle or those of the other six employees.

[76] The compliance order will remain in effect from 21 October until Transfield has consulted the seven employees under clause 8 and 9 over the implementation of GPS. The period of consultation after mediation, if there is no resolution by that process, will be two weeks until 5pm on Wednesday 4 November 2009. The compliance order will then lapse.

[77] Further orders may be sought from the Authority to extend any time periods given above.

Costs

[78] Costs are reserved for any application to be made in the event mediation does not resolve this matter. Further directions will be given by the Authority if and when an application is made for costs.

A Dumbleton
Member of the Employment Relations Authority