IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 116/09
5157764

	BETWEEN	NZ AMALGAMATED ENGINEERING PRINTING AND MANUFACTURING UNION INC Applicant
	AND	ZEAL 320 LIMITED Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Anne-Marie McInally for Applicant Andrew Caisley for Respondent
Investigation Meeting:	On papers
Submissions received:	6 April 2009, 7 April 2009
Determination:	8 April 2009

DETERMINATION OF THE AUTHORITY ON AN APPLICATION FOR REMOVAL TO EMPLOYMENT COURT

Employment Relationship Problem

[1] On 3 April the applicant union lodged this employment relationship problem which is in two parts. The first concerns a claim for penalties in respect of alleged breaches of good faith arising out of direct communications by the respondent to union members in the course of (and related to) bargaining.

[2] The second relates to a claim that (in breach of s.20 of the Employment Relations Act) a union organiser had been denied access to parts of the respondent's premises. In relation to the second part of the problem, the union sought interim injunctive relief, a permanent order and penalties. The union also sought urgency in relation to the whole problem.

Telephone Conference 3 April

[3] I conducted a telephone conference with the representatives on the afternoon of 3 April. Ms McInally stressed that the second part of the problem, in particular, needed to be addressed with urgency given that industrial action was occurring in relation to the bargaining and advised that the union was of the view that neither part of the problem was suitable for mediation.

[4] Mr Caisley argued that:

i. the two parts of the problem were unrelated and should be dealt with separately;

ii. neither part (but especially not the communications issue) was urgent, and

iii. both matters should be mediated and indeed the parties were at that moment engaged in mediation in relation to the bargaining which was the context in which they had arisen.

[5] I advised as follows:

i. It was accepted that the two parts to the problem required different treatment, and that the communications issue did not warrant urgency;

ii. The access issue however would be dealt with as a matter of urgency, and

iii. It was accepted that the access issue should be the subject of mediation however a direction to mediation would not be made immediately since the parties were already meeting with a mediator as the conference call proceeded. The need for a direction to mediation would be reviewed when that mediation concluded.

[6] I further indicated to the parties that the Authority could offer two alternative tracks for dealing with the claims in relation to the access issue:

i. The application for interim relief (which I understood to be in fact an application for interlocutory relief) would require an investigation meeting which could be set down for investigation on 7 or 8 April.

ii. Alternatively the Authority would proceed to an urgent (within two or three weeks) investigation of the substantive and permanent relief sought.

[7] By way of explanation of the need for an investigation meeting in relation to the claims for interim injunctive relief I advised that I would require submissions on the Authority's jurisdiction and powers to provide the relief sought, and would determine those matters as a threshold issue.

[8] Some discussion followed as to the practical difficulties each of these alternatives posed for the parties. The conference call adjourned on the basis that Ms McInally would seek further instructions from her client on these options and on a third option, which was to apply to have part or all of the proceedings removed to the Court. The conference resumed later that afternoon at which point Ms McInally confirmed that an application for removal would be lodged. Mr Caisley responded by saying that he had yet to take full instructions but was able to say that the removal of the jurisdiction issue, at least, was unlikely to be opposed. It was agreed that the Authority would determine the removal application on papers and a timetable was agreed for the lodging of the application and response and for submissions from both parties.

[9] After some slippage with the timetable, I have now received all the papers. The applicant seeks the removal of all of the proceedings lodged on 3 April, while the respondent, as foreshadowed, opposes the removal of the substantive issues relating to access and to communications but supports the removal of the issue relating to the Authority's power to grant injunctive relief in this case.

[10] The application for removal is made upon the grounds set out in Section 178 (2) (a) namely that there are important questions of law which are likely to arise in the proceedings other than incidentally. These are identified as follows:

> i. "*Is the question of access to a workplace during strike action within the exclusive jurisdiction of the Employment Court?*
>
> ii. *If not, does the Employment Relations Authority have jurisdiction to issue an interim injunction to require the Respondent(s) to provide the Applicant with access to a workplace?*
>
> …
>
> iii. *Is a condition of an individual's entry to an airport security area of a workplace, such as a requirement to be escorted by an authorised person, when imposed by Aviation Security Services (Avsec) under delegated authority from Civil Aviation Authority a requirement of the kind contemplated by s 21 (2)(c)(ii) of the Employment Relations Act?*
>
> iv. *Has the Respondent acted in breach of s20 by unlawfully refusing to allow access by refusing or failing to provide the union representatives with an escort to enable them to have access to the workplace?*
>
> v. *If not, is Zeal 320 Limited obliged to take positive steps to facilitate the union representatives access to the workplace by requesting Air New Zealand Limited as the airline operator to provide an escort for the union representative."*

[11] In addition it is argued for the applicant that the grounds set out in s.178 (2) (b) are also made out. The union says that because it is involved in bargaining and in

strike action at present this matter is of such a nature and of such urgency that it should be removed immediately to the Court.

[12] Finally Ms McInally notes that it *"would not be efficient to refer any one or all of the above questions to the Court while leaving the Authority seized of the jurisdiction to then determine the substantive issues."*

[13] For the respondent, Mr Caisley has submitted that there is only one important question of law to be addressed and that is whether the Authority has power to issue interim injunctions, and

"that question should be addressed and resolved, either by the Authority in the first instance, or preferably by:

a. Removal of that part of the case to the Employment Court pursuant to s178 of the Employment Relations Act 2000; or

b. Referral of a suitable question of law to the Employment Court pursuant to s177 of the Employment Relations Act 2000."

[14] Mr Caisley goes on to argue that the removal of the whole case will prevent the question of law relating to the Authority's jurisdiction from being resolved since it will not arise if the Employment Court is seised of the whole matter.

Determination

[15] I am satisfied that an important question of law arises in relation to the Authority's jurisdiction to grant injunctive relief. My reasons are as follows.

[16] In *Credit Consultants Debt Services v Wilson (No 2*[1]*)* a full bench of the Employment Court considered the question whether the Employment Relations Authority can grant injunctive orders. After revisiting the obiter dicta statements made on this issue in *Axiom Rolle PRP Valuations Services Limited v Kapadia*[2] and

[1] [2007] ERNZ 205
[2] [2006] 1 ERNZ 639

reviewing the effect of s 162 of the Employment Relations Act the full bench concluded at paragraph [46]:

"We find that as an injunction is a form of relief which may be granted in order to preserve rights under a contract, it is a rule of law relating to contracts.

[47] We conclude therefore that by expressly conferring on the Authority the power to make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts, the Authority is empowered to grant injunctions both under rules of law relating to contracts and under enactments."

[17] And in its final paragraph, the decision summarises its conclusions as follows:

"Having regard to the meaning of the words of s.162, the case law of its predecessor s 104 (1) (h) of the Employment Contracts Act, its legislative history, and the scheme of the Employment Relations Act 2000, we have concluded that the words in s 162 mean that the Employment Relations Authority has the power to grant interlocutory, interim and permanent injunctions in cases before it within its jurisdiction as conferred by s 161."

[18] What is not expressly clarified by *Credit Consultants* (because it was not an issue in that case) is whether the Authority has the power to grant interlocutory, interim and permanent injunctions in cases which are not brought within the jurisdiction conferred by s 161.

[19] This leaves to be settled the question whether the Authority may grant injunctive relief in relation to a breach of a statutory provision such as section 20 of the Employment Relations Act 2000. I consider this to be an important question of law and not one which is incidental to the matter.

[20] For completeness I note also that the original statement of problem does not plead the basis for the union's submission that there are important questions of law associated with the substance of the access issue. I have consequently been unable to reach a conclusion on that point.

[21] I accept however that it is more efficient for the substance of the access issue and the associated jurisdictional issue to be removed together, especially given that the matter has been granted urgency. As it is, slippage in the timetable for submissions has already, unfortunately, delayed the removal of the matter to the Court. As for the respondent's point that the jurisdictional question may not be addressed by the Court once it is seised of the substantive matters as to access, I consider that a matter for the Court.

[22] I note finally that I continue in the preliminary view, expressed to the representatives in the telephone conference, that the "direct communications" issue can and should be addressed separately, and does not require urgency. That part of the original proceedings remains in the Authority.

[23] **The union's claims for relief in respect of alleged breaches of s.20 of the Employment Relations Act are removed to the Court pursuant to section 178 (2) (a) and (b).**

Yvonne Oldfield
Member of the Employment Relations Authority