

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 363/09
5142038

BETWEEN NATIONAL DISTRIBUTION
UNION INCORPORATED
First Applicant

KATHLEEN HEIHEI, VIVIAN
MACDONALD, JOHNNY
SNELL, DENNIS O'NEIL,
SILE AHOLELEI, LOIS
KURRY
Second Applicants

AND THE WAREHOUSE LIMITED
First Respondent

THE WAREHOUSE
PEOPLES' UNION
INCORPORATED
Second Respondent

Member of Authority: Dzintra King

Representatives: Peter Cranney, Counsel for Applicants
Penny Swarbrick, Counsel for First Respondent
Carl Reaich, Counsel for Second Respondent

Investigation Meeting: On the papers

Determination: 13 October 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination deals with two interrelated issues: the first relates to standing and the second relates to *res judicata*. The first and second respondents, The Warehouse Limited (“the Warehouse” or “the company”) and The Warehouse Peoples’ Union Inc (“the WPU”) say that the first applicant, the National Distribution Union Incorporated (“the NDU”), does not have standing to bring the proceedings.

They also submit that the Authority's determination, *NDU v The Warehouse Ltd*, 12/8/2208, M Ulrich (member) AA288/08 is correct, should be followed and there is no reason to make a contrary decision on the same point. In that determination, the Authority found that the NDU did not have standing: that was the sole issue determined.

[2] The Authority said:

It is not apparent that this employment relationship relates to or arises out of an employment relationship between the parties to these proceedings. The employment relationship arises out of or relates to the employment relationship between members of the applicant union and the respondent.

[3] In para.[20] of the determination, the Authority stated:

As discussed with the parties during the teleconference call this issue could be resolved by the application being brought by affected worker parties.

[4] The NDU is a registered union representing workers in the retail industry and distribution centres. The NDU has approximately 150 members employed in distribution centres operated by the first respondent. A number of those workers were members of the second respondent, the WPU, at the time that the WPU, the Warehouse Cellars Ltd and the Warehouse negotiated a collective employment agreement ("the WPU CEA"). The NDU and the Warehouse have subsequently entered a separate collective employment agreement ("the NDU CEA"). That agreement was settled on 30 June 2008.

[5] The NDU and the second applicants, who are members of the NDU and employees of The Warehouse, and were previously members of the WPU when the WPU CEA (which is due to expire on 31 July 2010) was negotiated, say that the WPU CEA was not lawfully entered and is therefore not binding or enforceable. Whether or not the WPU CEA is lawful and therefore binding on its affected members has a direct bearing on the application of the NDU CEA to people who were WPU members at the time of negotiation and subsequently resigned and joined the NDU.

[6] The first and second respondents say that the WPU CEA was lawfully entered and is enforceable and that the NDU does not have standing to challenge the lawfulness or enforceability of the agreement.

[7] The respondents say the NDU is estopped from bring proceedings relating to the WPU CEA because the current proceedings are subject to the principles of the doctrine of *res judicata* which are set out in *New Zealand Building Trades Union v. New Zealand Federated Furniture etc IUOW* [1991] 1 ERNZ 331. In that matter, the Court relined on the elements set out in para.19 of Spencer Bower & Turner, 2nd ed, 1969 which are as follows:

- (1) That the alleged judicial decision was what in law is deemed as such;
- (2) That the particular judicial decision relied upon was in fact pronounced as alleged;
- (3) That the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
- (4) That the judicial decision was final;
- (5) That the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
- (6) That the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive *in rem*.

[8] The propositions regarding *res judicata* were adopted by *Shiels v. Blakeley* [1986] 2 NZLR 262 (CA) which is one of the leading decisions in New Zealand on issue estoppel and the doctrine of *res judicata*.

[9] The first four propositions are easily satisfied. However, there is an assertion that the current cause of action is not identical. Furthermore, the WPU claims that the second applicants are privies of the NDU and are therefore barred from pursuing this issue.

[10] On 30 June 2008, the NDU and the company signed a new CEA which was not referred to or pleaded in AA288/08. It is pleaded and relied upon here. The new CEA provided in an attached memorandum:

The Warehouse Limited does not agree that this collective employment agreement will cover employees who are or were

covered by the Warehouse Peoples' Union/Warehouse collective employment agreement dated 1 August 2007 by virtue of their membership of The Warehouse Peoples' Union. Both The Warehouse Limited and the National Distribution Union have agreed that the negotiation of this collective employment agreement proceeded on the basis that this dispute is yet to be resolved and has been referred to the Employment Relations Authority.

[11] The parties were in disagreement about which members of the NDU it covered, as specifically identified in this agreement and the mode of resolving it was set out in the CEA, being proceedings in the Employment Relations Authority. The NDU says that had the Authority in the earlier proceeding known about that clause, it is doubtful that it would have found that the NDU was not entitled to argue or advance its case in the Authority. Both parties had agreed and anticipated that the issue would be argued by them in the Authority. The clause is a recognition by both the company and the NDU that that would occur and that they expected it to occur.

[12] In light of the clause the NDU says it is not appropriate for the company to now argue that the NDU cannot advance this case and should be prevented from doing so by way of an interlocutory order. The Authority should form its own view as to standing and should not accept the *res judicata* argument. The Authority is entitled and obliged to consider the matter anew and to make its own decision.

[13] The memorandum sets out that the matter of concern (coverage of NDU members who were previously WPU members) has been referred to the Authority. While this memorandum does not appear to have been put before the Authority in the earlier proceedings it is difficult to see why that was the case. Submissions were received by the Authority on 19 June and 16 and 23 July. The NDU CEA was signed on 30 June.

[14] The Authority was aware of the matter referred to in the memorandum because it had the proceedings before it. It was dealing with the dispute referred to in the memorandum.

[15] Although the current Statement of Problem is worded somewhat differently from the Statement of Problem filed in the earlier proceedings both sets of proceedings are fundamentally about the purported invalidity of the WPU CEA and the impact of that (if correct) on the NDU CEA.

[16] I accept the submission that the NDU is estopped from contesting the issue of its standing again.

[17] The WPU says the second applicants are also estopped from bringing this claim because they were, at all material times, privy to the NDU in the previous proceedings by virtue of having interests in the same matter. That is, the second applicants were members of the first applicant at all material times and were bound by any decision affecting their employment to which the first applicant was a party. The interests of the second applicants are co-extensive with those of the first applicant. The second applicants cannot somehow choose not to be bound by a decision affecting them that involves the first applicant because it does not suit them.

[18] The WPU submits that the key point is that the Authority finally resolved the issues advanced by the first applicant in its capacity as a union representing its members. Those same members cannot now purport to advance the same issues in their personal capacity as a means of avoiding an unhelpful determination. Such a selective and inconsistent approach would call into question the finality of any Court or Authority decision involving a union. Otherwise, what would stop another group of NDU members, unhappy with the Authority's determination on the present application, from purporting to make another application on the same points?

[19] In support of those submissions, the second respondent relied on *Shiels v. Blakeley* (supra) at p.268, wherein Somers J, in relation to the issue of privies, stated the following:

We conclude that there must be shown such a union or nexus, such a community or mutuality of interest, such an identity between a party to the first proceeding and the person claiming to be estopped in the subsequent proceeding, that to estop the latter will produce a fair and just result having regard to the purposes of the doctrine of estoppel and its effect on the party estopped.

[20] Parties and their privies are estopped from denying not merely the formal result of the judgment but also the grounds upon which the judgment was based. The term "privy" is a rough equivalent for those claiming through the original parties. Privies can be either in title (lessor and lessee or vendor and purchaser), in blood (ancestor and heir) or in interest, for example, testator and executor or intestate and administrator.

[21] The NDU and its members do have common interests. However, the nature of those common interests, the legislative provisions and the basis for the earlier decision all need to be taken into account.

[22] Section 5 of the Employment Relations Act 2000 defines an employment relationship problem as being:

A personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment

[23] Section 4 (2) sets out what constitutes an employment relationship. The Authority found that there was no employment relationship between the NDU and any of the respondents and therefore it had no standing and the Authority had no jurisdiction.

[24] A plaintiff will have standing if it can demonstrate a sufficient interest in the matter at hand. The second applicants have an interest in having the applicability of the WPU CEA to them clarified. The second applicants have an employment relationship with the Warehouse: they are employees: s 4 (2) (a).

[25] Section 120 provides that a person bound by, or party to, an employment agreement may pursue a dispute about the interpretation, application or operation of an employment agreement. The issue for the second applicants is whether they are bound by the WPU or the NDU agreement. They have a clear interest in having that matter determined. Section 129 gives a separate right to contest applicability of an agreement to parties and persons bound by agreements. The interest of the NDU is a collective interest; that of the individual members is an individual interest.

[26] The second applicants are not privies of the NDU.

Costs

[27] If the parties are unable to resolve the issue of costs the applicants should file a memorandum within 28 days of the date of the date of this determination. The respondents should file a memorandum in reply within 14 days of receipt of the applicants' memorandum.

Dzintra King
Member of the Employment Relations Authority