

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 60/09
5140458

BETWEEN

NZ AMALGAMATED
ENGINEERING, PRINTING
AND MANUFACTURING
UNION
First Applicant

TEO FUDAKOWSKI,
RHONDDA KING, ALICIA
MORGAN AND ANN
HURRING
Second Applicants

AND

TELSTRA CLEAR LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Tony Wilton for the Applicant
Daniel Erickson for the Respondent

Investigation Meeting: 7 April 2009 at Wellington

Determination: 12 May 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant union, the EPMU, wants a penalty to be awarded against the respondent, TelstraClear, for failing to allow all of its members who wanted to attend a union meeting on 11 August 2008. It also seeks payment to the four second respondents of two hours pay, which was deducted from them for attending the meeting.

[2] TelstraClear defends the claim on the basis that it was not given 14 days notice of the meeting, that the EPMU failed to make arrangements to ensure that TelstraClear's business was maintained, and that it also failed to be responsive and

communicative by refusing to discuss TelstraClear's requirements for ensuring the maintenance of the business and the continuation of its operations.

The Facts

[3] The EPMU, as it is entitled by law, arranged a series of regional meetings of the union in and around August 2008. The Wellington region meeting was to be held in Petone on 11 August 2008. The union has 151 members who work for TelstraClear, less than 10% of its total full time equivalent staff. However, at the Kapiti Contact Centre in question, the union had 65 members out of a total staff of 89. The Contact Centre, as its name implies, is there to answer queries from customers.

[4] Subject to meeting its obligations to TelstraClear under the Act, the union would be entitled to insist that TelstraClear allowed every union member to attend the meeting. In actual fact TelstraClear only allowed five members to attend the meeting and the other four, who did attend, are those named as second respondents.

[5] It is accepted that if a determination is made in the EPMU's favour then the four second respondents will be entitled to two hours pay.

[6] There is some history between the parties about how the union has been asked to contact TelstraClear in matters relating to it. In particular, Ms Jenny Judd, the Manager of Employee Relations for TelstraClear, emailed Mr Glen Mitchell, the EPMU National Education Administrator responsible for sending out union education leave applications and notifications to employers about union meetings, on 14 February 2008, asking him to amend the union's records so that all written correspondence be sent directly to her. For obvious reasons human resources personnel wished to be informed of interactions with the EPMU directly and as soon as possible.

[7] On 11 July Mr Mitchell was responsible for sending out the notice of the union meeting to TelstraClear in relation to the Kapiti Contact Centre. It was, however, one of more than 4,000 letters to cover 25 union meetings. That is why letters were sent to specific sites in relation to large companies. TelstraClear, for instance, has at least three offices in different places where the EPMU has members.

[8] The letter was addressed to: The Manager, TelstraClear Limited, Contact Centre, Kapiti, 43 Ihakara Street, Paraparaumu, the physical address of the centre. I

accept that the first time this letter came to attention of somebody in TelstraClear who recognised its significance was on 31 July, when it was read by Ms Nicola Kyle, a Human Resources Consultant based in TelstraClear's Wellington office. No one in TelstraClear or the EPMU was able to shed light on what happened to the letter between 11 and 31 July, although Mr Mitchell, as a former "postie", speculated that given the knowledge that "posties" have of business on their runs, it may have been redirected to TelstraClear's Wellington post office box address.

[9] The Manager at the Contact Centre was Ms Rachel Comerford, whose title is Group Manager, although there are 13 other workers at that site with the title Manager. When contacted by Ms Kyle, Ms Comerford was concerned that the planned staff numbers on that day, before any loss of staff to a union meeting, would barely provide effective service to customers. A reduction of 12 people from capacity means that the average wait time would increase from next to nothing to over ten minutes, for instance.

[10] Ms Comerford also made Ms Kyle aware that there were likely to be greater problems than usual on 11 August because the likelihood of illness at that time of the year is greater than usual, the call demand on a Monday is high, and the fact that there had been a number of storms meant that there were ongoing issues for telephone and internet services to clients. TelstraClear is in the business of providing customers service and I accept that delays in answering customers inquiries would negatively affect its business, particularly as it is a telecommunications company and as such could be expected to provide a good call centre service to its clients.

[11] Ms Kyle made the point about weather conditions and Monday being a busy day in her email to Mr Thomas Webster, the relevant EPMU organiser, on 6 August. TelstraClear was of the view that because the Union needed to make arrangements to ensure its operations would continue *we can put in alternative arrangements and sustain operations as normal for two hours if we have five members attend the meeting.*

[12] Mr Webster took advice from his delegates and responded stating that Monday is a particularly quiet day of the week because maximum staff are in attendance. He also noted that for a previous union meeting a full bus load of union members attended and TelstraClear coped with that. He noted that 23 members wanted to

attend the meeting and that the remaining staff should be sufficient to enable TelstraClear to continue its operation for that period.

[13] The next day Ms Kyle responded, noting that 14 days notice had not been given. She stated that because of this, the illness issue and the reasons already given, only five members could be allowed to attend. Mr Webster was encouraged to speak to Ms Comerford directly about the matter.

[14] Mr Webster responded stating that he believed the letter had arrived at the postal address in time and that given that less than half of the EPMU members intended to attend the stop work meeting 23 was more than a reasonable solution. However, he indicated a willingness to negotiate over that number.

[15] Ms Kyle responded stating:

To continue as if there was no union meeting going on would be by having all staff at work, to have the business continue would be releasing 5 people.

[16] Ms Kyle noted again the importance of ensuring that TelstraClear is responsive to its customers and noted that on even the last working day before the meeting TelstraClear's grade of service to customers was particularly low. She concluded by asking Mr Webster to tell Ms Comerford the names of the 5 people who would be attending.

[17] In actual fact nine members of the Kapiti Contact Centre attended the meeting. Only five were paid.

[18] As it turned out, although there were not as many calls as expected, because of the absence of nine additional staff the grade of service for that date was the lowest for the whole of August. What that meant was that only 16% of all calls were answered within 60 seconds instead of the month's average of 27%. The percentage of calls abandoned was 18%, compared to an average for the month of 14%. Clearly therefore the absence of the 9 employees had an impact on customer service levels provided by TelstraClear that day, although neither measure was close to the internal standards Telstra Clear set.

The Law

[19] Section 26 provides:

26. *Union meetings*

- (1) *An employer must allow every union member employed by the employer to attend-*
 - (a) *at least 1 union meeting (of a maximum of 2 hours' duration) in the calendar year 2000; and*
 - (b) *at least 2 union meetings (each of a maximum of 2 hours' duration) in each calendar year after the calendar year 2000.*
- (2) *The union must give the employer at least 14 days' notice of the date and time of any union meeting to which subsection (1) applies.*
- (3) *The union must make such arrangements with the employer as may be necessary to ensure that the employer's business is maintained during any union meeting to which subsection (1) applies, including, where appropriate, an arrangement for sufficient union members to remain available during the meeting to enable the employer's operations to continue.*
- (4) *Work must resume as soon as practicable after the meeting, but the employer is not obliged to pay any union member for a period longer than 2 hours in respect of any meeting.*
- (5) *An employer must allow a union member employed by the employer to attend a union meeting under subsection (1) on ordinary pay to the extent that the employee would otherwise be working for the employer during the meeting.*
- (6) *For the purposes of subsection (5), the union must:*
 - (a) *supply to the employer a list of members who attended the union meeting; and*
 - (b) *advise the employer of the duration of the meeting.*
- (7) *Every employer who fails to allow a union member to attend a union meeting in accordance with this section is liable to a penalty imposed by the Authority.*

[20] Section 26 has been interpreted in *Greenlea Premier Meats Limited v. NZ Meat & Related Trade Union Inc.* (No.2) [2006] 1 ERNZ 549. It was held at para.[43] – [58] that:

- [43] *I conclude that s.26 is intended principally to benefit unions and their members who are employees. There is no*

countervailing statutory provision that benefits employers as in some parts of the Act. It is inherent in the section that, depending upon the percentage of union coverage in a workplace, a union's entitlements under the section will be at some cost (including financial) to the employer. That is the price Parliament has considered should be borne by employers to promote the collective organisation of employees in workplaces...

- [45] *Because, as in this case, union meetings in work time may not be welcomed by employers, the section gives unions the ability to trigger its operation by giving a period of minimum notice to an employer of the holding of a meeting. The date and time for that meeting is not something the employer can object to if the union fulfils the notice requirements. However, unions' roles are also to assist employers by imposing other obligations upon unions.*
- [46] *A union must make arrangements with the employer. These are to be arrangements with the employer as are necessary to ensure that the business is maintained during the union meeting that has been notified. So long as the union makes an arrangement for the maintenance of the business (but that such an arrangement does not impinge upon the entitlement of the union to have its members attend the meeting), it has discharged its obligations under the section. The employer is entitled to have input into the arrangements but cannot resist the union's and the employees' statutory entitlement to meet during normal working hours and on pay.*
- [47] *The section provides one instance of an arrangement although this is exemplary and non-exhaustive. Where the circumstances, including the nature of the business, are appropriate, such an "arrangement" may be for sufficient union members to remain available during the meeting to enable the employer's operations to continue. The notion of remaining available connotes that the employees will be at the meeting and able to participate in it except to the extent that unforeseen or unavoidable circumstances may require them to leave the meeting to enable the employer's operations to continue.*
- [48] *Consistent with the scheme of the legislation to promote cooperation through communications, s.26 both places an initial onus on the union to make these arrangements referred to in subs (3) but also on both parties, during the notice period, to discuss and establish a suitable arrangement that will both allow employees to attend the meeting during normal working hours and on pay, and will also ensure that the employer's business is maintained during that period.*
- [49] *Although s.26 places an onus on the union to "make" arrangements for business maintenance, this is not a unilateral obligation that can be discharged simply by the union making plans and presenting these to the employer. "Arrangements" connote mutuality and cooperation and these are concepts so prevalent in the spirit of the legislation*

that it is irresistible that they must apply also to s.26. A union is required to initiate the making of arrangements.

The most difficult question in this case (and generally) is to determine what Parliament meant by maintaining an employer's business during the meeting.

[51] *"Maintain" means, among other things, "to continue" and "to preserve unimpaired". "Impair" is itself defined as "to make worse, less valuable, or weaker" and "to lessen injuriously". "Operations" include "action, performance, work" and "a particular form or kind of activity".*

[52] *Section 26 is not intended to be cost-neutral for employers. Although a union's obligations to make arrangements to maintain the business may, logically, minimise the loss to the employer, the reality behind the section is that, at the least, there will be employees paid to be at meetings who are not productive units during that time. The statutory emphasis is on the maintenance of the employer's business, not upon the elimination or even minimisation of financial loss although those two aspects of workplaces and businesses cannot be separated entirely and neatly...*

[56] *It was common ground in this case, and would be so in many other employment situations, that a 2-hour stopwork meeting of a significant number of the employer's workforce without other arrangements being made might disable the employer's operations for at least the duration of that meeting, that is, will not enable the employer's operations to continue...*

[58] *The primary obligation under s.26(3) is to make such arrangements as may be necessary to ensure that the employer's business is maintained during the meeting. Enabling operations to continue is one part of one example of the sorts of arrangements that may have to be made to maintain the business during the meeting. The variables that go into whether an employee availability arrangement will be "appropriate" include the nature of the business or enterprise, the number of union members at the meeting compared to the numbers of employees not attending, and the importance of the work to be done by those attending the meeting.*

The Issues

[21] The issues for determination are:

- whether TelstraClear was given at least 14 days notice of the date and time of the meeting;
- whether the EPMU made such arrangements with TelstraClear as may be necessary to ensure that TelstraClear's business was maintained during the

meeting, including an arrangement that sufficient union members remained available during the meeting to enable TelstraClear's operations to continue; and

- if the first two conditions are met, whether TelstraClear should be penalised pursuant to s.26(7).

Determination

[22] A matter of fact to be determined, on the balance of probabilities, is whether the EPMU gave TelstraClear at least 14 days notice of the date and time of the union meeting. There is no doubt that the letter giving notice was posted in plenty of time, and that it was sent to the correct physical address of the Contact Centre. While I accept that the EPMU should have sent the letter direct to Ms Kyle or Ms Judd, that is not a requirement of s.26 and addressing it to The Manager, Kapiti Contact Centre was not so confusing as to invalidate the notice.

[23] I accept that the notice had to have been received by TelstraClear at least 14 days in advance of the meeting for it to be effective. It was received by Ms Kyle 11 days before the meeting. If the letter had never been received by TelstraClear, the result of this case would be different.

[24] However, assessed objectively, I conclude that the letter had arrived somewhere in TelstraClear's internal mail system within time, rather than that it had been with NZ Post for 20 days. This is because it is more likely that the letter was within TelstraClear's internal mail system (involving Post Office box numbers and offices in Paraparaumu and Wellington at least) than otherwise. Furthermore, the fact that TelstraClear did not contact the union until 6 August, 6 days after Ms Kyle read the notice, is a factor consistent with the letter having been received by someone in TelstraClear 14 days before the meeting or earlier.

[25] The figures supplied by TelstraClear over grade of service and abandonment are not so fundamentally worse than its average daily performance levels in August as to demonstrate that the attendance of nine union members precluded TelstraClear's business from being maintained during the meeting, or that insufficient members remained available during the meeting to enable TelstraClear's operations to continue.

[26] Rather this was the sort of disruption that, while inconvenient, could not be said to have stopped TelstraClear maintaining its business. The union's actions in

leaving it up to individual union members to attend or not in the face of a ceiling of five members placed by TelstraClear, which resulted in nine members actually attending, shows not only that it had not failed to act in good faith, but is also evidence of it making arrangements to ensure the business was maintained, and providing sufficient union members remaining available to enable those operations to continue.

[27] This overrides Mr Webster's previous failure on behalf of the EPMU to accept TelstraClear's views that operations could not continue with 23 members at the meeting. It is also worth noting that Mr Webster was prepared to be negotiable on the figure of 23.

[28] In conclusion, I accept that the union did not make any proposals at the time of the notice, as it could have. Given the fact that TelstraClear did not appear to have raised the issue of a constraint on numbers attending in the past, there was no reason for it to do so. Once the union was on notice of a problem, however, it was for the parties to discuss and establish a suitable arrangement. Here Mr Webster did have a different view to TelstraClear, and he took advice from his delegates rather than Ms Comerford. The union was, however, negotiable, and did not insist on 23 members attending. In fact only 9 did. As established above, the resulting disruption was within the boundaries envisaged by the legislation. For these reasons I conclude that there is no breach of s.26 or the duties of good faith by the union.

Remedies

[29] It is accepted that the second respondents are entitled to be paid an additional two hours pay. Leave is reserved for additional submissions if that sum cannot be agreed.

[30] The union seeks penalties because TelstraClear misconceived its rights and took the view that it was up to it whether it chose to release staff or not, and that this was determined on whether normal business could be maintained. On the union's behalf Mr Wilton also noted that TelstraClear has a history of involvement with the union, including attempts to have its access to employees and members in work places restricted. I do not accept that TelstraClear taking a dispute to the Authority over the interpretation of union access rights constitutes a basis for imposing a penalty on TelstraClear in another case.

[31] The question is whether, given that TelstraClear's actions have been found to be in breach of s.26, it should be penalised for those actions. I accept that TelstraClear was of the honest view that the union had not given it proper notice. If those grounds were correct it could have refused to allow any union members to attend the meeting, but it never attempted to do so. Given the uncertainty over the notice, the genuine business concerns TelstraClear had about maintaining services, its agreement to allow five union members to attend the meeting and the lack of case law on this section, I conclude that no penalty is appropriate. Rather this matter should hopefully be a valuable learning exercise for all concerned.

Costs

[32] Costs are reserved.

G J Wood
Member of the Employment Relations Authority