

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 121/09  
5142142

BETWEEN                      NZ DAIRY WORKERS  
   UNION  
   Applicant

AND                              FONTERRA CO-OPERATIVE  
   GROUP LIMITED  
   Respondent

Member of Authority:        Yvonne Oldfield

Representatives:             Helen White for Applicant  
   Sally Beard for Respondent

Investigation Meeting:      21 January 2009

Submissions received:      30 January 2009 from Applicant and Respondent

Determination:                16 April 2009

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**DETERMINATION OF THE AUTHORITY**

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## **Employment Relationship Problem**

[1] This problem concerns the application of the bargaining fee clause in the *Fonterra Dairy Workers Collective Agreement 2007-2008* (CEA).<sup>1</sup> The specific question for determination is how long non-members of the applicant are obliged to pay a bargaining fee. Clause 14.5.2 of the CEA provides:

***14.5.1 “Subject to the secret ballot of members of the union and other workers within the coverage clause of this Agreement as prescribed by Section 69Q of the Employment Relations Amendment Act 2004, workers who are not members of the union shall pay to the union a bargaining fee of 0.5% (50c per \$1000)”***

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<sup>1</sup> Fonterra Limited was initially cited as first respondent however all parties were agreed that Fonterra Co-operative Group Limited was the correct respondent. By agreement, Fonterra Limited has been removed as a party.

*of gross taxable earnings that are earned during the term of the Collective Agreement.”*

(Emphasis added.)

[2] The term of the CEA is set out in Clause 2.6 as follows:

**“2.6 Term**

*This Collective agreement shall come into force on 1 September 2007 and shall continue in force until 30 September 2008.”*

[3] On or about 6 August 2008 the applicant (the union) initiated bargaining for a new CEA. Negotiations began soon after. At their outset the parties agreed in principle that whenever a settlement might be concluded, it would be backdated to 1 October 2008. On 1 October, the respondent (Fonterra) ceased deducting bargaining fees from the wages of non-members. The union responded to this action in correspondence to Fonterra dated 9 October 2008 as follows:

*“Fonterra are in breach of clause 14.5 of the Collective Agreement. It is understood that Fonterra ceased to collect the bargaining fee on or about 30 September 2008. While the term of the Collective Agreement is expressed at clause 2.6 as expiring on that date the effect of s53(1) if the Employment Relations Act 2000 is to continue the Collective Agreement for a period not exceeding twelve months while bargaining continues.”*

[4] Fonterra replied the same day, saying:

*“Clause 14.5 of the CEA provides for deductions of a bargaining fee for employees whose work is covered by the CEA, based on gross taxable earnings during the term of the CEA. The term of the CEA is 1 September 2007 to 30 September 2008... Under section 69V a bargaining clause expires when the collective agreement containing that clause expires. Section 69V does not refer to s53 or to the initiation of bargaining for a new agreement, and employees who are not members of the union are not party to such bargaining...it is our view that the continued deductions of monies from the*

*wages of non-union employees after the expiry date under clause 2.3 would be a violation of the Wages Protection Act 1983.”*

[5] On 6 November 2008 the union lodged this problem in the Authority, seeking *“the First Respondent’s urgent compliance with clause 14.5 of the Fonterra Dairy Workers Collective Agreement 2007-2008 and recovery of all loss caused by breach of that clause.”* The request for urgency arose out of a concern on the union’s part that if not resolved, the dispute relating to clause 14.5 would jeopardise negotiations for the new collective agreement.

[6] As it turned out, bargaining was progressed swiftly and on 12 November 2008 the parties reached a settlement. Consistent with that agreement, it was expressed to be for a three year term commencing on 1 October 2008. The request for urgency was withdrawn and the parties agreed that any claims either might have for recovery<sup>2</sup> would be suspended until the Authority had determined the respondent’s obligations pursuant to the 2007 -2008 CEA and to the provisions of the Employment Relations Amendment Act 2004.

[7] This determination therefore deals with only one element of the relief sought: a declaration about the duration of the respondent’s obligation to deduct the bargaining fee.

## **Argument**

[8] Set out in full, clause 14.5 of the CEA provides:

### ***“14.5 Bargaining Fee***

*14.5.2 This clause shall apply only to workers whose work is covered by the coverage clause of this Collective Agreement who are not or do not become members of the Dairy Workers Union.*

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<sup>2</sup> In its Statement in Reply, Fonterra noted that it had come to the view that it had, in the past, deducted bargaining fees unlawfully and signalled its intention to seek to recover those monies on behalf of the affected employees.

***14.5.3 Subject to the secret ballot of members of the union and other workers within the coverage clause of this Agreement as prescribed by Section 69Q of the Employment Relations Amendment Act 2004, workers who are not members of the union shall pay to the union a bargaining fee of 0.5% (50c per \$1000) of gross taxable earnings that are earned during the term of the Collective Agreement.***

*14.5.4 The terms and conditions of employment of those workers required to pay the bargaining fee will comprise the terms and conditions of employment specified in the Collective Agreement.*

*14.5.5 The Company shall deduct the bargaining fee from the worker's wages or salary and remit it, along with a schedule of such deduction, to the union at quarterly intervals or at lesser intervals by agreement of the parties.*

*14.5.6 At the conclusion of the ballot specified by s69Q of the Employment Relations Amendment Act 2004, a worker who does not wish to pay the bargaining fee must notify the Company in writing within 21 calendar days or two pay days whichever is the lesser.*

*14.5.7 For those workers who are on leave of any description at the time of the ballot, the clause above will not apply. Instead on return from leave if one of these workers does not wish to pay the bargaining fee, they must notify the Company in writing within 21 calendar days or two pay days whichever is the lesser.*

*14.5.8 Such workers terms and conditions will remain the same until such time as varied by agreement.”*

(Emphasis added.)

[9] The provisions of the CEA operate within a statutory framework provided by sections 52 and 53 and Part 6B of the Employment Relations Act 2000. Section 69Q provides that bargaining fee provisions take effect once agreed by the employer and by the majority of all employees (union members and non-members) whereupon non-

members become obliged to pay fees unless they have opted out of receiving the terms and conditions in the CEA (s69R, s69S, s69T, s69V.)

[10] Section 69R provides:

1. *“if a bargaining fee clause is agreed to in a secret ballot, the employer must provide the employees referred to in section 69S(a) to (c) with a copy of the collective agreement that contains the bargaining fee clause and notify them in writing that-*

*a. their terms and conditions of employment will comprise the terms and conditions of employment specified in the collective agreement (including the obligation to pay a bargaining fee) on and from the later of the following:*

*i. the expiry of the period referred to in paragraph (c); or*

*ii. the date on which the collective agreement comes into force; and*

*b. ...*

*c. if an employee does not wish to pay the bargaining fee, the employee must notify the employer in writing within the period specified in the collective agreement for that purpose ...”*

[11] Section 69V provides:

*“Expiry of bargaining fee clause:*

*A bargaining fee clause expires when the collective agreement that contains the clause expires.”*

[12] Section 52 provides:

*“When collective agreement comes into force and expires...*

(3) *A collective agreement expires on the close of the earliest of the following dates:*

- a. the date specified in the agreement as the date on which the agreement expires;*
- b. the date on which an event occurs, being an event that is specified by the agreement as an event on the occurrence of which the agreement expires;*
- c. the date that is the third anniversary of the agreement coming into force.*

(4) *Subsection (3) applies subject to section 53.”*

[13] Section 53 provides:

*“Continuation of collective agreement after specified expiry date*

*(1) A collective agreement that would otherwise expire as provided in section 52(3) continues in force-*

- a. if subsection (2) is complied with; and*
- b. for the period specified in subsection (3).*

*(2) This subsection is complied with if the union initiated collective bargaining before the collective agreement expired...*

*(3) The period is the period (not exceeding 12 months) during which bargaining continues for a collective agreement to replace the collective agreement that has expired.”*

[14] So, once bargaining is initiated, the expired collective agreement continues in force for the period during which bargaining continues for a collective agreement to replace it (or for 12 months, whichever is the lesser.)

[15] The union says that in these circumstances, the term of the agreement is until the conclusion of bargaining, which it says is upon ratification of the replacement CEA (with any agreement to backdate the benefits of the new agreement making no difference to this.)

[16] In its submissions, Fonterra referred me to Brookers' Employment Law Online commentary on s69 where it is suggested:

*“Although s53 provides for the “continuation” of an expired collective agreement when bargaining for a new agreement is initiated, it might be argued that the specific expiry provided for in this section is not so overridden and the bargaining clause continued, as this section contains no reference to s53 or to the initiation of collective bargaining for the purpose of replacing the old collective agreement.”*

[17] Fonterra says that the union's argument that the bargaining fee provisions remain in force until bargaining for the new CEA is completed is untenable on a plain construction of the words of both the new CEA and the Act. Fonterra argues:

*“an employee's obligations to pay the bargaining fee arise under statute and the individual terms of each employment agreement, which are based on the CEA as at the time that the bargaining fee provisions are agreed. Accordingly any references to the “term of the CEA” in relation to the bargaining fee (whether in the CEA or the Act) must refer to the term agreed in the CEA itself, not in any subsequent variation or extension.”*

[18] The respondent noted that continuation of bargaining fee deductions after the express expiry of the CEA would mean that the union derived a benefit from failing to conclude negotiations. It noted that unlike union members (who can cease membership and payment of fees at any time) fee-paying non-members are bound to pay a fee determined by the term of the CEA.

[19] In any event, the respondent says that if the term for which the bargaining fee is payable is not that specified in clause 2.6, it cannot in this case be later than 30 September by virtue of the new CEA retrospectively coming into force on 1 October 2009. The respondent noted that clause 2.5.1 of the new CEA provides:

*“This Collective Agreement supersedes all previous collective contracts and agreements between the [Respondent] (or its predecessors) and the [Applicant], including all variations to such contracts or agreements.”*

[20] While the new clause 2.6 provides:

*“This Collective Agreement shall come into force on 1 October 2008 and shall continue in force until 30 September 2011.”*

[21] Thus, the respondent says, the only bargaining fee arrangement between the parties in force from 1 October 2008 was the bargaining fee arrangement for the new CEA, and:

*“Under s69R(1)(a) the bargaining fee obligations in respect of the new CEA did not take effect until the expiry of the period during which employees could opt out of the arrangement. Due to delays in the ratification process this period ended on or about 23 January 2009. Thus under the CEA no deduction obligations arose for the period 1 October 2008 to 23 January 2009.”*

[22] In relation to the situation after 30 September the union argued:

*“The time for negotiation of alternative terms by non-members is at the time of opting out... the Respondent’s interpretation of the law would lead to an unnecessarily complicated situation. If the respondent is right then it raises a question as to what the terms and conditions of such employees are [in] the period from 30 September 2008 and whether the non-member and the respondent were expected to negotiate individually during this time...”*

*The application of the end of the obligation to pay a bargaining fee at the same point in time as the replacement agreement commences provides for a simple commonsense process...”*

### **Determination**

[23] Consideration of what initially appeared to be a relatively narrow issue for determination has given rise to a number of related questions. In addition to the points recorded here already, the respondent’s written submissions reiterated some points which were canvassed by the representatives at the investigation meeting. I accept the following, which I consider form a part of the relevant background:

- i. non-members who pay a bargaining fee become entitled to the terms and conditions in the CEA, but do not become parties to it;
- ii. each non-member who pays a bargaining fee remains on an individual employment agreement (IEA);
- iii. the terms of each such IEA are unchanged by the subsequent expiry of the CEA or the ratification of any new CEA;
- iv. thereafter those terms continue in effect unless varied by express agreement between the individual worker and the employer or until the process in Part 6B of the Act is followed in respect of a new CEA, and
- v. it is of no benefit to fee-paying non-members that the CEA continues in force since their terms and conditions of employment remain enforceable in any event.

[24] In this case, non-members who shared in the fruits of the union's bargaining efforts were to pay a sum (0.5% of gross earnings for the term of the CEA) in consideration of the service the union had rendered. They did not receive full benefits of union membership and when the time came for the agreement to be re-negotiated, they did not participate in that process unless they chose to take up union membership.

[25] If any subsequent CEA were to include a bargaining provision agreed in a secret ballot, non-members who again chose not to opt out would be required to pay a further bargaining fee as set out in the new bargaining fee clause. This is what in fact did happen, with the new bargaining fee clause being in the same form as the previous one which obliged non-members to pay (and employers to deduct) "*a bargaining fee of 0.5% (50c per \$1000) of gross taxable earnings that are earned during the term of the Collective Agreement.*" Non-members who again chose not to opt out would be required to pay a bargaining fee for the term of the new agreement as they had for that of the *Fonterra Dairy Workers Collective Agreement 2007-2008*.

[26] The respondent's argument is that "the term" of the agreement is as set out in the agreement, and that section 53 effectively provides that the agreement remains in force beyond its original term (as opposed to changing or extending that term.) I

accept this argument. It is consistent with the plain meaning of the word “term” which is “*a limited, usually specified period*”<sup>3</sup> or “*a period for which something lasts or is intended to last.*”<sup>4</sup>

[27] As follows from the points I have noted in paragraph [22], I do not accept the union’s position that “*the time for negotiation of alternative terms by non-members is at the time of opting out...*” Non-members are free to negotiate alternative terms at any stage (clause 14.5.7.)

[28] However I do accept the assertion (also vigorously promoted by the union) that where a new agreement has been backdated to the date on which the old was expressed to expire there should be no shortfall in fees from non-members who again choose not to opt out. I find no basis for, and reject, the respondent’s assertion that no deduction obligations arose for the period 1 October 2008 to 23 January 2009. My reasons are as follows.

[29] I consider that the issue has been confused by the representatives’ focus on the deduction of weekly instalments and on the question when the obligation to deduct those instalments ended. Clause 14.5 requires non-members to pay “*a...fee*” calculated with reference to total earnings during the term of the CEA. I consider this to be a fixed payment, albeit one that can be made in instalments.<sup>5</sup> The total amount to be paid is not increased by the operation of s.53, nor decreased by the operation of s. 69R (should the term be expressed to begin at a date prior to ratification.)

[30] Construing the clause in the way I have means that fee payment of non-members who have again chosen not to opt out will be seamless (as the union says it should be.) It also means (as the respondent says) that when the expressed term of one collective has run its course, non-members cease to pay anything further unless a replacement is concluded and they choose not to opt out of it.

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<sup>3</sup> Pocket Oxford Dictionary

<sup>4</sup> Concise Oxford Dictionary

<sup>5</sup> I was told that many of these individuals do pay in a lump sum when they take up the terms of the CEA; others pay through deductions at intervals.

[31] All this is consistent with the bargaining fee being essentially a fee for services provided (and quite different in nature to a membership fee.) Non-members do not become liable to pay anything in relation to the negotiation of a new CEA until they decide not to opt out of it. When they do become liable however, that fee will be calculated from the day the CEA is expressed to come into force.

[32] As I have indicated earlier, what appeared to be a narrow issue became increasingly complicated as the representatives explored it. It may well have lent itself to being removed to the Court or to being referred there as a point of law. However, the parties opted to seek a determination from the Authority. In these circumstances, I note that the outcome of this case is very much dependent on its own facts, in particular the wording of the bargaining fee clause.

### **Costs**

[33] The issue of costs is reserved pending advice from the parties as to their intentions regarding the outstanding aspects of the original employment relationship problem.

Yvonne Oldfield

Member of the Employment Relations Authority