

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 98/10

File Number: 5284495

BETWEEN NZ Amalgamated Engineering
 Printing & Manufacturing
 Union Inc
 Applicant

AND Steelfort Engineering Company
 Limited
 Respondent

Member of Authority: Denis Asher

Representatives: Greg Lloyd for the Union
 Peter Smith for the Company

Investigation Meeting Palmerston North, 15 April 2010

Submissions Received By 22 April 2010

Determination: 14 May 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] The applicant (the Union) says the respondent (the Company) is in breach of its obligations under ss 4, 32 (1) (e) and 34 (3) of the Employment Relations Act 2000 (the Act). In particular, in the context of bargaining for a collective employment

agreement, the Company continues to refuse the Union's request that it provide financial information in respect of its zero percent wage increase offer to Union members.

[2] The Company says the information sought is neither reasonably necessary nor relevant and it therefore has no obligation to provide it.

The Investigation

[3] During a telephone conference call on 27 January 2010 the parties agreed to a one-day investigation in Palmerston North on 15 April. Timelines for the provision of witness statements were also put in place. During the investigation timelines were also agreed for closing, written submissions.

Background

[4] The relevant facts are not in dispute:

[5] The Union represents 5 employees employed by the Company.

[6] Union members' terms and conditions are contained in a collective agreement the term of which was 1 April 2008 to 31 March 2009.

[7] The Union initiated bargaining for a new collective agreement on 9 February 2009.

[8] During the course of subsequent bargaining between the parties the Company advised it was not in a position to make any wage increases to union members (refer to document C attached to the statement of problem).

[9] On 30 July the Union wrote to the Company and sought access to financial information to support its zero percent wage increase offer. The request was made pursuant to ss 32 (1) (e) and 34 (2) of the Act.

[10] By letter dated 17 August the Company declined the request; an offer at the same time that an independent Union reviewer scrutinise its books was withdrawn shortly afterward.

[11] Despite an exchange of correspondence and mediation the parties' respective positions remained unchanged.

Summary of the Union's Position

[12] The Union relies on the relevant statutory provisions, in particular ss 4 and 32 of the Act:

4 *Parties to employment relationship to deal with each other in good faith*

The parties to an employment relationship ... -

(a) *must deal with each other in good faith*

(1A) *The duty of good faith ...*

...

(b) *requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;*

...

(4) *The duty of good faith ... applies to ...:*

(a) *bargaining for a collective agreement ...*

32 *Good faith in bargaining for a collective agreement*

(1) *The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do at least the following things:*

...

(e) *The union and employer must provide to each other, on request and in accordance with section 34, information that is reasonably*

necessary to support or substantiate claims or response to claims made for the purposes of bargaining.

[13] Section 34 of the Act specifically deals with the provision of confidential information and sets out a detailed process that must be complied with, including the use of an independent reviewer. The Company therefore cannot rely on confidentiality to justify not providing the information.

[14] This matter turns primarily on the meaning of s 32 (1) (e) in that the information requested must be “*reasonably necessary*” to support or substantiate claims or responses to claims. The specific claim of the Company was that it was not prepared to make any offer of a wage increase. It gave various reasons, some of which were relevant, some of which were not (e.g. that it was a closely held family company).

[15] As with most employment relationship problems this matter turns on its own facts. The Authority has rarely been called upon to consider these provisions of the Act. In this instance the information sought by the Union is to substantiate a claim by the Company that it will not provide a wage increase position broadly based on financial constraints. The constraints claimed by the Company (refer to its letter of 21 April 2009) include the ability to absorb and recover any increased costs, the effect (of any pay increase) on sales and revenues, pay roll increases of 22.5% over the past five years and a decline in sales and potential profit following the loss of an identified franchise. These claims related to the Company’s financial position and can only be substantiated by an examination of that position.

[16] The Union notes the Company’s position for not providing the requested information has changed over time and it now claims it can afford a wage increase but chooses not to grant one. The Company cannot resile from its stated position for not providing a wage increase simply because it is inconvenient to comply with its statutory obligations. The Union is entitled to rely on the representations made by the Company as being accurate and truthful.

[17] The applicant seeks a declaration that the Company has acted in breach of its good faith obligations by failing to provide the information sought to substantiate its

offer of a zero percent wage increase to Union members. The applicant also seeks a compliance order pursuant to s. 137 of the Act requiring the Company to comply with its good faith obligations and provide the information requested by the Union on July 30 2009.

[18] The Union does not resile from its position that the Company's breach of its good faith obligations was serious and sustained but, having regard to the circumstances and reserving its position should this matter proceed to the Employment Court, no longer pursues this remedy at this point.

Summary of the Company's Position

[19] Because of my finding in favour of the Company, it is unnecessary for me to summarise their position which I now adopt and adapt as my determination.

Findings

[20] I agree with the Union's submission that, as with most employment relationship problems, this matter turns on its own facts. For that reason I do not see any applicable precedent in the few Authority determinations that have sanctioned Union requests for certain information.

[21] During the Authority's investigation the Company's representatives reiterated what they said was always the respondent's position, that it can afford a pay increase but for various reasons is electing not to offer any increase.

[22] I accept the Company's claim that its communication to staff advising it was not offering any pay increase for 2009 (doc C, attachment to statement of problem) does not say it was unable to pay any increase but that it was choosing – for the reasons cited – not to. As its witness, Mr Christopher Keenan makes clear at par 3 of his witness statement,

The Respondent is not claiming financial hardship in this letter and accordingly we believe that no obligation exists to supply financial information to justify (its) position.

[23] I do not find evidence in another communication, an email from Mr Keenan to the Union organiser (attachment D to the statement of problem) of it sending a different message. The phrase, “*There is no room for upwards movement on wages this year ...*” does not amount to the Company plainly saying it could not afford a pay increase. What is clear is that, when pressed to clarify its position, the Company has clearly answered, in the words of the Italian playwright, Dario Fo: “*Can’t pay? Won’t pay!*”

[24] In other words, and for those reasons set out in its letter 21 April 2009, namely difficult trading conditions, the loss of a franchise, a decline in sales and the increase to its payroll costs (claims I do not understand the Union to be challenging), and not because of an inability to pay, the Company declines the Union’s offer to provide its members with a pay increase. It is, as Mr Smith makes clear at par 20.4 of his closing submission, “... *a preference in allocating resources*”.

[25] Sub-section 32 (1) (e) requires the provision of information that is, “... *reasonably necessary to support or substantiate claims or responses to claims made for the purposes of bargaining*”.

[26] Because I accept the Company’s response that the Union’s wage claim would not break it, that it can afford to pay but prefers to allocate its resources elsewhere, I refuse the Union’s application on the grounds that the information sought is not necessary or relevant to support or substantiate the Company’s response to the applicant’s claim made for the purposes of bargaining.

Determination

[39] The application is dismissed.

[40] As requested, costs are reserved.

Denis Asher

Member of the Employment Relations Authority