IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 174/10
5311242

	BETWEEN	HOUSING NEW ZEALAND CORPORATION Applicant
	AND	PUBLIC SERVICE ASSOCIATION INC Respondent

Member of Authority:	P R Stapp
Representatives:	Peter Cranney, Counsel for the Applicant Susan Hornsby-Geluk, Counsel for the Respondent
Investigation Meeting:	4 August 2010 at Wellington
Determination:	29 October 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Housing New Zealand Corporation (HNZC) and the Public Service Association Inc Te Pukenga Tikanga Mahi (PSA) have been involved in collective bargaining to renew a collective agreement. The parties have a bargaining process agreement dated 19 August 2009 (BPA), which has an addendum dated 23/24 November 2009 (bundle Doc. 4 and 9).

[2] The parties have not been able to reach an agreement on the renewal of the collective agreement. They last met on 14 June 2010 with the assistance of a mediator.

[3] HNZC has claimed that the PSA has breached good faith under the Employment Relations Act (the Act) with an email sent to members on 18 June 2010 (Doc.18).

[4] Further, HNZC has claimed that the PSA has breached the Act with its conduct in regard to a communication on 25 June 2010 that was not in accordance with the BPA.

[5] Next HNZC says the PSA issued a press release on 30 June that was misleading and inaccurate as to its content and information.

[6] Finally, HNZC claims that the PSA has undermined bargaining in breach of s.32(1)(d)(iii) of the Act by issuing the 18, 25 and 30 June communications it claims were misleading and deceptive.

[7] The PSA has denied the claims.

The issues

[8] The issues in this employment relationship problem relate to allegations that have to do with alleged breaches by the PSA of its duty to act in good faith and not to do anything that is misleading and deceptive under the Act. HNZC has relied on s.4 (1) (a) and s.4 (1) (b) of the Employment Relations Act.

[9] Simply put the HNZC position is that there is conduct permitted under s.4 but that this may be constrained by s.32 of the Act and that there is conduct prevented by s.32, that cannot be permitted by s.4.

[10] Section 32 (1) (d) (iii) reads as follows:

> *Section 32 - Undermining the bargaining*
>
> *32. Good faith and bargaining for collective agreement.*
>
> *(1) The duty of good faith in s.4 requires a Union and an employer bargaining for a collective agreement to do, at least, the following things:*
>
> *(d) The Union and the employer - …*
>
> *(iii) must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining; and …*

[11] Section 5 provides a definition of bargaining:

> ***Bargaining,*** *in relation to bargaining for a collective agreement, -*

> *(a) means all the interactions between the parties to the bargaining that relate to the bargaining; and*
> *(b) includes –*
>
> > *(i) negotiations that relate to the bargaining; and*
> > *(ii) communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining.*

[12] Section 4 of the Act requires:

> *4.* ***Parties to employment relationship to deal with each other in good faith***
>
> *(1). The parties to an employment relationship specified in sub-section (2)-*
>
> > *(a) must deal with each other in good faith; and*
> > *(b) without limiting paragraph .(a), must not, whether directly or indirectly, do anything-*
> >
> > > *(i) to mislead or deceive each other; or*
> > > *(ii) that is likely to mislead or deceive each other.*

[13] Section 4 also provides:

> *(1A) The duty of good faith in sub-section (1)-*
>
> …
>
> *(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; …*

[14] The relevant clauses in the BPA agreed between the parties read as follows:

> *27. Both parties may communicate with other directly interested parties, including employees who would be covered by the intended collective agreement, about matters relating to the bargaining, during the bargaining, provided that such communications does not undermine the bargaining or the role and authority of the other in bargaining, or otherwise breach the requirements of good faith.*
>
> *28. Both parties agree that joint communications may be prepared from time to time to report on the progress of bargaining to their respective constituents and/or other directly interested persons or agencies. Where it is agreed between the parties to issue a joint statement, the content of*

that joint statement will be agreed and signed off by both parties.

29. Where either party wishes to prepare a separate communication that party will provide the other with a copy of the draft communication and allow a reasonable opportunity for comment prior to finalisation and circulation. The party issuing the communication must take into account any feedback provided by the other in good faith but will not be obliged to amend the intended communication.

30. Clause 28(sic) shall not apply to communications between the PSA bargaining team and PSA officer holders including the National Secretary, and the HNZC bargaining team and HNZC office holders, including the Chief Executive and the senior leadership team and managers (excluding any PSA members). Such communications shall remain confidential to the individual parties.

31. Communications must be accurate and must not undermine the bargaining process, or the role and authority of the other in the bargaining.

32. It is agreed that the parties will focus their attention on negotiating with each other directly. PSA and HNZC agree to communicate directly with each other in the first instance on bargaining issues and will invite any written comments from each other on draft media statements prior to making any press release.

[15] The addendum to the BPA stated that:

It is agreed that the following terms will apply to the bargaining between HNZC and the PSA, by way of an addendum to the bargaining process agreement signed and dated 19 August 2009.

1. At the conclusion of each bargaining session, the parties will formulate a joint communication to provide a summary on the progress of negotiations.

2. Joint communications shall highlight the areas where progress has been made, and shall provide a fair and accurate account.

3. All communications issued by either party shall be provided to the other for comment. Where feedback is provided which is not accepted by the other party, that party shall provide an explanation of the reasons why that feedback has not been accepted.

4. A reasonable period of time shall be allowed for providing feedback. As a guide 24 hours shall generally be regarded as a reasonable period.

5. When there remains disagreement as the content of an intended communication, Basil [Prestidge] and Phillipa

> *[Jones] shall discuss the areas of disagreement with a view to resolving the issue, before the communication is distributed except where it is impracticable for such a discussion to take place within a timely manner, and there are genuine reasons why the communication needs to be issued with urgency.*

[16] Do the communications referred to by HNZC breach s 4 and 32 of the Act?

The facts

[17] On 18 June the PSA issued a communication to its members (the first breach claim). This was a newsletter (HNZC 4). A copy of it was sent by Cheryl Reynolds, PSA Organiser, to Connie Nicholson-Port, HNZC HR Manager after it had been sent to PSA members. Ms Nicholson-Port says that HNZC had no opportunity to comment on a draft of the communication and there were concerns that it was misleading and inaccurate. HNZC says that the newsletter's misleading and inaccurate aspects include:

a. That the PSA stated that the HNZC offer would benefit fewer than 20% of members when HNZC had provided commercially sensitive information that showed around 80% of employees would receive a salary increase of at least 2% in 2010.

b. That a $500 lump sum payment would be offered to all employees, not just PSA members. The communication stated that PSA members would have to give up claims around pay, the management of change, the redundancy cap and hours of work in return for the payment. HNZC says the PSA implied that non-PSA members would not have to give up anything to get the same benefit. The HNZC says it had not determined how the payment would apply and to whom. Subsequently HNZC decided it would not extend the benefit to non members and the PSA's statement did not include this offer.

c. On the management of change the PSA's communication stated that HNZC's proposal remained the same when there had been an update and alternative wording to the management of change provision proposed. HNZC says that its proposal represented a significant compromise that was ignored by the PSA.

d. The PSA stated that HNZC offered to increase the cap on redundancy from 20 to 26 weeks and for those on around $40,000 redundancy would amount to less than is currently available. HNZC says that there was no mention made to the fact that the entitlements of all existing members would be grand parented.

e. The PSA's statement on hours of work referred to HNZC proposing a change to hours and requiring employees to attend work outside their normal hours to attend training or team meetings. However, HNZC says that there had been an offer to withdraw it and that was not included by the PSA.

f. The statement also alleged that the HNZC proposed to take away the shift allowance, tea breaks and defined 40 hour week and to remove the requirement to consult on rosters in the national call centre. The HNZC says it withdrew those claims on 28 May 2010 and that the current clauses would remain unchanged.

[18] Ms Reynolds has a different point of view about the communication's content and stands by the opinions and statements expressed in that communication.

[19] HNZC wrote to the PSA on 18 June with a complaint that the PSA had breached the BPA, but did not receive a reply, although there was correspondence on the same date from the PSA expressing concern about HNZC's communications to senior managers and to HNZC's non PSA employees. Ms Reynolds says that the alleged breaches occurred after the HNZC purported to announce that bargaining had ended. HNZC has denied that it communicated in any way that bargaining had ended, except to say that this reflected an impasse being reached (23 & 25 June letters).

[20] Also, the PSA claims that its communication was sent in response to two communications issued by HNZC. The first was a bargaining update for senior managers dated 16 June. HNZC says this was specifically excluded from the communications provisions of the BPA (clause 30). Secondly, on 17 June an HNZC email was sent to non-PSA employees. HNZC says this is also excluded from the communications provisions under the BPA. The PSA also denied and responded to each of the points being raised by HNZC.

[21] On 23 June HNZC wrote to the PSA and enclosed a copy of a draft communication the corporation intended to send to PSA members. HNZC provided the PSA with 24 hours to respond under the BPA. Following consultation the HNZC decided to remove a statement contained in that draft, and then sent it to all PSA members. Five minutes later Ms Nicholson-Port received an email from Cheryl Reynolds with a copy of a PSA newsletter sent on 25 June in response to the corporation's earlier communication. This was the first notification that the PSA was even considering another newsletter. The HNZC's concern was with a comment about a copy of a 2003 OECD report with information being selectively used by the PSA.

[22] HNZC has criticised the PSA's newsletter in regard to the following matters:

a. That the PSA had not argued for two pay systems when its pay claim seeks two pay systems: one for union members and the other for non union members.

b. That the PSA's claims seek an across the board increase for all employees, prescribed salary ranges and contain fixed steps for progression to the midpoint based on performance; and that the HNZC's position has no guaranteed across the board increase, applies salary ranges to sit outside the collective agreement, has no prescribed steps and criteria to apply salary increases year to year.

c. That the PSA says that the HNZC pays 3 % below the market, which is denied by HNZC.

d. That the PSA says that the HNZC has not agreed to formalise a policy on redeployment, but HNZC has consistently adopted a practice of considering affected staff for redeployment where possible, and has offered to formalise this. The offer was made in June 2010 and wording was proposed, but no agreement had been reached.

[23] Again, Ms Reynolds stands by the statements and opinions expressed in the communication.

[24] On 30 June Cheryl Reynolds sent an email to Ms Nicholson-Port proposing to release a press statement in half an hour. Ms Nicholson–Port replied that it was not reasonable to provide feedback in that time. She however conveyed her intention to provide a substantive reply the next day. That afternoon she learnt that the press release had been issued publically. HNZC claimed that it was misleading, inaccurate and undermined bargaining because:

a. The press release referred to a 2% pay increase and this implied that that was the total amount, but did not refer to other proposed benefits.

b. The press release did not refer to HNZC's redundancy cap offer in commenting on the redundancy cap.

[25] Ms Reynolds stands by the statements and opinions expressed in the communication.

[26] Industrial action commenced on 30 June.

[27] The parties attended mediation on 15 July 2010 on the employment relationship problem filed in the Authority and this resulted in an amended statement of problem on the legal issues. A determination on the matters is now required from me.

Determination

[28] This is not about the enforcement of the BPA, but has to do with the parties' conduct under it in regard to s 4 and s 32 of the Act. The HNZC has claimed that the PSA's actions in regard to the three complaints are breaches of the Act, and it has claimed penalties, under the Act. Thus, I do not accept Mr Cranney's submission in regard to there being no jurisdiction to enforce the BPA, because that is not the respondent's focus on the alleged claims and penalties sought.

[29] Ms Reynolds' evidence that she believed bargaining to be at an end can be explained by HNZC's reference to it. That reference made by the HNZC about bargaining being at an end was in the context of an impasse, and has not been helpful, I hold. HNZC had indicated that the bargaining had come to an end, but has qualified that on the basis that there has been an impasse reached, and it refused to agree to

further bargaining dates. Both parties are apparently still engaging in a process that involves continuing discussions and communications (not challenged) and there are still claims between both parties and a collective agreement has not yet been settled. Therefore bargaining is hardly at an end. Anyway there are still other options available under the Act, for instance facilitation, before the parties can properly say that bargaining has ended.

[30] I cannot accept that the decision to send out the newsletter was reasonable as a response to the HNZC's communications to senior managers and non-PSA employees on individual employment agreements (16 and 17 June). This is because the BPA excluded senior managers and impliedly excluded non-PSA employees (clause 30). The latter exclusion has not been challenged. I accept Ms Nicholson-Port's explanation in her brief of evidence. The PSA has not adequately explained how these two documents caused such urgency to warrant the first newsletter being sent on 18 June without providing a reasonable period of 24 hours for feedback under the agreed process in the BPA addendum. The lack of any adequate explanation from the PSA includes any misunderstanding about the bargaining being at an end, I hold.

[31] In the meantime the PSA and HNZC were communicating by correspondence on their differences about the information in the two HNZC communications and an additional proposal from HNZC to communicate with PSA members (24 June). The PSA had a difference with HNZC in regard to the information in the HNZC draft proposal. Upon considering the reply from the PSA (24 June) and making an alteration to the draft, HNZC sent out its communication. I hold that this was an entirely separate action to the three claims relating to 18, 25 and 30 June communications.

[32] In the course of these communications a senior official from the PSA suggested to HNZC releasing his letter on points raised about the parties' positions on a number of issues when commenting on HNZC's draft communication. In retrospect this might have been a very sensible suggestion if there was any doubt about the parties' understanding of the issues and to convey each other's positions properly. However, a mutual release of correspondence does not appear to have happened. Also, I find that that official's role was not directly linked to the matters between HNZC and Ms Reynolds' involvement on explaining the communication of 18 June which had been sent before HNZC had the opportunity to provide any feedback.

[33] The PSA is required under the Act to act in good faith. It has breached the requirement to act in good faith under ss 4 (1) (a) and 4 (1) (b) of the Act, but the evidence does not extend to establish that it was intended to undermine the bargaining and the employment relationship under s 32, and in terms of s 4 A (b) (i) and s 4 A (b) (iii) of the Act for consideration of penalties. By issuing the communication on 18 June to its members without providing reasonable time for feedback under the BPA was a breach under s 4 (1) (a) of the Act. The allegation that the content was misleading and deceptive based on Ms Nicholson-Port's closely detailed analysis of the issues means that the communication did not convey the full position, and as such leads to the conclusion the content was misleading and deceptive. On the face of it both parties are in dispute about the content of the communication and the PSA stands by the opinions and statements expressed. Given the parties' positions this is at the very low end of the scale to be arguing over when there is a bigger picture to resolve on the bargaining. The evidence has not established that the PSA has undermined the bargaining.

[34] The differences over the content in the communication between Ms Nicholson-Port and Ms Reynold's highlights that the context of HNZC's offer to the PSA was not made clear by the PSA.

[35] The second PSA communication on 25 June was also a breach of good faith under the Act because the PSA did not follow the agreed process under the BPA.

[36] The PSA contacted HNZC within 5 minutes of the HNZC communication to PSA members being sent by HNZC.

[37] I find that the decision by the PSA to issue its second communication on 25 June was unreasonable given the process and timeframes under the BPA for feedback.

[38] Again, in regard to the content the PSA has left itself open to criticism that the content was misleading and deceptive given Ms Nicholson-Port's evidence. There is an issue about the level of the accuracy of the information.

[39] Furthermore, HNZC's claim that the PSA's actions undermined the bargaining is affected by the conflicting evidence where the PSA stands by its statements and opinions according to the thrust of Ms Reynold's evidence. The consequence of the PSA's action has been to cloud the employer's offer given the evidence from Ms Nicholson-Port and Ms Reynolds, however.

[40] Also, the PSA was not acting in good faith when it was on notice of the potential illegality of its actions involving the earlier communication, it had not responded, and went about repeating its actions without engaging HNZC properly to avoid this situation.

[41] The third matter related to the 30 June media release. The PSA breached good faith because it failed to follow the agreed process under the BPA.

[42] It was a perfunctory attempt to consult when Ms Reynolds sent a copy of the release that was going to be made in half an hour. The PSA was also being disingenuous when it was demanding HNZC follow a reasonable period under the BPA to consult. The HNZC had conveyed its wish to respond, and was not given the time it requested to do so, by the PSA. The failure of the PSA to respond and or reply, and then releasing its media release was a deliberate action contrary to the BPA, I hold. The time for providing feedback on communications under the BPA was at least 24 hours, and if the PSA wanted less time, it had a responsibility to engage HNZC for an agreement, and that did not occur here, I hold. In not complying and following the BPA the PSA has breached its obligation to act in good faith, I hold.

[43] Ms Nicholson-Porter has produced evidence that supports the content of the release to be inaccurate and misleading, which Ms Reynolds has not addressed satisfactorily, and although, I accept that she holds a different point of view on the matters.

[44] In the event that there is an issue as to a link to the PSA's members' meetings held for discussions and the bargaining, and what degree the three communications contributed to the decision to take industrial action, I allude to it only for completeness. There is no evidence to suggest any other wording in the communications would have averted that action and indeed whether or not that the action was decided based on these communications, I hold. In this regard the evidence does not establish that these communications if used in any meetings were used to undermine the bargaining.

Conclusion

[45] The PSA is in breach of s 4 (1) (a) and s 4 (1) (b) of the Employment Relations Act. The evidence does not support that the PSA's actions breached s 32

(1) (d) (iii) of the Act. The breaches of s 4 (1) (a) and s 4 (1) (b) of the Act relate to the PSA's communications dated 18, 25 and 30 June in regard to providing reasonable time for feedback and the inaccuracy of the content in each of the communications. There was intention displayed in the PSA's actions because of the timing of its actions and failure to follow reasonable timeframes and process under the BPA for feedback. I make the observation that where more time within the 24 hours has been requested by a party that should be accommodated by the other party unless agreement is reached on the time to provide feedback, I hold. Given HNZC's notice of illegality and request for time to respond, the PSA's action, can only be seen as deliberate, which I associate with the climate of the bargaining. In addition the breaches involved communications that were inaccurate misleading and selective, which is supported by Ms Nicholson-Porter's evidence. I conclude that the PSA's action has come about because of difficulties in the bargaining that relate to communicating the parties' positions properly and properly following the BPA. I further conclude that much greater care needs to be taken. There were the three communications made that means the PSA's actions were repeated. There is also an allegation that the PSA is allegedly continuing, since the filing of the proceedings, to act contrary to the BPA with communications on 20 July and 27 July. That is an entirely separate matter and I have put it to one side because they have not been put as causes of action on the claims put before me.

[46] The breaches on the three instances before me were fundamental, and could have a potentially grievous impact on the bargaining with HNZC given the extent of HNZC's complaints about the accuracy of the information and following the BPA if it was not for the different points of view genuinely held by Ms Reynolds. In addition any damage has been avoided with the finding that there was no attempt to undermine the bargaining in the actions that HNZC has complained about.

[47] I have considered the claim to apply penalties under s 4 A of the Act. I have described above the PSA's action as repeated, being deliberate, and with potentially grievous impact on the bargaining, but note that in these proceedings the action relates to three communications associated with different reasons for responses and where in the future the PSA will have to take greater care in its communications and processes. I have concluded that there is insufficient evidence to establish that the breaches were intended to undermine the bargaining and an employment relationship. I have decided not to apply a penalty because this litigation should assist both parties in

regard to their approach to communicating on the issues and to avoid the problems that have arisen and given rise to the employment relationship problem. Also, the problem with the communication is at the lower end of the scale and should able to be addressed by both parties. Also, there are apparently continuing efforts being made to bargain successfully that need to be encouraged. Issuing a penalty at this stage would, I conclude, not be helpful having regard to s 157 (2) (b) and s 157 (2) (c) of the Act.

[48] This is not a matter for a compliance order given the passage of time since the complaints were made, the continuing relationship between the parties and the resolution of the employment relationship problem based on the findings reached.

[49] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority