IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 206/10
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	BETWEEN	THE NEW ZEALAND DAIRY WORKERS' UNION Applicant
	A N D	WESTLAND CO-OPERATIVE DAIRY COMPANY LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Andrew McKenzie, Counsel for Applicant Garry Pollak, Counsel for Respondent
Investigation Meeting:	22 July 2010 at Hokitika
Date of Determination:	11 November 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant union (the Union) has a collective employment agreement (the Agreement) with the respondent employer (Westland). In terms of Part 6B of the Employment Relations Act 2000 (the Act), the agreement contains a bargaining fee clause. During the currency of the Agreement, several members of the Union resigned their membership but, for various periods, continued to be employed pursuant to the Agreement. Those employees have refused to consent to the deduction of a bargaining fee in accordance with the Agreement and Westland has refused to deduct that bargaining fee without the consent of the former members of the Union.

[2] The Union seeks a compliance order from the Authority requiring Westland to comply with s.69T(b) of the Act. Westland resists the Union's claim on the basis that,

whatever the statutory enactment, it is precluded from complying by reason of the refusal by the individual workers concerned to agree to the remitting of those fees back to the Union.

[3] The Authority's investigation meeting was helpful in clarifying the factual position and in clarifying the views of both parties as to the factual matrix. It is appropriate for the Authority to record that the parties to this employment relationship problem have had a long and relatively harmonious relationship and the nature of that relationship was amply demonstrated by the good faith and good humour in which the present problem was addressed before the Authority.

[4] The employment relationship problem had its genesis in a decision made by a number of tanker drivers employed by Westland and members of the Union, who decided, for various reasons, to resign their membership of the Union.

[5] Subsequently, those seven employees negotiated individual employment agreements and then committed to those new employment agreements. The seven employees then instructed Westland not to make deductions for bargaining agents' fees from their wages.

[6] Westland was written to by the Union on 3 September 2009 requesting that deductions be made and remitted for the bargaining agent fees in respect of each of the seven employees. Westland declined to oblige, on the footing that the affected employees did not consent to the deduction being made.

Issues

[7] It will be necessary for the Authority to consider the relevant law and then look at the applicable provision in the collective employment agreement, namely clause 41.2, which is the bargaining agent fee clause.

Part 6B of the Act

[8] Part 6B of the Act was passed into law in December 2004 and broadly it has the effect of abrogating the law derived from the case of *New Zealand Dairy Workers' Union v. New Zealand Milk Products Ltd* [2004] 1 ERNZ 376. In that decision, the Court of Appeal concluded that a bargaining fee provision in the employment

agreement in that case was caught by the Wages Protection Act 1983. The Court of Appeal concluded:

> *The scheme of the Wages Protection Act was that no deductions could have been made without an employee's written consent. It was not in accordance with that scheme for the requirement for consent to be overridden by a collective agreement that an employee could not have been seen to consent to in any way.*

[9] Part 6B of the Act then addresses that very prohibition. In effect, Part 6B seeks to deal with the issue of what has been loosely described within Australasian jurisprudence as the *freeloader* situation, that is, the situation where a worker obtains a benefit from the negotiations of a bargaining agent (including a union) but fails to contribute financially to the activities of that bargaining agent, notwithstanding that that worker has received a benefit from those activities.

[10] Part 6B of the Act comprises eight new sections which form a code dealing with the issue of bargaining fees, first by defining what a bargaining fee is, then by explaining how bargaining fees can be included in a collective employment agreement and finally dealing with the question of how such bargaining fees, where they are included in a collective employment agreement, are to be enforced.

[11] For our purposes, the two most important provisions are contained in s.69P and s.69T. For the avoidance of doubt, I now set out the definition of *bargaining fee clause* in s.69P:

> *Bargaining fee clause means a provision in a collective agreement that, subject to this Part, -*
>
> *(a) Applies to the employer's employees who are not members of a union and who perform work that comes within the coverage clause of the collective agreement; and*
>
> *(b) Specifies the amount of the bargaining fee; and*
>
> *(c) Requires those employees to pay a bargaining fee; and*
>
> *(d) Provides that those employees' terms and conditions of employment comprise the terms and conditions of employment specified in the collective agreement.*

[12] Also relevant for our purposes, as I mentioned, is s.69T which is the provision the Union relies upon to obtain the relief it seeks from the Authority. Section 69T reads as follows:

> *While a bargaining fee clause applies to an employee, -*
>
> *(a) The clause is binding on the employee and his or her employer; and*
>
> *(b) The employer must deduct the bargaining fee from the employee's wages and pay it to the union concerned.*

[13] For the sake of completeness, I also note that s.69W of the Act makes explicit that a bargaining fee clause, and anything done under it in accordance with Part 6B of the Act, is not in breach of, or inconsistent with, the Employment Relations Act and, critically, overrides the Wages Protection Act 1983. This supports the Authority's view that Part 6B of the Act is properly construed as a code in respect of bargaining and their application in collective employment agreements.

The relevant provision in the Agreement

[14] The relevant clause in the Agreement is clause 41.2 and I set this clause out in full:

> *This clause shall only apply to workers whose work is covered by the coverage clause of this collective agreement (CEA) who are not or do not become members of the union party to this agreement.*
>
> *Subject to the secret ballot of members of the union and other workers whose work is covered by the coverage clause of this agreement as prescribed by s.69Q of the Employment Relations Act (2004 Amendments), workers who are not members of the union shall pay to the union a bargaining fee of 0.5% (50c per $100) of gross taxable earnings that are earned during the term of the agreement.*
>
> *Workers who pay the bargaining fee shall be entitled to the terms and conditions of the CEA.*
>
> *The employer shall deduct the bargaining fee from the worker's wages or salary and remit it along with a schedule of such deductions to the union at fortnightly or monthly intervals.*
>
> *At the conclusion of the secret ballot specified by s.69 of the ERA, a worker who does not wish to pay the bargaining fee must notify the employer in writing within seven days that the worker does not wish to pay the bargaining fee. Such worker shall remain on the terms and conditions of employment which applies prior to the commencement of this agreement.*

[15] When this matter first came before the Authority, Westland argued that it was unable to accede to the Union's request because the bargaining agent fee clause in the Agreement could not override the individual employee's rights as provided for in the Wages Protection Act 1983: statement in reply clause 2, p.2, para.3. As the Union

makes clear in its submissions to the Authority, that proposition cannot be right. The effect of Part 6B of the Act (s.69W(b)) makes plain that a bargaining fee clause overrides the Wages Protection Act 1983. Westland accepted it was mistaken about that earlier view in submissions filed in respect of the Authority's investigation meeting, noting that clause 41.2 of the Agreement was accepted by Westland *as an exception or is permitted in terms of the Wages Protection Act*. However, Westland then goes on to contend that the actual terms of clause 41.2 of the Agreement do not comply with the statutory code (particularly the definition of a bargaining fee clause in s.69P) and therefore the clause in the Agreement is unenforceable.

[16] Unsurprisingly, the Union resists that proposition. Again, I conclude that I prefer the Union's argument on this point as well. In its submissions to the Authority, the Union's counsel goes through the definition provided in s.69P and identifies that each of the four elements of that definition are in fact present in the bargaining fee clause in the Agreement, albeit in different words.

[17] First, the clause provides that it only applies to workers whose work is covered by the coverage clause of the Agreement and who are not members of the Union. I am satisfied that that deals with s.69P(a) of the Act. The second paragraph of clause 41.2 of the Agreement specifies the bargaining fee and I am satisfied that that deals with subsection (b) of s.69P. The fourth paragraph of the clause in the Agreement requires the employees covered to pay a bargaining fee which deals with subparagraph (c) of s.69P. That leaves only the final subparagraph (d) of s.69P which is the subsection which, according to Westland, is not covered. Westland says in its submissions to the Authority:

> *… there is no correlation between s.69P(d) and the collective agreement.*

[18] I do not agree. I think the Union's submission on the point is correct when it maintains that the third paragraph of the bargaining agent fee clause in the Agreement deals with the requirements of subsection (d) of s.69P of the Act. The relevant paragraph reads as follows:

> *Workers who pay the bargaining fee shall be entitled to the terms and conditions of the CEA.*

[19] I am satisfied that the contractual term just set out provides for precisely what subsection (d) of s.69P requires, namely that employees covered by the relevant

clause and thus making the bargaining fee payment, get the benefit of the collective agreement. That is, of course, precisely what, to put it crudely, those employees are paying for. It may be that the use of the word *entitled* in the Agreement is capable of several meanings, but I am satisfied the appropriate meaning of the provision, taken in its totality, is to create compliance with s.69P of the Act.

[20] Where Westland's logic does stand up is in its contention that once employees not only cease their membership of the Union but also enter into alternative contractual arrangements (typically individual employment agreements) then the position must be that the bargaining fee clause can no longer apply. In that regard, I agree absolutely with Westland's submission that the crystallising point is not the employee's resignation from the Union but rather their entering into a definitive alternative employment agreement. Once that happens, I am satisfied that the employee is no longer caught by the provision at clause 41.2 of the Agreement.

[21] Westland also opines that if employees simply resigned from the Union but chose to not enter into a fresh employment agreement and rather derived their terms and conditions of employment from the collective agreement, according to law, those employees would continue to be obligated to make a bargaining fee payment precisely because they were still caught by the clause (specifically s.69P(d)) and in consequence were still deriving a benefit from the activity of the Union's negotiating.

[22] While in respect of the seven subject employees that the present employment relationship problem is concerned with, none of them are in the category just described, there are employees of Westland who have previously been members of the Union, have subsequently resigned their membership but continue to derive the terms and conditions of their employment from an individual employment agreement based exclusively on the terms of the collective agreement and are thus caught by the provision in s.69P and who continue to make the bargaining fee payment.

[23] It follows from the foregoing analysis that I am satisfied that in respect of the seven subject employees, the Union is entitled to receive a bargaining pro rated for the period from the date of the resignation from the Union and the date that each of those seven employees signed an individual employment agreement which was different in its terms from the collective employment agreement which the Union bargained for. The reason this conclusion follows is that during the period from the date of the resignation of the employee down to the date that the employee has signed a new

individual employment agreement, his terms and conditions of employment are derived exclusively from the terms of the collective agreement until those terms are subsequently varied by later agreement.

[24] That conclusion rather begs the question of the Union's second principal submission which is that the effect of s.69S of the Act is effectively to require that any employee is covered by the clause if they are within the coverage clause of the Agreement, and not a member of any union, have not advised the employer of their wish not to pay the bargaining fee and either is entitled to vote in the secret ballot or is employed immediately after the secret ballot was held but before the collective agreement came into force.

[25] In its analysis, the Union correctly identifies that each of those conditions is met by the seven affected employees and as a consequence contends that each of them is liable for the payment of the bargaining fee. But it seems to me that the Union 's logic is flawed. A correct interpretation of s.69S must read that section as being subject to the definition of *bargaining fee clause* contained in s.69P. The very fact that the two sections in question are part of a codified arrangement must give force to that conclusion. It cannot be the position that s.69S makes provisions in respect of the application of bargaining fee clauses which, on their face, do violence to the very definition of the provision *a bargaining fee clause.*

[26] In particular, the logical consequence of the Union's interpretation, in my judgment, is that if the work coverage clause in the Agreement applies, then all employees who are not members of the Union, broadly speaking, are caught by the bargaining fee provision. That seems to me to do violence to logic and commonsense when the essence of the definition in s.69P of bargaining fee clause is to marry together the terms and conditions of employment of employees caught by the clause to the terms and conditions contained in the collective agreement. Where plainly that is not the case, as is the position in respect of the seven affected employees from the date at which they signed Individual employment agreements which are different in structure, content and provision from the collective employment agreement, then it seems to me that the bargaining fee arrangement cannot apply.

[27] That argument is given additional force by the commonsense position that the whole purpose of the bargaining fee clause, as a matter of philosophy, is to prevent *freeloading*. On the Union's interpretation, reliance on s.69S, far from there being no

freeloading, in fact there would be no free choice at all because provided the coverage clause applied, every worker would be caught.

Determination

[28] Pursuant to s.69T of the Act, I direct that Westland and the subject employees[1] are to pay to the Union the pro rata bargaining fee payable to the Union for the period between the date of the resignation of that employee from the Union and the date that employee's individual employment agreement was signed.

Costs

[29] As the parties quite properly identify, this case is in the nature of a test case and as a consequence, in principle, this may well be the sort of matter where costs should lie where they fall. The Authority encourages the parties to discuss matters with respect to costs on that basis, but in the event that either party wishes to make application to the Authority for costs to be fixed, leave is reserved.

James Crichton
Member of the Employment Relations Authority

[1] The subject employees are David Clausen, union resignation 22 April 2009, individual employment agreement signed 23 April 2009; Ian Hibbs, union resignation, 29 August 2009, individual employment agreement signed 10 September 2009; Robert Lane, union resignation 28 August 2009, individual employment agreement signed 10 September 2009; Bryan Upchurch, union resignation 20 April 2009, individual employment agreement signed 22 April 2009; Christopher Roberts, union resignation 9 June 2008, individual employment agreement signed 10 July 2008; Tony Roughan, union resignation 25 September 2007, individual employment agreement signed 11 February 2008; Thomas Stenkaner, union resignation 5 October 2007, individual employment agreement signed 25 January 2008