IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 23
5321286

	BETWEEN	SERVICE & FOOD WORKERS UNION NGA RINGA TOTA INC Applicant
	AND	PACIFIC FLIGHT CATERING LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Simon Mitchell, counsel for Applicant Gerda Gorgner, advocate for Respondent
Investigation Meeting:	22 November 2010
Submissions Received	3 and 8 December 2010
Determination:	19 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem – breach of good faith

[1] The applicant Service & Food Workers' Union Nga Ringa Tota Inc (SFWU) lodged a statement of problem on 1 October 2010 seeking resolution by the Authority of a problem that had arisen from its relations with the respondent employer, Pacific Flight Catering Limited (PFC).

[2] The Union alleged that PFC had breached the obligation of good faith that attaches to parties during bargaining for a collective agreement. The breach was alleged to have been intended to undermine the bargaining.

[3] To resolve the problem the Union sought a declaration from the Authority that PFC had breached the obligation. It sought a compliance order requiring PFC to

observe the obligation and a penalty as the Employment Relations Act 2000 provides under the general good faith provisions in Part 1 at s 4.

[4] As the bargaining between the parties was continuing when the application was made, SFWU requested that the Authority investigate the matter urgently.

[5] PFC lodged a statement in reply on 6 October denying that it had breached any good faith obligation and rejecting the entitlement of the Union to any of the remedies sought against the employer.

[6] The degree of urgency in the matter was subsequently reduced after an undertaking was given by PFC to deal with SFWU and its members in good faith. PFC undertook not to:

> *1. (Directly or indirectly) bargain about matters relating to terms and conditions of employment with persons whom the applicant* [SFWU] *is acting for; and*
>
> *2. Undermine or do anything that is likely to undermine the bargaining or the authority of the applicant in the bargaining.*

[7] The undertaking was given on 4 October 2010 in writing signed by Ms Gerda Gorgner. She is PFC's Human Resources Manager and has been its advocate or representative during the Authority's investigation.

[8] Despite the undertaking SFWU has continued to seek an order of the Authority requiring PFC to comply with the statutory obligation of good faith for as long as bargaining continues.

Penalty claim

[9] Section 4A of the Act, under which the penalty claim has been brought, provides that a party to an employment relationship who fails to comply with the duty of good faith in s 4(1) is liable to a penalty if the failure was deliberate, serious and sustained, or if it was intended to undermine bargaining for a collective agreement. It is contended for SFWU that the general duty of good faith under s 4(1) draws in specific duties found at s 32 of the Act, which include those PFC is alleged to have breached.

[10] At the investigation meeting held on 22 November 2010, evidence for PFC was given by Ms Gorgner. Four witnesses gave evidence for SFWU, including Ms

Jill Ovens the Northern Regional Secretary of the Union, an SFWU organiser and two members of SFWU who are employed by PFC. Written submissions were received from counsel for the Union, Mr Mitchell, and from Ms Gorgner.

Bargaining for a collective agreement

[11] There is no dispute that SFWU initiated collective bargaining with PFC in April 2009. The Union sought to negotiate a collective agreement covering ground stewards and scullery employees who work for PFC in its flight catering business. Previous collective agreements had covered ground stewards but not scullery employees.

[12] There is no dispute that by mid 2010 the bargaining had become protracted. The parties accuse each other of being more responsible for that.

[13] The most recent bargaining meeting between the parties the Authority is aware of was shortly before the investigation meeting in November 2010, over 18 months after bargaining was initiated.

Notification of strikes

[14] Difficulties with bargaining and the speed at which it was being conducted reached their height in September 2010 following formal notification of intention to strike given by SFWU to PFC. Three notices were received by the employer. Of those one was subsequently withdrawn, a second given on 15 September notified a strike for 24 hours commencing 30 September, and a third given on 17 September notified a 24 hour strike commencing on 3 October 2010.

[15] The notices were expressed to be given by SFWU on behalf of its members covered by the collective bargaining initiated by the Union and who were employed at PFC's premises at and near Auckland International Airport. The nature of the strike was described as a total withdrawal of labour by SFWU members continuously over a 24 hour period.

[16] There is no dispute in this case about the legality of the strike notices or the strikes that occurred. Under s 83 of the Employment Relations Act 2000 the strikes were lawful, as they related to bargaining for a collective agreement intended to bind the employees participating in the strikes.

[17] PFC has presented itself to the Union and its employees involved in the strike, and to the Authority, as an employer that has at all times been fully aware of its employees' right to bargain and strike. Even so, PFC regarded the exercise of that right in the circumstances as being inappropriate or ill-advised, particularly because the strikes seemed timed to occur during a phase when PFC was tendering for work from major airline customers for the provision of flight catering to them.

[18] The timing of the strike action, if not the action itself, caused PFC to criticise the integrity of that action and to point to it as being short-sighted and possibly self-defeating in the event the tenders were lost because of reluctance by potential customers to deal with a supplier facing industrial action. Failure to win the work could reasonably be predicted to impact on PFC's business to the point of jeopardising the employment of its workers who carried out that work.

Conduct alleged in breach of good faith

[19] The Union's claim is that before and after notification of the strikes, and while bargaining was continuing, PFC conducted itself in a way that breached the obligation of good faith which applies under s 32 of the Act specifically to collective bargaining and under s 4 of the Act generally to all parties to any employment relationship.

[20] The employer's alleged unlawful conduct is stated to have included the questioning of several union members individually as to their reasons for belonging or continuing to belong to SFWU, the offering of incentives to members to either leave the Union or to encourage other members not to participate in the strikes, the intentional delaying of payment of wages due to striking employees, and the intimidation of them by requiring the return of their security cards and uniforms for the 24 hour period of each strike.

PFC's statement to union members

[21] Further allegedly unlawful conduct of PFC strongly relied on by the Union in its claim was the publication by the employer to SFWU members of a written statement about the bargaining being carried on. The Union claims that the statement, written by Ms Gorgner and dated 28 September 2010, which was only about a day before the strike of 30 September and about three days before the strike of 3 October, was in breach of the s 32 provisions of the Act that specifically relate to good faith in bargaining for a collective agreement.

[22] Those provisions include a requirement for both a union and an employer in collective bargaining to recognise the role and authority of any person chosen to be a representative (s 32(1)(d)(i)) and another requirement not to undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining (s 32(1)(d)(iii)). They are "core" requirements.

[23] There is no dispute that PFC's statement of 28 September 2010 was a direct communication to SFWU members as well as other employees of the company who were not union members. A copy of the statement was displayed on a noticeboard in PFC's workplace for all to read.

[24] In its statement of problem SFWU alleges that the contents of the written statement published on 28 September undermined, or were likely to undermine, the bargaining, and that they were intended to undermine the ability of the Union to conclude a collective agreement in bargaining. It is contended that the statement expressed or implied criticism of the SFWU over the way it had conducted bargaining.

[25] The statement must be read in its entirety and against the knowledge that SFWU members and other PFC employees had of relations between the Union and the employer, and also their knowledge of the tendering taking place through which PFC was seeking to obtain or renew important contracts with international airlines to provide employment for Union members.

[26] In relation to the strikes notified to occur on 30 September and 3 October, the 28 September statement said the following:

> *The risk of going ahead with the two days of strike on 30.9.10 and 3.10.10:*
>
> - *PFC does in no way dispute the right of all employees to bargain for a Union contract*
>
> - *PFC does not dispute the right to strike*
>
> - *We are saying that the timing of this strike, while we are awaiting the outcome of the most important tender we have been in for years, is ill timed and potentially can put everyone's employment at risk.*

[27] In relation to an earlier part of the statement dealing with the progress of collective bargaining, it is alleged PFC misrepresented the situation by painting a one-

sided picture without acknowledging its own responsibility for delays that had occurred since the bargaining had been initiated, some 17 or 18 months earlier.

[28] As well as the acknowledgment expressly given in the statement that SFWU members had the right to strike, it is another important fact that the statement itself was written and published only a few days after Ms Ovens had sent an email to Ms Gorgner, which included the following message:

> *Giving you the opportunity to present a statement to our members at the meeting is one of the issues between us in the BPA. However, I invite you to give me a draft of that statement and I will consider whether to present it or not. I remind you about constraints on the employer communicating with union members during negotiations and also the requirements that you do not undermine the union in any way.*

[29] At material times, a Bargaining Process Arrangement – a BPA - had not been concluded but PFC had sought provisions in a BPA that would allow communications directly with union member employees during bargaining. Other warnings against directly communicating with Union members had been given in writing to PFC by SFWU from the end of 2009. Ms Gorgner had expressly acknowledged to SFWU that a fair basis for that to occur needed to be negotiated first.

Section 4(3) of the Employment Relations Act

[30] In the absence of any arrangement or agreement enabling it to communicate directly with SFWU members, PFC has relied on s 4(3) of the Act as permitting that action. Section 4(3) allows the communication of:

> *… a statement of fact or of opinion reasonably held about an employer's business or a union's affairs.*

Direct communications – the law

[31] The relationship between the exemption at s 4(3) and the core requirements of at s 32(1)(d) of the Act was considered by the Court of Appeal in *Christchurch City Council v. Southern Local Government Officers' Union Inc* [2007] ERNZ 37. In its judgment the Court held that conduct in breach of s 32(1)(d) was not protected by or subject to s 4(3). Rather, s 4(3) was subject to s 32, the Court held. It observed at [30]:

> *… s 32 must … modify s 4 where there is a conflict between a specific provision in s 32 and a more generalised concept in s 4. In short, s 4*

> *continues to apply in a s 32 case to the extent it is not inconsistent with the specific provisions of s 32.*

[32] At [31] the Court held:

> *The general power to communicate conferred by s 4(3) must be constrained by the restriction in s 32(1)(d)(iii). The* "modification" *required to s 4(3) is something along the following lines:*
>
> > So long as, in a case of a union and an employer bargaining for a collective agreement, such communication does not amount to or lead to a breach of s 32(1).

[33] The Court rejected a submission that a communication coming within s 4(3) could not, by definition, undermine the bargaining process. It held that an employer's reasonably held opinion about the way the union was conducting the negotiations might very seriously undermine the bargaining and the union's status as representative of the employees.

[34] The Authority must therefore determine principally not whether PFC communicated statements of facts or opinions reasonably held about its business and/or the affairs of the SFWU with regard to progress in collective bargaining, but whether the communications recognised the role and authority of the SFWU to conclude a collective agreement and whether they undermined or were likely to undermine the bargaining or the authority of the Union.

[35] In considering the actions of PFC during bargaining I attach most weight to the interviews given to several members of the Union by Ms Gorgner about their reasons for belonging to the Union, and also the communications directly to them in writing about the proposed strike action and the possible consequences to their continuing employment.

[36] I consider that the removal of uniforms and security cards and the delayed payment of wages were linked to the other actions but were intended more to irritate the employees rather than induce them to leave the Union.

[37] In considering the evidence given for SFWU, including that of employees of the company, I note that Ms Gorgner elected not to question any of the witnesses who gave it. I found them to be reliable witnesses in the accounts they gave. Two employees said they were called upon by Ms Gorgner to explain why they had joined the Union. One in particular said that in about May or June 2010 he had been

required to go to her office where she had asked him a lot of questions. During the discussion Ms Gorgner had asked if he thought he was going to get money out of being part of the Union. When he replied that he was unsure she had retorted "no, you're just fucking me over." When he denied that that was his intention, Ms Gorgner had replied "well that's what you're doing by joining the union." I accept that in a later discussion with the same witness, Ms Gorgner had said that if he had not been in the Union she would have been able to negotiate a promotion with him but that because he was a Union member and had someone else to negotiate for him she could not do that.

[38] Another witness said he was asked to see Ms Gorgner and she had questioned him about his Union membership, reminding him of a loan of money the company had given him. Ms Gorgner, I also accept, mentioned that all ground steward members could have a loan of $1,000 if the strike was called off. I accept the evidence from the same witness that shortly before the strike notified to take place on 30 September 2010, he was called to see Ms Gorgner and asked by her to call off the strike. He replied that he had no power to do that.

[39] Ms Gorgner in her evidence confirmed that she had questioned, although not "quizzed," four or five members of SFWU about their reasons for joining the Union. She explained her motivation had been concern for their welfare, as she had wanted to know from them if there were any issues, other than the bargaining for a collective agreement, the company could address. That explanation is insincere. With her considerable experience Ms Gorgner must be taken to have known perfectly well that the employees had appointed the Union to be their representative in all matters concerning their welfare and interests in the employment relationship. If she had genuine concerns about the welfare of the employees in their employment relationship, the proper way, and the ideal way, was to take those up with the representative.

Matters relevant to good faith

[40] In deciding whether SFWU and PFC were dealing with each other in good faith, I have considered the matters and circumstances set out at s 32(3) and (4) of the Act. PFC has said it took advice about its actions and there was no lack of experience on the part of Ms Gorgner in the bargaining process and legal requirements of that.

[41] There was no basis for Ms Gorgner concluding that SFWU had misled or deceived its members in reaching the decision to strike, so that PFC was justified in communicating directly with members. The decision to strike was obviously the wrong decision as far as PFC as an employer was concerned, but that was no basis for challenging the genuineness or *bona fides* of the Union's involvement in trying to achieve its lawful objectives.

[42] If PFC was especially vulnerable because of the timing of the strikes, that was a matter it could have addressed by conducting bargaining with more speed to try and conclude it before the sensitive tendering phase began. In her evidence Ms Gorgner conceded that PFC had some responsibility for delays in bargaining.

[43] I consider there are no matters or circumstances under s 32(3) and (4) that when viewed with the conduct of PFC complained of by SFWU should lead the Authority to find that the employer was dealing in good faith with the Union when other circumstances point strongly to the contrary.

Determination

[44] Looking at the complained of conduct in its totality of the employer towards employees who were members of the SFWU, I find that conduct amounted to a breach of s 32(1)(d) of the Act. In particular, I find, that through its conduct PFC failed to recognise the role and authority of the SFWU as the representative of those members of the Union, as it was required to do by s 32(1)(d)(i), and I find that the employer acted in a way that was likely to undermine the bargaining for a collective agreement and undermine the authority of the SFWU in that bargaining, as it was required not to do by s 32(1)(d)(iii) of the Act.

[45] Questioning employees about their membership of the SFWU and communicating with them directly about strike action they intended taking, particularly during bargaining, cut across the role of the employees' representative, a union, and was likely to undermine the lawful strike action the union had given PFC notice of on behalf of its members. The employer's motives and intention can be reasonably inferred from its conduct.

[46] Evidence that such actions have undermined bargaining will usually be elusive, but it is enough to find a likelihood of that occurring.

[47] Applying the *Christchurch City Council* case referred to above, I find that the oral and written communications by PFC with members of the Union were not protected by s 4(3). In the circumstances of this case that general provision is inconsistent with the specific requirements of s 32(1)(d) and must be modified accordingly.

[48] As PFC by its actions breached core requirements of good faith in collective bargaining under Part 5 of the Act at s 32, the employer failed to deal in good faith with employees and the Union as parties to an employment relationship as required by s 4(1)(a) of the Act.

[49] It follows that a penalty may be imposed on PFC for its conduct if its failure under s 4(1) either was deliberate, serious and sustained, or was intended to undermine bargaining for a collective agreement. I am satisfied that PFC's conduct amounted to a breach in the latter respect. The intention to undermine bargaining can be reasonably inferred from the actions of PFC and the consequences of them PFC obviously hoped would follow.

[50] I am quite satisfied that by questioning SFWU members serially about their membership and by writing them her statement, Ms Gorgner intended to persuade employees that their interests would be better served by leaving the Union or by helping to avert the risk of strikes and possible adverse consequences of industrial action to PFC's business.

[51] In that respect I find that the questioning of the Union members was intended to undermine bargaining, especially if the members succumbed to persuasion and resigned from the Union, thereby reducing the strength of support for the Union in bargaining. PFC tried to persuade Union members not to use a lawful tactic of striking at a sensitive time so as to encourage the employer to address or respond favourably to the claims in bargaining.

[52] The written statement of 28 September 2010, I find, as alleged was a communication directly with members that was likely to undermine the bargaining and the role and ability of the Union to conclude a collective agreement. It was an unbalanced and inaccurate account of the way bargaining had been conducted. I agree with the submissions of Mr Mitchell that the statement painted a one-sided

picture as to the reasons for the delay. The blame was placed on the Union entirely, whereas PFC had also contributed, as Ms Gorgner conceded in her evidence.

[53] The statement that the timing of the strike was bad and could potentially put "everyone's employment at risk" also was likely to undermine bargaining and was intended to have that effect. Making that statement directly to members failed to respect the authority of their representative, the SFWU, which no doubt had carefully considered the optimum timing of any strike being used as a means of gaining maximum leverage in bargaining. I find the communication was intended to undermine the bargaining.

[54] In her written evidence, Ms Gorgner said:

> *I make no excuses for sending out the statement. The purpose of the information was not to undermine the Union or the Bargaining. The purpose was to ensure that members understood the seriousness of the situation. The company has never questioned an employee's right to strike or to join a Union.*

[55] This overlooks the fact that the members had made a conscious choice to join SFWU, just as they could make the same choice to resign if they wished, and Ms Gorgner, on behalf of PFC, was required to respect that freedom of choice exercised by the members. Just as the political or religious beliefs of any employees were not the business of Ms Gorgner, neither was their choice to belong or not to belong to a union. The Union, as agent of its employees, was the place for Ms Gorgner to take up her views about the bargaining and the strike.

[56] While outwardly PFC professed to the Union's members it had knowledge of their right to bargain and right to strike, plainly the employer did not agree with those rights and did not respect them.

Remedies

[57] I give the declaration sought by the Union that PFC breached its obligation of good faith, as alleged. In considering the penalty claim I note the maximum penalty for a breach of the Act including s 4 is currently $10,000. I agree with the submission of Mr Mitchell that, in the circumstances, the actions of PFC, through Ms Gorgner, were deliberate. Despite Ms Gorgner being warned by Ms Ovens and others on behalf of the Union not to communicate directly with members, she went ahead and did exactly that.

[58] I agree that a significant penalty is appropriate, given the deliberateness of the employer's actions. Pursuant to s 136 of the Act the Authority orders PFC to pay a penalty of $6,000, with half that amount to be paid directly to SFWU and the other half to the Authority for payment to the Crown.

[59] As to the order of compliance sought by the Union, that remedy is discretionary even where a breach of the Act has been established. There is no reason at this stage to reject the undertaking that PFC gave to comply with the good faith requirements. That undertaking remains live until bargaining has been concluded. I decline to order compliance at this time. If SFWU should have concerns that the undertaking is not being observed or has been breached, then leave is reserved for the Union to apply to the Authority for an order to be made with urgency. In the meantime it is expected that PFC will abide by its undertaking given in writing by Ms Gorgner on behalf of the company.

Non-publication order

[60] I confirm the order made during the investigation meeting that p.3 of the notes marked 'B' annexed to the brief of evidence of Ms Ovens, are not to be published. The notes contain a comparison of pay rates among workers employed in flight catering.

Costs

[61] Costs are reserved. The Union is entitled to an award and may apply in writing within 14 days of the date of this determination. PFC may reply in writing within a further 14 days after any application has been made by SFWU.

A Dumbleton
Member of the Employment Relations Authority