IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 86
5159924

BETWEEN	NEW ZEALAND MERCHANT SERVICE GUILD INDUSTRIAL UNION OF WORKERS INCORPORATED First Applicant (responding in this application)
	DAVID BOURNE, JOHN CONRAD and JAMES KING-TURNER Second Applicants
A N D	REAL JOURNEYS LIMITED Respondent (applying in this proceeding)

Member of Authority:	M B Loftus
Representatives:	Paul McBride, Counsel for Applicants Janet Copeland, Counsel for Respondent
Investigation meeting:	28 February 2013 at Invercargill
Submissions Received:	At the investigation meeting
Date of Determination:	10 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Real Journeys Limited seeks recompense for damages emanating from a requirement to continue paying the wages of the second applicants as a consequence of an Authority decision restraining it from continuing a restructuring process on an interim basis (see *New Zealand Merchant Service Guild IUOW Inc & Ors v. Real Journeys Ltd* NZERA Christchurch, CA74/09, 5 June 2009).

[2] The applicants deny any liability.

Background

[3] This is a matter with a long history. It has its genesis in a decision by Real Journeys to restructure its business and reduce frequency of tourist vessels sailing in Milford Sound given diminished demand after 2008's global financial crisis. The applicants took issue with the process adopted and sought to prevent its continuation. On 5 June 2009 they succeeded on an interim basis.

[4] A substantive hearing followed which canvassed a multiplicity of issues. That decision (*New Zealand Merchant Service Guild v. Real Journeys Ltd*, NZERA, Christchurch, CA74A/09, 5 October 2009) saw an end to the interim restraint. Real Journeys then continued with its restructuring which resulted in redundancy for the second applicants.

[5] In closing, the Authority noted it had *sparse information in relation to financial damage sustained by the respondent as the direct result of the interim injunction being determined in the applicants' favour*. It put the matter aside for further submission and, possibly, another investigation meeting.

[6] The Authority's decision was then the subject of a largely unsuccessful challenge in the Employment Court (*Bourne & Ors v. Real Journeys Ltd* [2011] NZEmpC 120, 28 September 2011).

[7] Resolution of the challenge saw the question of damages revisited and the present application was filed with Real Journeys seeking reimbursement of monies spent as a result of the requirement to continue employing the second applicants for the period of the interim restraint.

[8] There is a secondary issue which relates to the undertaking as to damages and who may be liable should the damages claim succeed.

[9] Contained in the undertaking is a statement that:

> *The First Applicant agrees that it will abide by any order that the Employment Relations Authority may make in respect of damages –*
>
> *(a) That are sustained by the Respondent through the granting of the orders sought; and*

> (b) *That the Employment Relations Authority decides the Applicants ought to pay.*

[10] The undertaking was signed on behalf of the first applicant, the Guild, by its Secretary, Ms Helen McAra. The propriety of the undertaking, and the fact none had been forthcoming from the other applicants, has been discussed but not determined during the various proceedings.

Determination

[11] Both parties provided comprehensive submissions but I must say a portion of these appear to be a re-litigation of the substantive claims which have already been determined. I need not go there and should only consider the following issues:

(a) Potential liability in respect to any damages, and at a later date costs, that may be awarded against the applicants in the initial proceeding; and

(b) Whether or not damages are payable.

[12] As already said, Real Journeys has previously expressed concern about the fact there has never been an undertaking as to damages from the second applicants. The concerns are supported by reference to *NZALPA v Jetconnect Ltd & Ors*, AC23/09, Chief Judge Colgan, 3 June 2009 where, when dealing with a substantive fact situation not dissimilar to the current one, the Court observed the second applicant's failure to provide an undertaking was fatal to his interim application. He could not be indemnified by the first applicant, NZALPA.

[13] The Guild's position is the lack of an undertaking from the second respondents is irrelevant. The Guild chose to indemnify its members and undertook to pay any and all damages that may subsequently be awarded against any of the applicants. The wording of the undertaking, and in particular, the use of the word *applicants* in the plural confirms this (see 9(b) above). The Guild has accepted all liability in respect to any award that may occur as a result of its having filed for interim relief on behalf of both itself and its members.

[14] Notwithstanding *NZALPA v Jetconnect* I agree with the Guild. This is an equitable jurisdiction. Equity, in my view, requires I hold NZMSG to its undertaking

and decision to indemnify its members. Equity aside, there are two other factors in reaching this conclusion.

[15] First it is arguable *NZALPA* is distinguishable. The comments referred to in 12 above were made when determining whether or not to grant interim relief. They effectively say this application should never have proceeded but were not distributed and available for consideration until after this matter was decided. Nothing can now overcome the fact interim relief was granted in this instance and that differentiates the situations.

[16] Second, to do otherwise may well leave Real Journeys with nowhere to go. The recipients of the benefits to which the damages claim applies were the second respondents. To apply *NZALPA* retrospectively may well leave Real Journeys with no redress as it may be unable to enforce any order in its favour given the lack of an undertaking from the second applicants.

[17] Turning to the claim for damages. It is well established there must be damage attributable to a wrong and when monetary, the quantum of restitution must be measurable.

[18] Here the alleged damage is said to stem from a requirement to continue paying wages which would not, in hindsight, have been payable given the outcome of the substantive investigation.

[19] Having considered the evidence and the submissions I conclude Real Journeys will have difficulty establishing damage and if any was incurred, incapable of quantifying it.

[20] The damage relates to wages. Wages are part of an exchange paid to recompense an employee for providing labour which benefits an employer. It may well be damage may accrue when wages are paid to someone who remains on garden leave and provides no benefit but that is not the situation here. There is no dispute the applicants continued to provide labour which benefited Real Journeys.

[21] Real Journeys counter with a claim that was *make work* and of no real value but that claim was undermined by the evidence of Mr Brian Humphrey, the General Manager – Engineering. He conceded the work was beneficial to Real Journeys but argued the issue was the tasks may not have been performed at that time. A number

involved maintenance tasks that could have been deferred. That is probably true but ultimately these tasks would have to be performed so it is difficult to argue damage has accrued by having them done earlier as opposed to later.

[22] The issue appears to be a directive Mr Humphrey's department do less in order to save costs and was unable to do so due to the interim order. As he put it, he could not rate the work highly and did not want to incur the cost at the time. While that sentiment may reflect both his and the company's view, it does not establish damage.

[23] Even if the above conclusion is flawed to the extent there was an element of *make work* and not all the tasks performed benefited Real Journeys a further problem arises. As said earlier, monetary damages must be quantifiable. Here the wages paid are being claimed in their entirety. It is clear given the admission beneficial work was performed that is unsustainable yet none of Real Journey's witnesses can place a value on what they consider beneficial as opposed to unbeneficial work.

[24] In other words any damage that may have been incurred can not be quantified and for these reasons the damages claim must fail.

[25] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority