IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2013] NZERA Wellington 52
5415068

	BETWEEN	NEW ZEALAND AMALGAMATED ENGINEERING PRINTING & MANUFACTURING UNION Applicant
	AND	SEALED AIR (NZ) Respondent

Member of Authority:	G J Wood
Representatives:	Greg Lloyd for the Applicant Lorne Campbell for the Respondent
Investigation Meeting:	By way of submissions received
Submissions Received:	By 7 May 2013
Determination:	14 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The respondent, Sealed Air, is cited as above by both parties because that entity is named as the employer party to the collective agreement with the applicant union. While it is not a legal entity, I am sure that the parties will have no difficulty in implementing this determination.

[2] The union applied to the Authority to determine first whether or not the parties had concluded bargaining for a collective agreement and second, if so, for a compliance order to require Sealed Air to comply with the terms and conditions of the collective agreement. Mediation has not resulted in the settlement of the issues.

[3] Sealed Air has applied to the Authority for the removal of the first part of the application to the Court to hear and determine it under s.178 for the Court to hear and

determine the matter without the Authority investigating it. Sealed Air relies on the following grounds:

- An important question of law is likely to arise in the matter other than incidentally; and/or
- The case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; and/or
- The Authority is of the opinion that in all the circumstances the Court should determine the matter.

[4] The factual background to the employment relationship problem appears unique. The parties had apparently agreed to the terms of settlement of, and a variation to, a new collective agreement and those terms had, apparently, been agreed to and ratified. According to the union its members had voted to accept the apparent terms of settlement, but had not ratified the collective agreement. An issue then arose as to payment under the new arrangements and therefore the union has declined to ratify the agreement or to agree that bargaining had ended. Thus the union seeks a determination that bargaining is not concluded or if concluded, Sealed Air be required to pay union members the meal and shift allowances that it considers should be paid.

[5] By contrast, Sealed Air believes that the parties have agreed on a new collective agreement, and have been informed by the union that the terms of settlement had been ratified, and a variation signed. It claims that the union is estopped from denying that bargaining has concluded and from denying that the terms of the collective employment agreement have been agreed.

[6] The important questions of law identified by Sealed Air relate to whether bargaining has been concluded over the terms of a new collective, whether these can be amended after ratification, whether the union is obliged in good faith to conclude the collective agreement and whether the union is estopped from denying that there is a collective agreement in force.

[7] The union does not consider that removal is appropriate, but that if it is then the whole matter should be referred to the Court. The union considers that the above questions are questions of fact relating to what had been agreed to in bargaining and thus are not questions of law.

[8] While Sealed Air considers that the matter is of such a nature and of such urgency that it is in the public interest for it to be removed to the Court, the union notes there is no explanation about the urgency claim and that the matter has not been dealt with on an urgent basis to date. While there has been strike action, that was over six weeks ago, and there is no evidence that export industries will be affected by any such strike.

[9] The union also considers that the Authority should not remove the matter of its own motion under subsection (d) or in its overall discretion, as it is best placed to investigate the matter in the first instance.

The law

[10] *Hanlon v. International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1, sets out the tests in relation to important questions of law as follows at p.7:

> *It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important for the purposes of s 94. On the other hand, a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law generally. Most questions of law that could be described as important will be far less momentous. I ask myself what Parliament intended by this epithet. Obviously it did not intend that there should be a power to remove cases from the Tribunal to the Court merely because of question of law was likely to arise in the course of the case. It has to be not any question of law, but an important question of law. Importance, at any rate of a question of law, cannot exist in isolation. Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or is strongly influential in bringing about a decision of it or a material part of it.*

Determination

[11] There is no particular urgency in this situation and therefore s.178(2)(b) does not apply.

[12] I accept that the factual matrix here appears unique and therefore there has been no determination made by the Court based on such a factual matrix. I accept that

in this case there are important questions of law of the type alluded to in *New Zealand Public Service Association Inc v. The Secretary for Justice* [2010] NZEmpC 11, particularly concerning the legality of strike action and what the terms and conditions of employment of staff currently are. Furthermore, there is an important question of law likely to arise about how parties who have reached agreement can have that agreement enforced, given the particular statutory mechanisms about the formal requirements for a collective agreement. The answer to these questions of law will also be relevant to determining whether, given the statutory overlay as found above, the parties' behaviour can be said to have resulted in an agreement that must result in a collective agreement at all. These are important questions of law for determination in this case and should provide guidance in others.

[13] There are no particular reasons why the matter should either be investigated first by the Authority or heard first by the Court. Given that there is an important question of law, it therefore follows, under subsection (d) and in the Authority's residual discretion, that the issue of whether bargaining has concluded or not should be dealt with by the Court. Thus Sealed Air's application is made out under subsections (a) and (d).

[14] Despite Sealed Air's application for removal of only part of the proceedings, I agree with the union that it would be more efficient and effective for both parties for the whole of the employment relationship problem to be removed to the Court, to avoid duplication. This can be achieved under subsection (c) or (d) of the Authority's jurisdiction, given the effective application from the union given Sealed Air's success in its application.

[15] I therefore order the removal of the whole of the proceedings 5415068 to the Employment Court for it to hear and determine without the Authority investigating it.

G J Wood
Member of the Employment Relations Authority