

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 86
5449973

BETWEEN	DAWN BARNES First Applicant
AND	DENISE GARDNER Second Applicant
AND	RUSSELL FOOTE Third Applicant
A N D	COLES GROUP NEW ZEALAND HOLDINGS LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Peter Cranney, Counsel for Applicants Penny Swarbrick and Tim Oldfield, Counsel for Respondent
Investigation meeting:	On the papers (by agreement of the parties)
Submissions Received	20 May 2014 from Applicant 30 May 2014 from Respondent
Date of Determination:	12 June 2014

DETERMINATION OF THE AUTHORITY

[1] This is an application for the removal of proceedings currently before the Authority to the Employment Court.

[2] It is made by the applicants and relates to their claims Coles offered non-union members benefits which constitute both an unlawful preference under the s.9 of the Employment Relations Act 2000 (the Act) and a breach of the collective agreement covering the applicants.

- [3] Coles denies the substantive claim and opposes the application for removal.
- [4] The relevant section of the Act, s.178(2), provides:

The Authority may order the removal of the matter, or any part of it, to the court if—

(a) an important question of law is likely to arise in the matter other than incidentally; or

(b) 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; or

(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or

(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

- [5] The application for removal relies on sections 178(2)(a) and (d).
- [6] The questions of law are said to be (1) whether or not the benefits in question conferred an unlawful preference and (2) what remedies may be available in addition to declaratory relief. It is submitted they are important to both unions and employers generally.
- [7] In particular it is argued Coles appears to be implying the value of the benefits (which it concedes it offered) is offset by other less favourable terms contained in non-union IEA's and this raises an issue over the meaning of the phrase *any preference* in s.9 of the Act. This argument does, however, appear to be undermined by the applicant's contention the agreements are, with the exception of the benefits about which they complain, materially identical.
- [8] It is also argued an important question of law arises from Coles motives and this raises issues about the meaning of the words *because ... of* in s.9(1) of the Act. Here reference is made to what, it is submitted, are potentially conflicting precedents from the Courts (Employment and Appeal). It is suggested finality is required and that can only be delivered by the Employment Court.

[9] Finally it is argued the Court's decision in *Eastern Bay Independent IWU v ABB* [2008] ERNZ 527 (paragraph 78) raises uncertainty as to what remedies are available for breaches of s.9 of the Act.

[10] The contrary argument is based on part 10 of the Act and in particular ss.143(f), (fa) and (g). These specify it is desirable matters be dealt with at the lowest possible level.

[11] It is submitted the issues will have little effect given the lack of preference claims over a number of years and this view is supported by the applicants *twin pronged* approach. One prong is that Coles' actions are in breach of a collective agreement to which it is a party. That must, by definition, limit the consequences to the parties themselves.

[12] With respect to the specific arguments tendered by the applicants it is submitted resolution of the first question involves disputed fact. That is properly the domain of the Authority in the first instance but, in any event, it is argued a full Court has given its exegesis of s.9 in *NUPE v Asure New Zealand Ltd* [2004] 2 ERNZ 487 and there is not, therefore, an important unresolved question of law.

[13] The second question (motive) arises incidentally and has not been pleaded in the substantive claim. The same response applies to the issue of remedies with all those sought in the original application being capable of consideration by the Authority.

[14] Having considered counsel's submissions I conclude I am persuaded by those of Ms Swarbrick.

[15] I agree that the Court has explained the exegesis of s.9 in *NUPE v Asure* (see 11 above) and this claim requires an inquiry into disputed facts. There are previous examples of the Authority examining s.9 claims and applying the Courts conclusions and a consideration of disputed fact is normally the domain of the Authority in the first instance.

[16] Similarly I agree with Ms Swarbrick's arguments as to why the issues of motive and remedies arise incidentally and are not important in the sense contemplated by s.178(2)(a).

[17] Finally, and this is relevant in respect of s.178(d), I note Ms Swarbrick's reference to *NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 and why a number of the discretionary considerations mentioned by Judge Colgan mitigate against a decision to remove in this instance.

Conclusion

[18] The application for removal is, for the above reasons, declined.

[19] Cost are reserved.

M B Loftus
Member of the Employment Relations Authority