

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 253  
5571687

BETWEEN      AFFCO NEW ZEALAND LIMITED  
Applicant

A N D            NEW ZEALAND MEAT WORKERS  
AND RELATED TRADES UNION  
INCORPORATED  
Respondent

**Counterclaim**

A N D            THE PERSONS LISTED IN  
SCHEDULES A-C  
First Applicants in Counterclaim

A N D            NEW ZEALAND MEAT AND  
RELATED TRADES UNION  
INCORPORATED  
Second Applicant in Counterclaim

A N D            AFFCO NEW ZEALAND LIMITED  
Respondent in Counterclaim

Member of Authority:      Helen Doyle

Representatives:            Paul Wicks QC, Counsel for Applicant and Respondent  
in counterclaim  
Peter Cranney and Simon Mitchell, Counsel for  
Respondent and first Applicant and second Applicant in  
counterclaim

Submissions Received:      18 August 2015 from the Applicant  
12 August 2015 from the Respondent

Date of Determination:      21 August 2015

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**DETERMINATION OF THE AUTHORITY  
ON APPLICATION TO REMOVE MATTER  
TO THE COURT**

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**A The proceeding in file number 5571687 is removed to the Employment Court in its entirety.**

**Employment relationship problem**

[1] The respondent, New Zealand Meat Workers & Related Trades Union Inc, seeks removal of the matter lodged with the Employment Relations Authority under file number 5571687 to the Employment Court. The application is made under s 178 of the Employment Relations Act 2000 (the Act) on the basis that the grounds for removal under s 178 (2) (a) to (d) are made out and the Authority should exercise its discretion and remove the matter to the Employment Court in its entirety.

[2] The applicant, Affco New Zealand Limited, opposes removal of the proceeding to the Employment Court and says that no reasonable grounds exist under s 178 (2)(a) to (d) for making an order for removal.

[3] It was agreed that the matter be dealt with on the papers. The Authority has considered the application and statement in reply and counterclaim lodged with the Authority, the application for removal and notice of opposition to the application and counsel's submissions in support and opposition to the application for removal.

[4] One of the grounds relied on by the respondent is that the Employment Court already has before it proceedings between the same parties and which involve the same or similar and related issues.

[5] On 18 August 2015 Mr Mitchell provided the Authority with a copy of the oral interlocutory judgment of Chief Judge Colgan in *New Zealand Meat Workers & Related Trades Union Inc and Roberta Kerewai Ratu and others v Affco New Zealand Limited*<sup>1</sup> in which the respondent was granted leave to file and serve a second amended statement of claim in proceedings that alleged an unlawful lockout.

[6] The Authority has had regard to that recent judgment in its assessment of whether the proceedings which are between the same parties involve the same or similar or related issues.

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<sup>1</sup> [2015] EmpC 114, 17 August 2015

## **The proceedings before the Authority**

[7] The applicant applies to the Authority for determination as to whether bargaining has concluded under s 50K of the Act. It says that despite 18 months of bargaining and attendance at mediation the parties have been unable to reach agreement or make any substantive movement toward it. Further the applicant says that the respondent has acted in bad faith and in doing so has undermined the bargaining and its ability to trust and work with the respondent. It says that further bargaining would be inappropriate and unconstructive and further mediation or facilitation would not contribute constructively and will otherwise be impractical or inappropriate.

[8] The respondent in its statement in reply says that the application under s 50K of the Act should be declined, that the various allegations against it are baseless and that the Authority is obliged to dismiss the application as the applicant has failed to observe good faith as described in s 50KA (3) of the Act and failed to rectify the failure. There is a counterclaim that the applicant's dealings during collective bargaining breached good faith, intended to undermine and did undermine bargaining employment relationships. Penalties are sought. There is a second counterclaim that the current employment agreements were obtained by oppressive mean, undue influence and duress within the meaning of s 69(2)(c) of the Act and orders for compensation are sought.

[9] In its response the respondent says the application should be declined and that the Authority is obliged to dismiss the application as the applicant has failed to observe good faith as described in s 50KA of the Act.

[10] Section 50KA (1) provides that the Authority must dismiss an application made under s 50K (1) and must refuse to make a declaration or determination under s 50K (3) or (4) being a determination that bargaining has concluded or has not concluded, if satisfied that the party seeking the declaration has failed to observe good faith as described in subsection (3) of 50K.

**Important question of law – s 178 (2) (a)**

[11] Mr Wicks submits that there is no important question of law requiring removal of this matter to the Employment Court. He submits that different issues arise legally in the proceedings before the Employment Court and Authority and that a full Court is to deal with the allegation of unlawful lockout.

[12] He submits that the matter before the Authority requires the straightforward application of the matters in s 50K and s 50KA of the Act by applying analysed facts to the well-established principles around good faith bargaining and harsh and oppressive conduct. Further he submits that the application being the first to be made under s 50K does not give rise to an important question of law.

[13] The approach in determining whether there is an important question of law by Chief Judge Goddard in the Employment Court judgment in *Hanlon v International Educational Foundation (NZ) Inc*<sup>2</sup> was to firstly conclude whether or not questions of law are likely to arise otherwise than incidentally and then, if they did, turn to the issue as to whether the questions of law are important.

[14] I find that there are questions of law that arise other than just incidentally. These involve the interpretation of s 50K and 50KA of the Act which have not previously been the subject of determination or judgment.

[15] There is an important issue of law in the correct interpretation of s 50K (1) about difficulties in concluding bargaining. It is an issue of law which could affect a large number of employees and/or employers and the question will be significant to employment law generally. This was a measure of the importance of a question of law in *Hanlon*.

[16] There is an important issue of law about the correct interpretation of s 50KA which provides that a declaration or determination under s 50K (1) is not to be made if there has been a breach of duty of good faith by the party seeking a declaration.

[17] There is an important issue of law that arises as to application and interpretation of the provisions in s 50K (c) (i) – (iv) particularly in circumstances where there has not been earlier facilitation. The respondent is willing to attend facilitation, the applicant does not consider it would contribute constructively to

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<sup>2</sup> [1995] 1 ERNZ 1 at 7

resolve the difficulties. It relies on the circumstances existing as set out in s 50K (2) (c) (i) – (iv) of the Act.

[18] Mr Wicks submits the approach of the applicant to individual employment agreements while bargaining for a collective agreement has been well understood law for 25 years. He refers to *NZ Meat Workers IUW v Richmond Ltd*<sup>3</sup>. I find notwithstanding that submission there is an issue of law arising about the approach and it is an important issue of law.

[19] In conclusion under this ground I find that there are important issues of law that arise other than incidentally.

**The case is of such a nature and urgency that it is in the public interest that it be removed – s 178( 2) (b)**

[20] Counsel agree that the matter is urgent. Mr Mitchell submits that there is a need for a definitive ruling as soon as possible as to the lawfulness of the actions of the parties and the appropriateness of any determination that bargaining has concluded.

[21] Mr Wicks submits that the need for urgency can only be met if the Authority is able to investigate the application and counterclaim on already set dates commencing from 31 August 2015. He submits that the prospect of the Employment Court accommodating a fixture within the same or similar timeframe is unrealistic. There are dates as I understand it set for early October.

[22] Mr Wicks refers to an acknowledgment by Mr Cranney in the Employment Court on 17 August 2015 in the course of hearing the application for leave to file a second amended statement of claim that he did not expect the proceedings if removed should be consolidated and heard with the proceedings currently before the Court. He submits that this supports that the proceedings in the Authority and Court are discrete and that the nature of the case favours an early hearing of the case in August as set down by the Authority.

[23] I accept Mr Wicks' submission that an earlier investigation meeting date is in all likelihood available in the Authority than a fixture date in the Employment Court. That is not the end of the matter. It is important to identify whether there is an

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<sup>3</sup> [1992] 3 ERNZ 643

overlap between the proceedings in the Authority and in the Court. If there is then it would be difficult to conclude that urgency and public interest would be best served by investigating the matter in the Authority. It has long been recognised that it is undesirable to have litigation about the same, similar or related issues in different specialist forums. I accept Mr Mitchell's submission that there is a risk that cannot be discounted of gaps in the evidence arising if that occurs. There is also duplication of costs for the parties with the need for evidence to be called in more than one forum about the same issue.

[24] Leave has been granted to the respondent to file a second amended statement of claim which includes allegations that individual bargaining was unlawful and contrary to s 4A of the Act in that it was intended to undermine bargaining for a collective agreement; to undermine the current individual employment agreements between the applicant and each individual plaintiff union member; to undermine the employment relationships between the individual plaintiffs and the Union; the employment relationships between the individual plaintiffs and the defendant and the employment relationship between the Union and the defendant.

[25] I find in all likelihood the Authority would need to investigate and determine those same matters under s 50KA of the Act as to whether there has been a breach of the duty of good faith and that the overlap between the proceedings is not small as Mr Wicks submits. The Court and the Authority both have proceedings with similar issues between the same parties. I accept that the Authority would in all likelihood also need to hear as part of the factual matrix about bargaining issues about allegations of unlawful lockouts which are also before the Court.

[26] There is also the likelihood of a challenge to the Authority determination. Chief Judge Colgan refers to that as a *virtual inevitability*<sup>4</sup>. In some circumstances that may not be a significant factor. As however there is overlap between the issues before the Authority and the Court it may lead to the difficult situation of a challenge to a determination of the Authority where there are the same, similar or related issues before the Employment Court. In those circumstances the benefit of an early investigation meeting in the Authority to deal with, what is accepted is an urgent situation, is lost.

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<sup>4</sup> [2015] EmpC 114, 17 August 2015 at [27]

[27] I do not find that issues of urgency and public interest favour the matter remaining in the Authority for those reasons.

**The Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues – s 178 (2) (c)**

[28] I find that the Court does have proceedings before it between the same parties which involve the same or similar or related issues. Mr Wicks submits that the fact is the matters before the Court involve conduct complained of that may be in part the same but the issues for determination are very different.

[29] The Authority is being asked to determine whether there has been a failure to observe good faith in s 50KA of the Act which issue is before the Court although I accept not with respect to that section. Determination of that matter is inextricably linked to the application for a determination that bargaining has concluded under s 50K. I do not find that the issues for determination before the Authority are in those circumstances very different to those before the Employment Court and will involve in all likelihood much of the same evidence.

**Discretionary considerations – s 178( 2) (d)**

[30] I find that there are important questions of law in this case. I do not find that the urgency and public interest favour the proceedings remaining in the Authority notwithstanding the dates that are available to deal with the matter in late August and early September 2015. Urgency and public interest favours the removal of the proceedings to the Employment Court. This is because there are the same or similar or related issues in proceedings between the same parties before the Employment Court. They arise out of the same events.

[31] I take into account that removing the matter would deprive the applicant of a further level of challenge. As the Employment Court has proceedings with similar issues before it between these parties I put more weight on that than I do the urgency with which the Authority can hear the matter or the removing of a further level of challenge. To not do so would mean that both the Authority and the Employment Court are hearing proceedings regarding the same or similar issues and that is most unsatisfactory.

[32] I am of the view that the discretion should be exercised to remove the matter lodged with the Employment Relations Authority. I accept that the issues in this case will be of public interest and of broad effect, and I accept Mr Mitchell's submission that one forum should hear all matters before it so that the issues can be addressed in a logical and cost effective manner.

### **Determination**

[33] I remove file 5571687 to the Employment Court for hearing and determination in its entirety.

### **Costs**

[34] I reserve the issue of costs which will no doubt be dealt with by the Employment Court in due course.

**Helen Doyle**  
**Member of the Employment Relations Authority**