

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 101
5516906

BETWEEN COREY WALLACE
First Applicant

NEW ZEALAND AMALGAMATED
ENGINEERING, PRINTING AND
MANUFACTURING UNION
INCORPORATED
Second Applicant

A N D CARTER HOLT HARVEY LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Greg Lloyd, Counsel for the Applicants
Daniel Erickson, Counsel for the Respondent

Investigation Meeting: 3 and 4 February 2015 at Nelson

Date of Determination: 22 July 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants seek determinations the respondent, Carter Holt Harvey Limited (CHH), has:

- (a) Failed to act in good faith by not consulting over the introduction or operation of its drug and alcohol policy and given the way it applied the policy;
- (b) Failed to act in good faith with respect to collective bargaining in that its actions undermine, or are likely to undermine, the authority of both applicants in relation to collective bargaining;

- (c) Breached s 20 of the Employment Relations Act 2000 (the Act); and
- (d) Breached the collective agreement between CHH and the second applicant, the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Incorporated (NZEPMU), in that CHH failed to allow an EPMU official (Corey Wallace) access to the worksite in accordance with clause 27 of the collective.

[2] CHH denies it has any liability in respect of the first applicant, Mr Wallace, as he is not in an employment relationship with CHH nor is he a party to the collective employment agreement.

[3] With respect to the claims brought by NZEPMU, CHH asserts it has acted in accordance with the collective employment agreement, its policies and procedures and the duty of good faith at all times in attempting to randomly drug test Mr Wallace. It denies it has breached s 20 of the Act.

Background

[4] Mr Wallace is employed by NZEPMU as an organiser. One of the sites he covers is CHH's sawmill at Eves Valley, Nelson.

[5] NZEPMU and CHH were parties to a collective employment agreement which expired on 3 July 2014. They have since been bargaining for a replacement. Contained therein is clause 27. It provides:

Any official of the NZEPMU or the NDU shall be entitled to enter the workplace at any reasonable time for purposes related to the employment of members and / or the union's business. He / she shall: ... comply with existing reasonable procedures in regard to safety, health and security ...

[6] In 2010 CHH introduced a drug and alcohol policy. Prior to doing so it says it consulted with both NZEPMU and its employees. It proposed –

- (a) random drug testing would be introduced at the Eves Valley site;
- (b) the entire site would be defined as safety sensitive in order to manage the risk of mobile plant and heavy machinery; and

- (c) the proposal would affect staff on site as well as contractors, employees of contractors and other visitors to the site.

[7] Those proposals were all contained in the ensuing policy document. Particularly relevant to this claim is a provision which states a visitor who refuses to undergo a test would be required to leave the site immediately.

[8] In 2012 the policy was revised and, according to CHH, the changes were explained to staff. NZEPMU claims neither it nor the relevant official was aware of the revised version and while it accepts staff were notified it portrays that effort as inadequate.

[9] In March 2013 CHH found two cannabis plants growing at Eves Valley. As a result CHH directed all employees undergo a *reasonable cause* drug test given a belief its policy entitled it to do so. NZEPMU objected and raised a personal grievance on behalf of 76 members who were subject to the testing. Those claims were the subject of an Authority investigation meeting in March 2014 and the ensuing determination was issued on 27 May 2015.¹ The Authority concluded CHH had failed to act in good faith and the 76 union members had been disadvantaged in their employment. The Authority declined to impose penalties and ordered the parties to mediation in an attempt to quantify the compensation payable to each applicant.

[10] The mediation saw agreement in principle however it required approval by the affected union members. CHH and NZEPMU agreed representatives of the union would meet the affected members on 5 and 6 August 2014 for the purpose of obtaining their agreement to the proposed settlement.

[11] On 5 August 2014 Mr Wallace and Mr Lloyd went to Eves Valley. CHH arranged for them to meet their members in a disused administrative block. About this NZEPMU says:

There was no requirement for the Union representatives to enter the timber processing part of the respondent's business. Nor was there any requirement to take any particular health and safety measures such as wearing protective or high visibility clothing. Nor was there a requirement to undergo any form of health and safety induction.

¹ [2014] NZERA Christchurch 81

[12] Two meetings followed and while the second was in progress, and at approximately 3.30pm, Mr Wallace was advised he had been selected to undergo a random drug and alcohol test.

[13] Mr Wallace refused to be subjected to what he considered an unlawful drug test and was, as a result, escorted from CHH's premises. He was also advised he was not entitled to enter the site until he submitted to a drug and alcohol test.

[14] A series of discussions and correspondence followed. The matter was also mediated but the dispute remains unresolved and Mr Wallace continues to be barred from entering the Eves Valley site. It is NZEPMU's contention this has affected his ability to organise its membership. As a result it has undermined his authority as an organiser and compromised his ability to actively participate in renegotiation of the collective employment agreement. In turn this has impeded the union itself.

Determination

[15] First I address Mr Wallace's claims. As already said CHH's response is he lacks the ability to bring a claim as he is neither an employee nor a party to the collective agreement. I agree.

[16] An employment relationship problem is one that arises out of an employment relationship.² Employment relationships are defined in the Act and of the eight specified an employer is only party to two.³ One is with its employees and the other is with a union. Mr Wallace is not an employee of CHH's nor is he a union.

[17] Furthermore I note the claims. Two are allegations of a breach of the duty of good faith. That duty is only owed between parties to an employment relationship.⁴ As already said CHH and Mr Wallace are not in such a relationship. The third ground is a breach of s 20. Section 20 gives rights to a union via its representative but bestows no rights on an agreement individual. Finally there is a claim the collective has been breached. Mr Wallace is not a party to the collective and cannot therefore bring such a claim.⁵

² Section 5 of the Employment Relations Act 2000 (the Act)

³ Section 4(2) of the Act

⁴ Section 4(1) of the Act

⁵ Section 129(1) of the Act

[18] For the above reasons I conclude Mr Wallace cannot succeed as an applicant. That said he is employed by, and is a representative of, NZEPMU and it can therefore pursue transgressions which impede Mr Wallace's ability to perform his duties as such. That is what it is doing as the second applicant.

[19] Notwithstanding the question of whether or not CHH consulted adequately when amending its drug and alcohol policy in 2012 NZEPMU accepts CHH is entitled to have one. It also accepts Mr Wallace was subject to the policy when on site provided it was reasonably applied. What NZEPMU does not accept is that the policy was reasonably applied in this instance or that CHH can justify its decision to bar Mr Wallace from the Eves Valley sawmill. In particular it takes issue with the fact the entire site was designated safety sensitive and the way in which Mr Wallace was selected for testing.

Scope of safety sensitivity

[20] It is NZEPMU's position CHH is not entitled to designate all parts of its site as safety sensitive, nor can it include areas which carry no increased health and safety risk.

[21] CHH asserts it is not for the Authority to make a determination about which employees or visitors occupy safety sensitive positions but that that is its role. In any event it argues the yard in which the disused administration block is sited is used as a park for heavy machinery. As such hazards are present and it can properly be designated safety sensitive.

[22] Both parties support their position with reference to *NZEPMU v Air New Zealand*⁶ and *Maritime Union of New Zealand v TLNZ Limited*.⁷

[23] Of particular relevance in this regard are paragraphs 252 and 254 of the *Air New Zealand* case. Paragraph 252 reads (in part):

We have already agreed that a balancing exercise is called for and that it involves a judgment on matters of fact and degree. In our judgment, the balance is to be struck in this case at the point at which the testing can objectively be said to have a sufficiently proximate connection between the impairment of employees by means of consumption of alcohol or specified drugs or both, and operational safety. We hold that the necessary connection is capable of existing –

⁶ [2004] 1 ERNZ 614

⁷ AC 51A/07, Employment Court, Auckland, 21 December 2007

- i. *on reasonable cause to suspect that an employee's behaviour is an actual or potential cause or source of harm to others as a result of being affected by alcohol or drugs or both;*
- ii. *On internal transfer to safety sensitive occupations (by analogy with pre-employment testing which is not attacked);*
- iii. *In post-accident/incident or near miss situations;*
- iv. ***In random testing in safety sensitive areas only, not across the board.*** (Emphasis is mine).

[24] Paragraph 254 expands on the last point by stating *It is unreasonable to require employees engaged in non-safety sensitive roles ... to submit to suspicionless, random testing.*

[25] The Court goes on to say:

We appreciate that the expression "safety sensitive areas" may not always be easy to define ... and the exercise of defining it, which is not one for the Court to undertake, is the responsibility of the first defendant which it should now discharge in consultation with the plaintiffs.⁸

[26] Having considered the evidence I conclude CHH has failed to justify its designation of the area around the disused administration block as safety sensitive.

[27] First the evidence suggests use of the area surrounding the old administration block as a heavy machinery park was sporadic with witnesses struggling to illustrate the use. Second there is nothing to suggest other car parks were deemed safety sensitive and extra precautions taken therein. Indeed the evidence is the area around the old administration block is now separated from the operational area with a gate being recently installed between the two areas.

[28] Third, and perhaps more importantly, the area in which Mr Wallace was conducting his meetings was the old administration block. All witnesses who were asked accepted there was nothing inordinate from a safety perspective about the old administration block, no additional OSH expectation and no requirement people entering the area don personal protection equipment or undergo any form of safety briefing. An example of this was an acceptance by Mr Cuttill, CHH's Site Manager, there was nothing inherently dangerous in the area of the old administration block. Similarly Mr Byrne, CHH's Health & Safety and Risk Manager, accepted the area was low risk.

⁸ *Air New Zealand* at [255]

[29] There is then evidence that while there was a level of consultation when the original policy was introduced in 2010 CHH did no more than advise staff of *new initiatives* by email and speak at a managers training meeting at which some NZEPMU delegates were present when amendment occurred in 2012. Advice of change is not consultation and while it may comply with a provision within the policy that allows changes at CHH's discretion it fails to comply with the consultative requirement imposed by the Employment Court.⁹

Mr Wallace's selection

[30] Turning to Mr Wallace's selection for a drug and alcohol test.

[31] The evidence is CHH provides a list of staff members to New Zealand Drug Detection Agency (NZDDA) – the organisation which conducts the testing on CHH's behalf. To that may be added various additional codes which may see the testing of others such as visitors and contractors. NZDDA then applies a *random selection computer programme* to identify those to be tested.

[32] In this instance 'A2' appeared on the list of those to be tested. The selection of A2 meant the second person who had signed the visitor register that day was to be tested.

[33] Mr Wallace was not A2. He was A3.

[34] CHH tries to justify Mr Wallace's selection as the person to be tested on the grounds A1 had left the site which meant Mr Wallace was now the second visitor remaining.

[35] This decision faces some major impediments. First the evidence makes it clear this was a departure from previously agreed and applied processes. The evidence shows there had not previously been any form of substitution and if a selected person was no longer present NZDDA would simply move on the next person on the random list.

[36] Second, and more importantly, the days' second visitor who would under previously applied processes have been considered to be A2 was still on site and could therefore have been tested.

⁹ Air New Zealand at [254] – paragraph 25 above

[37] The attempts to justify the substitution fell well short of adequate. The short answer is Mr Wallace was not originally selected and should not, applying previously agreed and applied processes, have been tested.

[38] Given the circumstances I conclude the decision to test Mr Wallace was ill conceived. Add to that the fact it occurred as result of a decision to depart from established and agreed protocols regarding the implementation of drug and alcohol tests I conclude it was not the act of a reasonable employer acting in good faith.

[39] The conclusion Mr Wallace should not have been selected means it follows he should not be penalised for failing to submit to the test. It further follows the subsequent decision to bar him from the Eves Valley site is unjustifiable and constitutes a breach of both s 20 of the Act and clause 27 of the collective employment agreement to which both CHH and NEPMU are parties. Here I note s 53 of the Act and the fact this means the collective continues to apply notwithstanding its stated expiry. I also note the union's undisturbed evidence which shows a significant detrimental effect on its ability to organise at Eves Valley.

[40] The above conclusions mean NZEPMU is successful with respect to all four of the determinations it sought.

[41] By way of remedies NZEPMU seeks the imposition of penalties under:

- a. Section 4A of the Act for a breach of good faith insofar as the respondent's actions were deliberate, serious and sustained and intended to undermine bargaining for a collective agreement and/or an employment relationship.
- b. Section 134(1) for a breach of the employment agreement; in particular clause 27 of the collective agreement that provides for union access rights to the respondent's workplace.
- c. Section 25(a) for unreasonably withholding consent in relation to a request for a union official to gain access to the workplace.
- d. Section 25(b) for obstructing a union official from entering the workplace.

[42] EPMU also seeks an order under s 136(2) that the whole or part of such penalties be paid to it as it has suffered financial loss and suffered inconvenience as a consequence of the respondent's actions.

[43] First I note there is no specific claim for a penalty in respect of the first alleged breach – namely the failure to consult over changes to the policy in 2012. Here I simply comment one would not have been granted given the provision allowing CHH to amend in policy which was agreed notwithstanding the existence of the *Air New Zealand* decision.

[44] Turning to the penalties sought. While all four grounds of complaint have been made out it is normal to apply penalties in a holistic manner especially where, as here, multiple breaches for which penalties are sought stem from one event, decision or failure.

[45] Given the evidence I conclude the decision to improperly attempt to drug and alcohol test Mr Wallace have had a significant effect on NZEPMU and its ability to organise on the Eves Valley site. I also note they are serious in that they constitute both a breach of stature and agreement. That evidence, along with a consideration of the party's submissions lead me to conclude \$10,000 is an appropriate sum.

[46] Turning to the s 136(2) application. Here I note the evidence NZEPMU has been put to considerable expense in addressing the problems caused by Mr Wallace's ban with the bulk being incurred by having to transport other organisers to Nelson so they can perform functions normally performed by Mr Wallace at Eves Valley. This, in my view, warrants a conclusion the penalty be payable to NZEPMU.

[47] Finally I make comment about the conclusion s 20 has been breached and simply advise CHH that if the ban on Mr Wallace entering the Eves valley site is still being applied it should cease forthwith.

Conclusion and orders

[48] For the above reasons I conclude CCH has breached both s 4A and s 20 of the Act along with clause 27 of its collective employment agreement with NZEPMU.

[49] As a result of these breaches Carter Holt Harvey Limited is ordered to pay a penalty of \$10,000 with payment to be made to New Zealand Amalgamated

Engineering, Printing and Manufacturing Union Incorporated pursuant to s 136(2) of the Act.

[50] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority