IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 98
5528833

	BETWEEN	GOLDEN BAY CEMENT, a division of FLETCHER CONCRETE AND INFRASTRUCTURE LIMITED Applicant
	A N D	NORTHERN AMALGAMATED WORKERS' UNION OF NEW ZEALAND INC Respondent
Member of Authority:	James Crichton	
Representatives:	Rebecca Rendle, Counsel for the Applicant Helen White, Counsel for the Respondent	
Investigation Meeting:	12 February 2015 at Auckland	
Date of Determination:	31 March 2015	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Golden Bay Cement) seeks a determination from the Authority that a clause in the operative collective employment agreement creates an unlawful preference for employees who are union members. It follows that the relief sought is a declaration that the particular clause (clause 24) confers an unlawful preference on members of the respondent union and that therefore it has no force or effect pursuant to s.10 of the Employment Relations Act 2000 (the Act).

[2] The application by Golden Bay Cement is resisted by the respondent (the Union) which contends that clause 24 is lawful and does not create an unlawful preference.

[3] The coverage clause in the operative agreement is in the following terms:

> *This collective agreement shall apply to work that is usually carried out by employees of the company who are members of the union and is directly or indirectly associated with cement manufacturing AND/OR despatching AND/OR maintenance of production equipment AND is performed by employees who are based at Portland Works, Portland Quarry or Wilsonville Quarry.*

[4] The subject clause itself is clause 24 of the collective agreement which I now set out as well:

> *24. Selection and process training*
>
> *24.1 When a job vacancy arises that has been traditionally covered by a AWU (the union) member the job will be advertised on the work noticeboards, then a selection process would take place with the following steps:*
>
> *(1) The vacancy will first be opened to applications from permanent GBC (Golden Bay Cement) employees who are covered by the ... collective agreement. If the company considers that none of the applicants are suitable and the union agrees with this assessment then the following two steps will be followed.*
>
> *(2) If no employee in section 1 above fills the vacancy then applications will be called amongst other ... employees including temporary or casual employees. A person who applies for the vacancy and who meets the requirements for the job will be appointed by the company. In selecting a suitable person for the job due consideration will be given to a variety of relevant factors, including but not limited to any training and length of service with GBC.*
>
> *(3) If no employee in section 2 above is found to be suitable for the vacancy then application will be called from other sources and the company will appoint a suitable applicant.*
>
> *24.2 Employees covered by the abovenamed CEA (the collective agreement) who wish to advance to other positions will apply for pre-training.*
>
> *24.3 Selected applicants will be pre-trained and ready for consideration for when those vacancies arise.*
>
> *24.4 The company and a union site representative will jointly select people for pre-training.*

> *24.5 Completion of pre-training does not mean that a person will automatically be offered a vacancy.*
>
> *24.6 A person who applies for, is selected for and completes pre-training is then obliged to take up a relevant job if they are required to do so by the company.*

[5] It will be apparent from the foregoing clause that the provision contemplates an arrangement where first, members of the Union can apply for what is called *"pre-training"*, that those applications for pre-training will be considered by the Union and Golden Bay Cement jointly, and that where a pre-trained union member is appointed to a position in terms of this clause of the collective agreement, they are required to take up the offer of employment.

[6] Golden Bay Cement says that the effect of the provision is to give an unlawful preference to members of the Union because it is said to breach s.9 of the Act and it further says that it raised the legality of this longstanding provision in the last bargaining round but was unable to obtain agreement from the Union on the matter and accordingly has consistently indicated its intention to refer the matter to the Authority for a declaration.

[7] Moreover, Golden Bay Cement says that it has stayed its hand in terms of further appointments that would be made under the relevant clause until that declaration from the Authority is to hand.

[8] For its part, the Union maintains that it is entitled to *"seek advantageous terms for those it bargains for"*. In particular, it contends that the relevant provision in the Act is not breached just because terms and conditions of employment for one employee are different from the terms and conditions that apply to another employee.

[9] In relation to that last mentioned point, the Union relies on subsection (2) of s.9 which effectively requires more than mere difference of terms and conditions of employment in order for the unlawful preference to be made out.

[10] Further , the Union relies on s.10 of the Act as well on the footing that if the contractual provision is found to be unlawful, it should be modified only to the limited extent required which the Union says would give effect to the statutory provision in s.10.

[11] Finally, the Union maintains that Golden Bay Cement has not acted in good faith in relation to the way in which it has dealt with this matter; that contention is resisted by Golden Bay Cement.

Issues

[12] The principal issue that the Authority must determine in the present case is whether the relevant provision constitutes an unlawful preference or not.

[13] However, the Authority also needs to consider if there has been a breach of good faith by Golden Bay Cement as is contended by the Union.

Does clause 24 constitute an unlawful preference?

[14] I have already set out in full the terms of clause 24 of the collective agreement together with the terms of the coverage clause of the collective agreement.

[15] The relevant statutory enactments are ss.9 and 10 of the Act. Those sections arguably are augmented somewhat by the statements of general principle in s.7 which is the object section relating to this part of the statute.

[16] The provisions of s.7, simply stated, give employees the freedom to associate with other employees to form a union to advance *"their collective employment interests"* and relevantly, prohibiting any person from giving a preference to another person because that person is or is not a member of a union.

[17] Section 9 of the Act contains that most important provision and it is in the following terms:

> *9. Prohibition on preference*
>
> *(1) A contract, agreement, or other arrangement between persons must not confer on a person, because the person is or is not a member of a union or a particular union, -*
>
> *(a) Any preference in obtaining or retaining employment; or*
>
> *(b) Any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.*
>
> *(2) Subsection (1) is not breached simply because an employee's employment agreement or terms and*

> *conditions of employment are different from those of another employee employed by the same employer.*
>
> *(3) To avoid doubt, this Act does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits –*
>
> *(a) Of a collective agreement:*
>
> *(b) Arising out of the relationship on which a collective agreement is based.*

[18] Section 10 of the Act is in the following terms:

> *A contract, agreement or other arrangement has no force or effect to the extent that it is inconsistent with s.8 or s.9.*

[19] Counsel for both parties have helpfully referred me to all of the leading cases on the interpretation of s.9. It seems to me to be the essence of the employer applicant's case in the present matter that the preference in question is conferred on particular employees because they are members of a particular union and it follows, so it is said, that that constitutes an unlawful preference. Conversely, the Union respondent maintains that the preferences are conferred as a consequence of a successful bargain being struck with the employer which benefits the Union's members.

[20] The Union defence of its position rests squarely on the exception provided in subsection (2) of s.9 of the Act, the burden of which is that a preference is not unlawful simply because an employee's terms and conditions of employment are different from those of another employee in the same enterprise.

[21] It follows that, according to the Union, the fact that members of the Union have obtained a priority in terms of recruitment to particular roles by virtue of clause 24 of the collective agreement is no more and no less than a benefit which has been obtained by Union members from the collective bargaining process and is not a function of the subject employees being a member of a particular union.

[22] Accordingly, so the argument goes, it would be available to other unions covering workers on the Golden Bay Cement site to negotiate similar provisions in respect of work that they had coverage of although plainly, those other unions could not obtain a preference in respect of work that the respondent Union has coverage of by virtue of its coverage clause because the coverage clause would preclude that consequence.

[23] However, it is conceivable that if the parties were minded to, another union on the Golden Bay Cement site could negotiate a similar kind of provision in relation to work that its members did.

[24] So the essence of the Union's defence of its position is that the benefit that is conferred on union members by clause 24 of the collective agreement is obtained by the bargaining undertaken by the Union with Golden Bay Cement and is not obtained as a consequence of the fact that the workers concerned are members of the respondent Union.

[25] I heard evidence from Maurice Davis who took over in late 2013 as Secretary of the Northern Amalgamated Workers' Union of New Zealand and from a Union delegate, Kevin Shelford. It was evident to me from the evidence of both of those men that the process contemplated by clause 24 of the collective agreement was critically important to the men on the site who were members of the respondent Union and it was clear also that the provision had been in the document for many years and had been relied upon by the Union and its members for many years. Indeed, Mr Shelford went so far as to say that what he described as *"the career path"* in clause 24 of the collective agreement was *"our heart and soul"*.

[26] These views are advanced because the respondent Union sees the benefit to its members of the effect of clause 24 of the operative collective agreement as critical to the membership's job progression within the site, from more menial roles to positions of skill and responsibility with commensurate increases in remuneration attached.

[27] The Union says that the achievement of the subject provision in the bargaining process was won as part of the give and take of the bargaining undertaken by the parties, and in consequence must be given effect to in terms of subsection (2).

[28] But the Union's whole argument seems to proceed on the basis of an equation of benefits won from collective bargaining with the effect of subsection (2) and I have not been persuaded that that equation is justified in terms of the normal rules of statutory interpretation.

[29] Subsection (2) simply provides that in order to demonstrate an unlawful preference it is not enough that there is a difference in the terms and conditions of one employee's employment from the terms and conditions of another employee's employment. There is no reference in the subsection to bargaining or indeed to the

consequences of bargaining being somehow exempt from the broad rules enunciated in subsection (1) of the section.

[30] It seems to me that all subsection (2) does is establish that just because there is a difference in the terms and conditions of employment of two employees, it does not necessarily follow that one of those employees has received an unlawful preference. Put another way, it is not enough to demonstrate an unlawful preference by simply citing differences in the terms and conditions of employment of co-workers.

[31] Nothing in subsection (2) seems to me to go so far as to allow the Union to argue that by virtue of having obtained the complained about conditions in bargaining it is somehow protected from the force and effect of subsection (1), the terms of which seem to me quite clear.

[32] Subsection (1) provides that if any preference is conferred on any employee in relation to terms and conditions of employment because that person is a member of a union, then that preference is unlawful. I have not found it possible to reach any alternative conclusion but to find that the clear terms of clause 24 of the operative collective agreement confer a preference for particular work on members of the respondent Union.

[33] It seems to me that the terms of the relevant clause in the operative collective agreement could not be clearer, that where job vacancies occur on the site in work traditionally performed by the Union's members, members of that same Union get preference for those vacant positions over other persons, whether employees or not and that whole process is facilitated by the clear prescriptive rules for the pre-training of members of the Union so that they are effectively in a kind of holding pattern awaiting a vacancy to which they might aspire.

[34] While I understand and sympathise with the Union in its enthusiasm to retain the effect of this provision, it seems to me to be a very clear example of a preference because of union membership in a particular union and it therefore offends the rule set out in s.9(1) of the Act. As I have already made clear, I have not been persuaded by the Union's reliance on subsection (2) which I am satisfied simply says that the mere fact that terms and conditions of employment are different between one worker and the next is not of itself sufficient to constitute an unlawful preference.

[35] Nor am I persuaded that by virtue of the Union having won this concession from Golden Bay Cement at some point in the past, it necessarily follows that because the clause emanates from a collective bargaining process it somehow is immune from criticism. The fact is that the clause provides a process which gives a straightforward benefit to members of one union against any other applicant. That fact seems to me to put the effect of clause 24 squarely within the ambit of s.9(1).

[36] In *Air New Zealand Ltd v. Kippenberger* [1999] 1 ERNZ 390, the High Court suggested that the *"preference"* meant some material advantage in terms and conditions of employment conferred on a person because of their membership of a union or non-membership of a union.

[37] Applying *Kippenberger*, it seems to me as plain as can be that the effect of clause 24 is to give a *"material advantage"* to members of the respondent Union over other employees of Golden Bay Cement. Put shortly, the effect of clause 24 is to give members of the respondent Union what amounts to a first right of refusal to the position or positions for which there are vacancies within the positions traditionally occupied by members of the respondent Union. Put another way, anybody who is not a member of the respondent Union starts from the back marker or is second in line to persons who are members of the respondent Union. This is so whether or not individual applicants are permanent, part time or casual employees; all that matters to give them a preference is their membership or not of the respondent Union.

[38] Moreover, I am satisfied also that the preference that is conferred by clause 24 is a preference conferred by membership of the respondent Union. The only way that persons who were not currently in receipt of that potential benefit could have that benefit or potential benefit conferred is by becoming members of the respondent Union and put that way, it seems to me axiomatic that the provision infringes the rule in s.9(1) of the Act because it makes plain that the only way a preference can be conferred in respect of clause 24 is on the footing that the person seeking to obtain that benefit is a member of the respondent Union.

[39] The only further issue that I think it necessary to consider is whether the motivation for the inclusion of the preference was relevant or not. Since the decision of the Court of Appeal in *Taylor Preston Ltd v. New Zealand Meat Workers and Related Trades Union* [2009] NZCA 372, that issue would seem to have been resolved in the negative. This is because, on an application (unsuccessful as it turned

out) for leave to appeal the decision of the Employment Court in the matter, the Court of Appeal said at para.[26]:

> *There is no warrant in the wording of that section* [section 9] *to require a further inquiry into subjective motive once the statutory test is met.*

[40] It follows from the foregoing that once preference was established as a matter of fact in terms of s.9(1), no further inquiry is required.

[41] I am satisfied that it does not put it too strongly to say, as counsel for Golden Bay Cement does in her submissions, that the effect of clause 24 is that members of the Union are given preference for vacancies and pre-training **because** they are members of the respondent Union. Once that factual finding is made (and I am satisfied on the evidence before me that that is the position), there is no need for any further inquiry into the parties' intentions in the original negotiation of the clause or indeed any attempt to discern a motive. I conclude then that clause 24 of the operative collective agreement is an unlawful preference in terms of s.9 of the Act and that Golden Bay Cement is entitled to a declaration to that effect.

[42] I am also not attracted by the respondent Union's argument that by s.10 of the Act, I can modify the agreement by effectively removing the offending parts. This is essentially because it seems to me that the modification proposed by the respondent Union offends the principle in s.163 of the Act which is fundamentally what the Union is asking the Authority to do.

[43] I am satisfied that the judgment the Union relies on, being *New Zealand Engineering, Printing & Manufacturing Union Inc v. ACI Operations New Zealand Ltd* 3 NZELR 457 can be distinguished from the present fact situation.

[44] The *EPMU* case did not involve modification of an unlawful preference but rather modification of a clause to provide minimum entitlements to employees in terms of the operative Holidays Act regime.

[45] In my view, the proper decision for the Authority is simply to declare its view of the matter, as I have done, and leave any replacement provision to be negotiated between the parties.

Has there been a breach of good faith by Golden Bay Cement?

[46] I am not persuaded there has been a breach of good faith by Golden Bay Cement. This contention is based on the Union's view that Golden Bay Cement has acted unilaterally and in breach of clause 24 because the employer did not agree with the terms of clause 24.

[47] I did not understand that to be the factual position at all. What I understood to be the case from the evidence before me was that Golden Bay Cement had suspended any actions taken in respect of the processes set out in clause 24 of the operative collective agreement, given notice to Union to that effect, and indicated that it was seeking a declaration from the Authority on the lawfulness of clause 24.

[48] Nor am I attracted by the Union's argument that the applicant employer entered into a settlement of the collective agreement, including clause 24, without making clear that it thought clause 24 was illegal and therefore could not be relied upon.

[49] It seems to me from the evidence before me that Golden Bay Cement has at all times during the most recent negotiation confirmed its view that it thought clause 24 was illegal. Indeed, Maurice Davis, the Union Secretary, confirmed in his evidence that Golden Bay Cement had maintained for some years that the clause was illegal but that this negotiation was the first occasion when it had tried to have the matter determined in the Authority.

[50] Mr Davis went on to say that he thought Golden Bay Cement's behaviour was improper because it waited until after settlement had been effected before seeking the Authority's determination of the matter, thus avoiding the prospect of strike action during an expired collective employment agreement.

[51] What Golden Bay Cement's witness told me about the bargaining process was that at all times, the applicant company hoped to get an agreement to remove the clause but that it made it very clear throughout the proceedings that if the clause remained its legality would be tested.

[52] It is common ground that Mr Peter Elder who was involved in the negotiations for Golden Bay Cement at an early stage, proposed some revised wording of clause 24

which was not accepted by the Union and so the settlement proceeded with the subject clause in place.

[53] However, Ms MacLean, the Human Resources Manager for Golden Bay Cement, was very clear that members of the respondent Union ought not to have been in any doubt that Golden Bay Cement was not going to implement clause 24 unless and until it was accepted as lawful by the Authority's determination.

[54] That view of matters seems to be supported by the evidence of Mr Shelford for the Union, at least to the extent that he confirmed that Golden Bay Cement intended to seek a declaration in the Authority and that that intelligence was conveyed before the settlement of the collective agreement. However, that view may not have been widely disseminated amongst the Union's members prior to settlement.

[55] If that is the position, the question that I must answer is whether Golden Bay Cement did everything it needed to do to convey its position notwithstanding the evidence that ordinary members of the Union may not have been aware of the company's position.

[56] I am satisfied on the evidence I heard that Golden Bay Cement did convey to the Union what its position on clause 24 was and if that intelligence did not make its way to the grass roots of the Union, that cannot be sheeted home to Golden Bay Cement.

[57] I am satisfied the company acted lawfully in making its position clear, being absolutely explicit that it intended to challenge the lawful efficacy of clause 24, conveying that to the Union prior to settlement, and that on that basis, if there was a belief in the Union's ranks that the company would continue to honour clause 24 notwithstanding Golden Bay Cement's view that the clause broke the law, that view of Union members was misplaced.

[58] I am not satisfied that Golden Bay Cement has committed a breach of good faith as a consequence.

Determination

[59] I declare for the avoidance of doubt my conclusion that clause 24 of the operative collective agreement between these parties is an unlawful preference in

terms of s.9 of the Employment Relations Act 2000 and that in consequence that clause has no force or effect in terms of s.10 of the Act.

[60] I am not persuaded that Golden Bay Cement has committed a breach of good faith.

Costs

[61] Costs are reserved.

James Crichton
Member of the Employment Relations Authority