

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 115
5598339

BETWEEN THE NEW ZEALAND MEAT
WORKERS & RELATED
TRADES UNION
INCORPORATED
Applicant

AND LAND MEAT NEW ZEALAND
LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Peter Churchman QC and Cassandra Kenworthy,
Counsel for Applicant
Graham Malone and Max Williams, Counsel for
Respondent

Investigation Meeting: 29 June 2016 at Wanganui

Submissions Received: 29 May 2016 from the Applicant
29 May 2016, from the Respondent

Determination: 22 September 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The New Zealand Meat Workers & Related Trades Union Incorporated (the Union) claims the respondent has refused to enter into a bargaining process agreement with it after it initiated bargaining for a collective agreement on 5 May 2014. The Union seeks a compliance order under s.32(1)(a) of the Employment Relations Act 2000 (the Act).

[2] The Union also seeks a declaration that the respondent has breached its duty of good faith pursuant to s.4 of the Act and an order that the respondent pay a penalty in relation to that breach of good faith.

[3] Land Meat New Zealand Limited (LMNZ)¹denies it has refused to enter into a bargaining process agreement with the Union regarding bargaining for a collective employment agreement. It opposes a compliance order on the basis that it has not failed to comply with s.32(1)(a) of the Act.

[4] LMNZ also denies it has breached its duty of good faith pursuant to s.4 of the Act and opposes an order that it pay a penalty for such breach.

Background

[5] The Union and LMNZ were parties to the Land Meat New Zealand Limited Slaughter Collective Employment Agreement 2013-2014 which expired on 1 July 2014. The parties have not entered into a bargaining process agreement or into negotiations for a new collective agreement since the Union initiated bargaining in May 2014.

[6] The Union met with the Plant Manager of LMNZ's meat processing plant in Castlecliff, Wanganui, on 28 May 2014 regarding the commencement of negotiations. Further contact followed but no negotiations resulted. Between 20 October 2014 and January 2015, LMNZ undertook a restructure as a result of which the Union and the Plant Manager of LMNZ agreed to put bargaining for the collective agreement on hold until the restructure and any ensuing redundancies were completed.

[7] On 10 June 2015, Scott Fry, Human Resources Manager for AFFCO New Zealand Limited (AFFCO), sent a bargaining process agreement (BPA) to John Woodhead, the Union's Whanganui branch secretary, for signing. In his accompanying email, Mr Fry proposed a meeting with Mr Woodhead and Dane Gerrard, a director of AFFCO, to discuss moving the collective agreement negotiations forward.

[8] The Union did not accept the BPA and Mr Woodhead and Mr Fry met for the purpose of negotiating one acceptable to both parties in June or July 2015. No

¹ Land Meat New Zealand Limited's sole shareholder is AFFCO Meats Limited, which in turn is wholly owned by AFFCO New Zealand Limited

agreement was reached and on 24 July 2015, Mr Fry asked the Union to reconsider signing the agreement it had forwarded on 10 June 2015.

[9] On 5 August 2015, LMNZ wrote to the Union, through its legal representative, stating it had no confidence the Union would honour any bargaining agreement it entered into. The letter stated LMNZ did not propose to sign off any bargaining agreement with the Union and nor did it see any point in meeting until such time as its s.50K application² had been heard and determined.

[10] Correspondence was exchanged between the parties following LMNZ's letter of 5 August 2015 until the lodging of these proceedings in the Authority on 30 November 2015. The parties were directed to mediation but did not resolve the matter.

The Authority's investigation

[11] Evidence for the Union was given by Graham Cooke, National Secretary of the Union, and Mr Woodhead. Mr Gerrard gave evidence for LMNZ. In accordance with s.174E(b)(i) of the Act, I will not set out a record of all the evidence heard.

Issues

[12] The issues for determination are:

- (a) Whether there has been a breach of s.32(1)(a) of the Act; and, if so
- (b) Whether a compliance order should be made;
- (c) Whether there has been a breach of the duty of good faith; and, if so
- (d) Whether a penalty is appropriate.

Relevant law

[13] Section 32 of the Act is headed *Good faith in bargaining for collective agreement*. Section 32(1) (a) provides:

The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:

² Proceedings between AFFCO New Zealand Limited and the Union which are before the Employment Court

- (a) *The union and the employer must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner; ...*

[14] Section 4 of the Act is headed *Parties to employment relationship to deal with each other in good faith* and provides:

- (1) *The parties to an employment relationship specified in subsection (2) -*
- (a) *Must deal with each other in good faith; and*
- (b) *Without limiting paragraph (a), must not, whether directly or indirectly, do anything –*
- (i) *To mislead or deceive each other; or*
- (ii) *That is likely to mislead or deceive each other*
- (1A) *The duty of good faith in subsection (1) –*
- (a) *Is wider than the implied mutual obligations of trust and confidence; and*
- (b) *Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
- ...

[15] Section 4A is headed *Penalty for certain breaches of duty of good faith* and provides:

A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if –

- (a) *The failure was deliberate, serious and sustained; or*
- (b) *The failure was intended to undermine –*
- (i) *Bargaining for an individual employment agreement or a collective agreement; or*
- (ii) *...*
- (iii) *An employment relationship; or*
- (c) *...*

Evidence of the parties

[16] Mr Woodhead says he met with John Fitness, who was then the manager of the LMNZ plant in Whanganui, on 28 May 2014, following the Union's initiation of bargaining. He informed Mr Fitness the Union was ready to start negotiations for a new collective agreement and says Mr Fitness undertook to contact the LMNZ head office about beginning bargaining. Mr Woodhead says this is the process he had followed in the last two rounds of bargaining for a new collective agreement.

[17] Mr Woodhead contacted Mr Fitness again on 21 July and 19 August 2014 as he had heard nothing from the LMNZ head office. On each occasion he says Mr Fitness told him he had not heard anything about the bargaining from head office although they knew Mr Woodhead was waiting to hear from them. In oral evidence Mr Woodhead said he had telephoned Mr Fitness a dozen times over the matter.

[18] There was an agreed hiatus between October 2014 and the end of the first week of January 2015 due to the restructuring I have referred to above. Mr Woodhead's evidence is that from February 2015 he made several unsuccessful attempts to get bargaining underway. These included attending the LMNZ Whanganui plant in February to meet with Mr Gerrard, who did not arrive; telephoning Mr Gerrard in March and being informed Mr Fry was responsible for collective bargaining and would be in touch with Mr Woodhead; telephoning Mr Fitness in June to inform him he had not been contacted by Mr Fry; and leaving voice mail messages for Mr Fry to return his calls on 4 and 5 June 2015.

[19] After none of those attempts had succeeded, Mr Cooke wrote to Mr Fitness on 9 June 2015 asking for a meeting between Mr Woodhead and LMNZ to negotiate a BPA and reminding LMNZ it was a breach of good faith for an employer to refuse to engage with union representatives after bargaining had been initiated. The following day Mr Fry emailed a BPA to Mr Woodhead asking him to sign and return it. Mr Fry said, once the BPA had been received, he and Mr Gerrard would meet Mr Woodhead the following Wednesday or Thursday.

[20] Mr Woodhead did not sign the BPA as it was not acceptable to the Union in its current form. There were some clauses that required modification and there was no detailed timetable for negotiations. He met Mr Fry in either June or July 2015 and, after discussing the changes the Union wanted to the BPA, Mr Fry said he would discuss the matter with AFFCO management before signing as he did not have the authority to sign the modified agreement.

[21] On 24 July 2015 Mr Woodhead emailed Mr Fry to ask if he had considered the Union's changes to the BPA. He received a response the same day to the effect that the employer did not think its original clauses were unreasonable or unnecessary, and asking the Union to reconsider its position on them.

[22] Mr Woodhead says he initially rejected Mr Fry's request but, after he heard nothing further from him, he contacted Mr Fry again to tell him the Union was willing to reconsider the BPA as it wished the bargaining to proceed.

[23] On 5 August 2015 he received a letter from Mr Malone, counsel for LMNZ, stating the Union had acted in bad faith against AFFCO and its subsidiaries over the past 18 months. The letter cited Mr Cooke having that day described AFFCO's conditions as third world conditions and the company as trying to remove workers' right to have a smoko break during an eight hour shift.

[24] Mr Malone's letter said LMNZ had no confidence the Union would honour any BPA it entered into given the "*many repeated breaches*" of its bargaining agreement with AFFCO. The letter continued:

The Union's actions are so serious that they have destroyed any possibility of a relationship between the Affco Group and Union at least until such time as the Union can show a significant change in behaviour and that it will act in good faith. Affco has applied to the Authority for a 50K order on that basis and that applies equally to LMNZ.

Accordingly LMNZ does not propose to sign off any bargaining agreement with the Union nor see any point in meeting until such time as the 50K application has been heard and determined.

[25] Mr Woodhead says he understood Mr Malone to be referring to a long-standing dispute over the AFFCO Wairoa plant which had resulted in several proceedings in the Employment Court. He says he has had no involvement in those proceedings which do not relate in any way to the LMNZ plant, the only connection being that AFFCO and the Talley family own both plants.

[26] According to Mr Woodhead, the relationship between the Union and LMNZ has in the past been uneventful. They had successfully concluded a collective agreement in 2013 and the Union had in no way acted in bad faith in its dealings with LMNZ. In Mr Woodhead's view the letter "*was attempting to draw in the applicant's Wanganui Branch into the other disputes between the applicant and AFFCO Group*".

[27] Mr Woodhead says he contacted Mr Gerrard in early May 2016, following their April mediation, in the hope of progressing a BPA and getting bargaining underway. Mr Gerrard formulated what he (Mr Gerrard) referred to as a "*revised and compressed*" BPA which he sent to Mr Woodhead for his consideration. The parties

were not able to agree on all wording. Mr Woodhead attributes this to Mr Gerrard's insistence on including the following clause under the heading "*Communication*":

There will be no derogatory media releases (including social media) or breaches of good faith bargaining by the signatory parties, against the other parties or their shareholders, while bargaining is taking place, or until such time as the site agreement is ratified.

[28] Mr Woodhead says he explained the Union's objection to the clause to Mr Gerrard and proposed several amendments to it but Mr Gerrard refused to alter the clause in any way. Mr Woodhead says the Union could not agree to that clause as it was too wide and would affect its ability to issue press releases in relation to matters completely unrelated to the bargaining with LMNZ for a new collective agreement.

[29] Mr Cooke also refers in his evidence to LMNZ imposing unreasonable conditions in the BPA it put to Mr Woodhead for signing. He describes this as being part of a "*carefully orchestrated campaign*" by the Talley family to de-unionise their meat plants. In his evidence Mr Cooke provided the background context to the difficulties faced by the Union with respect to agreeing a BPA with LMNZ.

[30] Mr Cooke cited recent proceedings involving AFFCO and The Union in support of his contention AFFCO was using various strategies with the aim of weakening the Union as much as possible. In his view it ultimately wanted no union presence in its plants.

[31] Mr Gerrard is a director of AFFCO and led the LMNZ bargaining team in bargaining for the expired collective agreement. It was his evidence the bargaining for that collective agreement had gone smoothly. He said he had also overseen matters involving LMNZ and the Union since the 29 April 2016 mediation.

[32] It was Mr Gerrard's understanding the Union's concerns with the draft BPA sent by Mr Fry to Mr Woodhead on 10 June 2015 were that timetabled dates should be included in the BPA and changes made to the clauses headed Negotiation Process and Communication. In Mr Gerrard's view the Union's objections were based on its wish to "*continue their media attack*" on LMNZ's parent company AFFCO. He saw the clauses as being necessary because "*in previous BPAs agreed to with the NZMWU the Union have paid no attention to their good faith obligations with regard to media/social media releases and statements.*"

[33] Mr Gerrard acknowledged under cross examination the Union had not breached the BPA in the bargaining for the expired collective agreement, but claimed the Union had upped the ante considerably since then. He referred to a number of media reports citing the Union which had made "*malicious*" and "*derogatory*" statements about AFFCO or Talleys or members of the Talley family.

[34] He acknowledged instructing Mr Malone to write the letter of 5 August 2015 I have referred to in paragraph 24 and said that letter had been written in the context of the Union-orchestrated "*barrage of derogatory comments*" about AFFCO and the Talley family reaching a crescendo. Mr Gerrard says LMNZ seeks assurances from the Union that it will not perpetuate the "*sustained breaches of good faith*" in bargaining for a new collective agreement it has brought to collective bargaining with AFFCO.

[35] When asked why LMNZ had been unresponsive for so many months since the Union initiated bargaining in May 2014, Mr Gerrard said the Union had not provided a draft BPA for consideration and Mr Woodhead should have contacted him directly. He accepted Mr Woodhead may have been contacting Mr Fry and Mr Fitness in an effort to get bargaining started in that time.

[36] Under cross examination Mr Gerrard also accepted LMNZ had an obligation to use its best endeavours to agree a BPA after the initiation of bargaining and that it did not do so. He was adamant, however, LMNZ would not enter into a BPA unless the Union agreed to the inclusion of a clause restricting media and social media comment derogatory to it or its parent company. He acknowledged none of the media or social media material placed before the Authority was derogatory about LMNZ.

[37] Mr Gerrard confirmed Mr Woodhead's evidence of their attempts to reach agreement over wording for a BPA in May 2016, and says they reached a stalemate. While he says he is willing to sign a BPA, he needs assurances the union will not make derogatory comments about LMNZ and its parent company throughout the bargaining.

Submissions

[38] The Union submits LMNZ's actions in refusing to enter into a BPA for the past two years and seeking to place unlawful and unreasonable preconditions on the commencement of bargaining reflects a total disregard of the Union's statutory rights and for employment law principles in general. Through its counsel, Mr Churchman, it describes this as calculated, cynical behaviour which demonstrates contempt for the law.

[39] In the Union's submission LMNZ's attempt unilaterally to impose conditions was not consistent with the duty of good faith or with the employer's obligation to have an open and communicative employment relationship. It notes LMNZ put a proposed BPA to the Union only after the Union's National Secretary had written to it. Mr Churchman submits that, rather than negotiating and resolving the BPA, LMNZ instructed its counsel to write to the Union stating its lack of confidence in the Union and its refusal to sign a BPA.

[40] He notes many of the media releases about which the respondent has complained and provided evidence to the Authority were in no way related to LMNZ. In his submission a BPA for single site collective agreement negotiations was not the appropriate place to attempt to force a party to refrain from making statements about the unlawful actions of other entities. Mr Churchman notes that LMNZ implies it is being derogatory to refer to actions of LMNZ directors and shareholders that Courts have held to be unlawful.

[41] In any event, in the Union's submission, it is unnecessary to impose a precondition such as that sought by LMNZ as the Act already provides the protections it seeks by requiring parties to an employment relationship to act in good faith. It also provides remedies applicable to any findings of such breaches by a party.

[42] The Union submits a compliance order should be issued as without it LMNZ would find spurious reasons not to engage with the Union and would repeat the behaviour that has led to the current proceedings. In its submission a penalty against LMNZ is also required for its breach of statutory good faith obligations under s.4 of the Act.

[43] LMNZ acknowledged in oral submissions it could not explain its delay in responding to the Union following the initiation of bargaining in May 2014, other than by referring to a number of other matters that were occurring at the time, and

noting LMNZ's rapid response after receiving Mr Cooke's letter of 9 June 2015 about the delay. Nonetheless its counsel, Mr Malone, denies the Union's claims in their totality and opposes the imposition of a compliance order and/or penalty.

[44] In LMNZ's submission it has repeatedly sought to agree a BPA with the Union but the Union has refused to agree to what Mr Malone describes as the "*reasonable terms*" LMNZ proposed. He refers to a concerted campaign conducted since early 2015 by the Union against LMNZ's parent company and wider group, asserting this is directly contrary to the Union's own obligations of good faith under ss.4 and 32(1)(a) of the Act.

[45] Mr Malone canvassed the meaning of the "*best endeavours*" the parties were obliged to make under s.32 to enter into a bargaining process agreement, citing various cases in which the phrase has been judicially scrutinised. One of those cases was *NZ Amalgamated Engineering Printing & Manufacturing Union (Inc) v Independent Newspapers Ltd & ors*³ in which the definition of the phrase set out in Stroud's *Judicial Dictionary of Words and Phrases* (6th Ed) 2000 was adopted. The Stroud's definition quoted *Sheffield District Railway Co. v Great Central Railway Co.*, 27 T.L.R. 451 as follows:

"Best endeavours means what it says—it does not mean second-best endeavours"

[46] Mr Malone also cites *Association of University Staff Inc v Vice-Chancellor off the University of Auckland*⁴ where the full Court held that that "*best endeavours*" sets a high standard for the entering into of a BPA. The Court said:

"It means trying one's very best in all the circumstances. It means more than making an initial proposal where that is either not responded to or is even rejected. The Code promulgated under s 35...set out some of the sorts of things that an agreed bargaining process can embrace."

[47] He submits, citing a 1984 High Court of Australia case⁵, "*best endeavours*" imposes a somewhat higher threshold than "*reasonable endeavours*" but does not oblige the obliged person to go beyond the bounds of reason. LMNZ submits that, although no progress was made by the parties in agreeing and signing off a BPA

³ WA 51/01, 3 August 2001

⁴ [2005] ERNZ 224 (EmpC)

⁵ *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 (25 October 1984)

between June 2014 and June 2015, its conduct through that period was not such as to amount to a breach of s. 32(1)(a).

[48] In support of this contention, LMNZ says Mr Woodhead made only two enquiries about bargaining in that period; the Union did not put forward a proposed BPA during that time; and at no stage did Mr Woodhead advise LMNZ it required the matter to be dealt with urgently. Additionally, between October 2014 and March 2015 the parties had agreed to put any talks about bargaining on hold pending the restructuring being undertaken by LMNZ.

[49] I do not accept Mr Woodhead made only two enquiries about bargaining in the period from May 2014 when bargaining was initiated until June 2015 when Mr Fry responded to the letter sent by Mr Cooke. I prefer Mr Woodhead's evidence that he met Mr Fitness and made approximately 12 telephone calls to him in order to get the bargaining under way as well as the other attempted contacts I have outlined earlier.

[50] I accept Mr Woodhead's evidence that his contact in the initial stage, as it had been for bargaining the last two collective agreements, was Mr Fitness. In bargaining for the earlier collective agreements he would set up the initial meetings with Mr Fitness and, once bargaining properly commenced, each party would send their negotiators to undertake the bargaining.

[51] As that process had worked well, he reasonably believed that would happen in 2014. I also prefer Mr Woodhead's evidence that the agreement he reached with Mr Fitness to put bargaining matters on hold while the restructure at the plant was underway was for the period from 20 October 2014 to January 2015 and not the longer period cited in submissions for LMNZ.

[52] I do not accept LMNZ's submission that the Union's duty of good faith required it to notify LMNZ it required bargaining to be dealt with urgently. Once bargaining was initiated on 28 May 2014 there was a duty on both parties under s.32(1)(a) of the Act to use their best endeavours to enter into a BPA as soon as possible. There was also a duty under s.4 of the Act for Land Meat to deal with the Union in good faith including being responsive and communicative.

[53] I am satisfied Mr Woodhead did act in good faith towards LMNZ and that he made best endeavours to enter into a BPA through his meetings and telephone discussions with Mr Fitness. I accept his evidence that Mr Fitness told him he would

contact head office to organise the commencement of bargaining. LMNZ has proffered no explanation for its lack of responsiveness until June 2015, other than for the three month period of the restructuring when Mr Woodhead and Mr Fitness agreed not to pursue bargaining matters. It submits it tried its best in all the circumstances to conclude a BPA with the Union from 10 June 2015 when Mr Fry drafted a BPA and sent it to Mr Woodhead for signing.

[54] That occurred 13 months after bargaining had been initiated, or 10 months, allowing for the agreement between Mr Woodhead and Mr Fitness to put collective bargaining matters on hold during the restructuring. That is an inexplicably lengthy period of non-responsiveness on LMNZ's part, both before the agreed hiatus and after it. I find LMNZ to have breached its duty of good faith to the Union under s.4 of the Act.

[55] I am not satisfied that, after LMNZ had sent Mr Woodhead a proposed BPA, 13 months after the Union had initiated bargaining, the employer fulfilled its obligation under the Act to use its "*best endeavours*" to enter into a BPA. While Mr Fry discussed with Mr Woodhead the changes the Union requested, he had no authority to agree those changes. LMNZ insisted on retaining the provisions the Union objected to without providing any rationale other than that it did not consider them unreasonable or unnecessary.

[56] After Mr Woodhead indicated the Union would reconsider those clauses for the sake of progressing the bargaining, LMNZ instructed its lawyer to write the 5 August 2015 letter in which Mr Malone stated LMNZ would not sign a BPA or meet the Union until proceedings unrelated to the LMNZ Slaughter collective agreement had been heard and determined.

[57] It is well known that LMNZ's parent company and the Union have other proceedings before the Authority as well as the Employment Court and the Court of Appeal. However, there is no valid reason for those proceedings to be used as an excuse to avoid bargaining for a new LMNZ collective agreement. Previous collective bargaining had been uneventful, with neither drama nor marked rancour between the parties. Many of the media releases referred to by LMNZ to justify its stance as conveyed in Mr Malone's 5 August 2015 letter did not relate to LMNZ but to wider AFFCO Group matters.

[58] LMNZ's apparent change of stance towards bargaining since mediation took place in April 2016 seemed to be a positive sign. However, the company's insistence on the inclusion in any BPA of a clause that would prevent the Union from making any "*derogatory*" media releases (including social media) against the other parties or their shareholders during bargaining or until the site agreement is ratified is has been a significant and unreasonable stumbling block.

[59] The Oxford online dictionary defines "*derogatory*" as showing a critical or disrespectful attitude. As the definition of "*critical*" includes "*the objective evaluation and analysis of an issue in order to form a judgement*", the restriction is unreasonable. It would prevent the Union from making any statement critical of AFFCO on matters that are unrelated to, and far removed from, the collective bargaining relating to the LMNZ plant in Whanganui. I am not satisfied LMNZ is serious about signing a BPA with the Union or progressing the bargaining. That being so, I find this is an appropriate case for a compliance order against LMNZ under s. 137(1)(a)(ii) of the Act.

[60] LMNZ's failure to engage in any meaningful way with the Union over a BPA after the Union had initiated bargaining was a deliberate, serious and sustained breach of good faith over a period of several months. I find the imposition of a penalty is justified.

[61] The Union submits it has sustained harm from LMNZ's actions and failure to engage in bargaining over the past two years. It notes the cost and time involved and has asked that any penalty imposed on LMNZ be paid to the Union to mitigate the harm it has borne. No evidence was put forward by the Union witnesses that would support the request and I am not satisfied that is appropriate to award any part of the penalty to the Union.

Determination

[62] LMNZ has breached its duty of good faith to the Union pursuant to s.4 of the Act.

[63] It is ordered to comply with s. 32(1)(a) of the Act specifically by using its best endeavours to enter into an arrangement that sets out a process for the bargaining in

an effective and efficient manner. This is to occur within six weeks of the date of this determination.

[64] Land Meat New Zealand Limited is to pay a penalty of \$15,000 under s.4A of the Act. The penalty is to be paid to the Authority for payment into a Crown Bank Account.

Costs

[65] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority