



[2] The Meat Workers Union says that the postings do not breach the duty of good faith, as the duty of good faith does not apply in the circumstances.

[3] The Meat Workers Union says that:

- (a) The AFFCO claim does not disclose any arguable cause of action;
- (b) The matters stated in the AFFCO claim do not give rise to any good faith obligations between AFFCO and the Meat Workers Union so the Authority does not have any jurisdiction to issue the orders sought;
- (c) The AFFCO claim is frivolous and vexatious.

[4] For these reasons, the Meat Workers Union applies for an order striking-out AFFCO's statement of problem (as amended on 1 June 2016). That order is sought pursuant to clause 12A of Schedule 2 of the Employment Relations Act 2000 (the Act).

### **Procedural background**

[5] This matter commenced by a statement of problem lodged by AFFCO dated 2 April 2016. That statement of problem alleged various breaches of the duty of good faith pursuant to s 4 of the Act in relation to the postings by the Meat Workers Union on Twitter and the Website. The orders sought in the statement of problem included a compliance order requiring the Meat Workers Union to comply with its duty of good faith by ceasing and desisting from publishing on the Website and Twitter any publications about AFFCO, its parent company or officers that were unbalanced, misleading, untruthful and/or derogatory of them. AFFCO also sought a determination that a particular employee of the Meat Workers Union acting or representing the Meat Workers Union or its members at meetings or mediations with the applicant would not comply with the Meat Workers Union's duties under s 4 of the Act.

[6] In this original claim, AFFCO sought to rely on a significant number of publications on both Twitter and the Website to support its statement of problem.

[7] In addition to the statement of problem lodged, AFFCO also made an application for urgency and for interim orders pending final orders to prevent any

further publication, which breached the duty of good faith, on Twitter or the Website whilst the Authority was determining this matter.

[8] The Meat Workers Union responded to the original claim with a statement in reply dated 15 April 2016. In addition, on 22 April 2016, the Meat Workers Union made an interlocutory application for an order staying this matter. That application was made on the basis that this matter was sufficiently similar to other proceedings in the Employment Court. As such, it would be an abuse of process for the proceeding not to be stayed and that it would be unfair to the Meat Workers Union to expect it to defend this claim whilst involved in proceedings that are substantially similar in the Employment Court.

[9] At a case management conference, the parties agreed that I would deal with the application for a stay in the first instance as a preliminary matter and if it was determined that the matter would not be stayed then I would address the application for urgency and/or interim orders after that.

[10] As a result, I held a meeting on 25 May 2016. There was no oral evidence in this meeting and I heard submissions from counsel for each party.

[11] In preparation for the hearing on the preliminary matter, I decided that there was an issue as to whether this matter should be removed to the Employment Court. This was on the basis that there was an important question of law that was likely to arise in the matter other than incidentally and/or because the Court already had before it proceedings between the same parties, which involved the same, similar or related issues. I invited counsel to consider the question of removal and make submissions on that point as well as the stay in the first meeting.

[12] In the meeting, Counsel for AFFCO submitted that this matter was about publications unrelated to collective bargaining and was premised purely on the basis of a breach of duty arising under s 4 of the Act and not a breach of duty arising under s 32 of the Act which is what the matters in the Employment Court are based on. Counsel for AFFCO's submission was that the publications do not pertain to collective bargaining and there could be no argument that there had been a breach of the duty of good faith in relation to collective bargaining and that this matter was not the same or similar to those matters before the Court.

[13] Because of discussion at the meeting on 25 May 2016, counsel for AFFCO requested to amend the statement of problem. This was essentially an acceptance that the wide ambit of the publications relied on to support the claim meant that some of the matters complained of were in fact a duplication of those matters that occurred in matters in the Employment Court.

[14] I considered it was appropriate for counsel for AFFCO to take the opportunity to amend the statement of problem so it reflected the case that it wished to put forward rather than the wider case that might directly cross over with those matters before the Employment Court. The amended statement of problem was lodged on 1 June 2016.

[15] The amended statement of problem removed reference to a number of the publications that AFFCO sought to rely on to evidence breach of the duty of good faith. It also removed the request for relief in relation to a declaration concerning the particular employee of the Meat Workers Union attending meetings or mediations on behalf of the Meat Workers Union and its members being a breach of the duty of good faith. That is, the amended statement of problem sought compliance orders only. The compliance order was amended slightly such that AFFCO seeks an order that the Meat Workers Union comply with its duty of good faith by ceasing and desisting from publishing on the Website and on Twitter items referring to the applicant, its parent company or officers that are unbalanced and/or derogatory of them.

[16] In response to the amended statement of problem, counsel for the Meat Workers Union advised that the Meat Workers Union continued to oppose the claim and that its position was the same as stated in its statement in reply. That is, counsel affirmed that the Meat Workers Union's position was that there was no breach of the duty of good faith as the duty did not apply to the circumstances referred to.

[17] In addition to confirming the Meat Workers Union's continued opposition to the AFFCO claim, the Meat Workers Union also filed an interlocutory application to strike-out AFFCO's statement of problem. As already expressed, the grounds on which that order is sought include:

- (a) The application (the amended statement of problem) does not disclose any arguable cause of action;

- (b) The matters listed in the statement of problem (as amended) do not give rise to any good faith obligation between AFFCO and the Meat Workers Union so that the Authority has no jurisdiction to issue the compliance order sought;
- (c) The application (in the amended statement of problem) is frivolous and vexatious.

[18] AFFCO opposed the application to strike-out and it filed a notice of opposition on 15 June 2016.

[19] When this matter came before me for a second meeting on 4 July 2016, it was for me to consider the Meat Workers Union's application to strike-out and the issue raised by me as to whether this matter should be removed to the Employment Court.

### **Background facts**

[20] AFFCO and the Meat Workers Union are parties to a collective agreement. That agreement expired on 31 December 2013. By virtue of s 53 of the Act, the expired agreement only remained in force for 12 months until 31 December 2014.

[21] On 4 November 2014, the Meat Workers Union initiated bargaining for a new collective agreement. A bargaining process agreement was signed between AFFCO and the Meat Workers Union on 4 February 2015.

[22] Despite meeting on a number of occasions in various attempts to agree the terms of a new collective agreement, that has not been achieved. Both parties have alleged various breaches of good faith against the other in relation to collective bargaining and this has resulted in at least three applications that have been made to the Authority.

[23] Matter 5571687 was lodged by AFFCO against the Meat Workers Union on 29 July 2015. This was an application by AFFCO to the Authority for a determination as to whether bargaining had concluded under s 50K of the Act (the s 50K matter). The Meat Workers Union opposed that application and raised a counterclaim alleging various breaches by AFFCO seeking penalties for those actions.

[24] Matter 5598687 was a statement of problem lodged by the Meat Workers Union on 1 December 2015. That statement of problem sought a determination fixing

the provisions of the collective agreement with AFFCO pursuant to s 50J of the Act (the s 50J matter).

[25] The Authority has removed both the s 50K matter and the s 50J matter to be decided by the Employment Court. Both of these matters contain allegations of breach of the duty of good faith as it pertains to collective bargaining (more particularly breach of s 32 of the Act).

[26] Matter 5559394 was a statement of problem lodged by AFFCO on 28 May 2015. The statement of problem alleged that the Meat Workers Union had breached its statutory duty of good faith set out in s 4 of the Act, breached the duty of good faith in relation to collective bargaining as set out in s 32 of the Act and breached its contractual obligations set out in the bargaining process agreement. AFFCO sought compliance orders against the Meat Workers Union and penalties.

[27] In a determination of 17 September 2015, the Authority stayed this matter pending the outcome of the s 50K matter that had been removed to the Employment Court.

[28] There is a fourth matter between the parties which is currently on appeal to the Court of Appeal. This matter relates to actions that AFFCO took in connection with employees who had previously been subject to the collective agreement once that collective agreement had expired. The Court has determined that AFFCO's actions in relation to those employees were in breach of the duty of good faith under ss 32 and 4 of the Act.

[29] It is against this background that AFFCO complains of actions by the Meat Workers Union.

[30] The actions complained of are publications made by a Union employee on a Twitter account between 19 May 2015 and 29 March 2016 and three publications on the Website on 25 June 2015, 19 January 2016 and 7 March 2016.

[31] The 32 publications on the Twitter account that AFFCO complains of cover various statements about AFFCO and people associated with AFFCO. Some examples of the publications complained of include:

- (a) On 31 May 2015, a publication on the Twitter account read: *“All we needed was another Sir Peter who thinks workers’ rights are a nuisance.”*;
- (b) Also on 31 May 2015, a publication on the Twitter account read: *“Um didn’t Sir Peter Talley engage in a secret one million plan to help Brash win in 2005? Perhaps that’s what’s meant by philanthropy.”*;
- (c) On 6 June 2015, a publication on Twitter read: *“97 workers at MWU meeting today have between them 1,626 years of experience. Does it count for nothing #SirPeterTalley?”*;
- (d) On 8 June 2015, a publication on the Twitter site read: *“Knowing HM Queen as I do, I don’t think one would approve that #SirPeterTalley knighthood if she knew his serfs would suffer”*;
- (e) On 18 June 2015, a publication on the Twitter site read: *“Hey Talleys. You don’t need workers to bow to your every command. Threats and bullying when workers speak out won’t stop them.”*;
- (f) On 8 December 2105, a publication on the Twitter site read: *“Lots of calls coming in from AFFCO Talley workers underpaid and ripped off by Talleys in first place since court win.”*;
- (g) On 16 December 2015, a publication on the Twitter site read: *“The Talley madness continues. Three workers at Rangiruru AFFCO suspended for wearing their nice green union shirts.”*;
- (h) On 1 February 2016, a publication on the Twitter site read: *“Workplace slaughter and rights abuses continue at Talleys/AFFCO.”*

### **The issues**

[32] The underlying issue in respect of the amended statement of problem lodged by AFFCO is simply whether the duty of good faith in s 4 of the Act applies to the publications.

[33] The Meat Workers Union says the duty of good faith does not apply to those communications so it is clear that there is no arguable cause of action. If there is no

cause of action then this matter is frivolous or vexatious and should be dismissed pursuant to clause 12A of Schedule 2 of the Act. In the alternative, it says that the Authority is not limited to the power to dismiss in relation to this being frivolous or vexatious but rather it could simply determine, having conducted an investigation meeting, that there is no cause of action and decide in favour of the Meat Workers Union.

[34] Therefore, the issue in respect of the application to strike-out (dismiss pursuant to clause 12A) is, is this matter frivolous or vexatious? Or can I decide that there is no cause of action and make a determination in favour of the Meat Workers Union?

[35] The issues to be resolved in respect of the question of removal of this matter to the Employment Court are:

- (a) Is there an important question of law arising in this matter other than incidentally; and/or
- (b) Does the Court already have before it proceedings between these parties which involve the same, similar or related issues?

### **Application to dismiss**

[36] The Meat Workers Union's application is expressed as being an application to strike-out. The jurisdiction that the Authority has to strike-out a matter is a power to dismiss a matter pursuant to clause 12A of Schedule 2 of the Act. This provides:

#### **12A Power to dismiss frivolous or vexatious proceedings**

- (1) The Authority may, at any time, in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.
- (2) In any such case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.

[37] The question of whether a matter is frivolous or vexatious has been considered by the Employment Court, the High Court and the Court of Appeal on many occasions. In *Lumsden v Sky City Management Ltd*<sup>1</sup>, Judge Inglis considered the question of frivolous or vexatious particularly as it related to the power of the

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<sup>1</sup> [2015] NZEmpC 225

Employment Relations Authority to dismiss a matter. Judge Inglis provided a comprehensive and thorough analysis of relevant and applicable case law in relation to the question of frivolous or vexatious. After reviewing the relevant case law, Judge Inglis made the following conclusions in relation to the power to dismiss for being frivolous or vexatious as it relates to the Authority<sup>2</sup>:

[37] The present matter falls for determination under clause 12A, not r15.1. However, the scope of clause 12A is usefully informed by the judicial decisions I have referred to. It seems to me that a matter is not frivolous simply because it has no reasonable prospect of success. Something more is required. A matter is frivolous where it trifles with the Authority's processes, lacking the degree of seriousness required to engage the attention of the Authority in the sense referred to in the *Shipwrights* case. A matter may be said to trifle with the Authority's process where it is, to use Chief Goddard's terminology, impossible to take seriously.

[38] Relevantly, Parliament has chosen to limit the circumstances in which the Authority may dismiss a proceeding without investigating it under clause 12A, to matters which are either frivolous or vexatious. There is, for example, no reference to dismissal of a matter which discloses no reasonably arguable cause of action or defence. While the dismissal of cases with little or no merit appears to have been contemplated at a relatively early stage of the legislative process, the wording did not find its way into the section or clauses as enacted. The rationale for limiting the scope for dismissal may well reflect the special characteristics of this jurisdiction and the underlying policy thrust of the Act, empowering employees to pursue claims and have them determined on their substantive merits, without undue regard for legalities, and in an efficient, non-technical manner. Dismissing claims without full investigation on broad grounds relating to an assessment of legal merits does not sit comfortably with this.

[39] I conclude that the Authority's power to dismiss is limited. The threshold is high. Dismissing a claim is a serious step, and not one to be taken lightly. It cuts a claim off at the knees and, because of its draconian effects and having regard to the scheme and the purpose of the legislation, it is reserved for clear cut cases. This is not one of them.

[38] As I have stated, the issue to be determined on the substantive matter is, does the duty of good faith in s 4 of the Act apply to the publications? It follows that if that is the case, there is then a further analysis of whether the publications complained of are in fact a breach of the duty of good faith or not.

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<sup>2</sup> At [37]

[39] In order to determine those two issues, it seems to me that I must investigate what has been published and the circumstances of publication, including whether the publication is true or a reasonably held opinion of the publisher.

[40] It might also be relevant to consider the intention of the publisher and the effect of the publication. It might be that on the face of it a publication appears fairly innocuous but in certain circumstances, including the background giving rise to the publication, the intention of the publication and the audience or recipients of the publication and how they respond to it, that the publication may take on a whole different meaning. This may cause the publication to be a situation in which the duty of good faith applies and is one where the publication is a breach.

[41] So for example, publications about Sir Peter Talley and his knighthood might be publications that undermine his position. They might also, in some cases, be seen as publications which, as he is someone who is seen as an owner of AFFCO or at least influential in the management of AFFCO, might undermine AFFCO's position vis-à-vis its employees or even undermine its position in relation to ongoing collective bargaining.

[42] Two things flow from this observation. First, whilst this analysis requires a few steps in terms of the investigation and the connection between the publication and the effect, this does not mean that the cause of action is tenuous or indeed that it has no merit at all.

[43] Second, even if I am wrong on the first point, what the analysis does show is that this matter does deserve the merit of a full investigation into the evidence before I determine whether the cause of action is sustainable and if so whether there has been a breach.

[44] It is notable that Judge Inglis refers to dismissing a claim without full investigation on broad grounds relating to assessment of legal merits not sitting comfortably with the jurisdiction that the Authority has to determine matters. This is also evident in other powers the Authority has, for example, the power to find a grievance is other than that which has been alleged, or the power to resolve an employment relationship problem on terms other than that claimed.

[45] It seems to me, therefore, that I should not dismiss a matter simply on the basis that one party says there is no sustainable cause of action. The relevant case law

expresses this quite clearly. I am looking for something more in relation to dismissing a matter, which Judge Inglis has described as being where a matter “*trifles with the Authority’s processes, lacking the degree of seriousness to engage the attention of the Authority*”.

[46] That is not the case here and therefore the Meat Workers Union’s application to dismiss AFFCO’s claim fails.

### **Removal to the Court**

[47] The Authority’s power to remove a matter to the Court is set out in s 178 of the Act. I may remove a matter of my own motion or on the application of any party to the matter. The grounds on which I may order the removal of a matter are set out in subsection (2) and include:

- (2) The Authority may order the removal of a 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.

[48] In the often quoted decision of *Hanlon v International Education Foundation (NZ) Inc*<sup>3</sup>, Judge Goddard considered when a question of law is important and stated amongst other matters:

The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A question of law arising in a matter would be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about the decision of it or a material part of it.

[49] I am satisfied that there are two questions of law, which are important on the basis that they are decisive of this case. Those two questions are:

- (a) Does the duty of good faith in s 4 of the Act apply to publications made by a union that are:

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<sup>3</sup> [1995] 1 RENZ 1 at 7

- (i) Not connected to collective bargaining or an individual employment agreement or any other matter listed in s 4(4) of the Act; and
  - (ii) Not directly connected to an employer's business or an employee's work?
- (b) Does the Union owe a duty of good faith under s 32 of the Act in respect of publications that are not directly connected to bargaining but are made whilst bargaining is still being undertaken (albeit with applications pending in the Court)?

[50] The second question is relevant notwithstanding that the amended statement of problem simply raises the question of breach of duty of good faith pursuant to s 4 of the Act because the publications relied on are made against the background of protracted and fractious collective bargaining.

[51] In essence, the second question is really a question about whether the circumstances of collective bargaining being ongoing means that the duty of good faith could apply to any publication that has the potential to undermine one of the parties' positions in that collective bargaining.

[52] In addition, it may be the case that if a decision is made that the duty of good faith applies to the publications in question, then it is open to the Meat Workers Union to rely on s 4(3) of the Act to say that the publications are true or reasonably held opinions. However, in *Christchurch CC v Southern Local Govt Union*<sup>4</sup> the Court decided that s 4(3) could not be relied on in relation to the duty of good faith as it applies to collective bargaining. Therefore, the question of whether the publications apply to the duty of good faith in collective bargaining arises again.

[53] I am also satisfied that both questions are important questions of law because they have significant implications for other parties involved in collective bargaining. The question of how wide the obligation in relation to the duty of good faith is when collective bargaining is ongoing, is a question that could determine the actions that unions and employers might take in making publications, particularly on social media and other internet forums that enable widespread communication and comment.

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<sup>4</sup> [2007] ERNZ 37

[54] I am also satisfied that notwithstanding that the statement of problem is pleaded as breach of s 4 of the Act, the question of the duty of good faith applying to publications made by the Meat Workers Union is similar to allegations before the Court in respect of the s 50K matter and s 50J matter.

[55] In all of the circumstances, it is appropriate to remove this matter to the Employment Court.

**Determination**

[56] I decline the Meat Workers Union's application to strike out this matter.

[57] This matter is removed to the Employment Court pursuant to ss 178(2)(a) and 178(2)(c) of the Act.

**Costs**

[58] I reserve the issue of costs.

Peter van Keulen  
Member of the Employment Relations Authority