Attention is drawn to the prohibition of publication of information as set out at [6] of this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 6
5560304

	BETWEEN	THE RAIL & MARITIME TRANSPORT UNION INCORPORATED Applicant
	AND	KIWIRAIL LIMITED Respondent
Member of Authority:	Michele Ryan	
Representatives:	Geoff Davenport and Guido Ballara, Counsel for Applicant Peter Chemis and Jennifer Howes, Counsel for Respondent	
Investigation Meeting:	14-15 June 2016 at Wellington	
Written submissions:	24 June 2016 from each of the parties	
Determination:	3 February 2017	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Between 2009 and 2013 KiwiRail Ltd (KiwiRail) purchased locomotives and wagons (rolling stock) from international manufacturer 'CNR Import and Export Corporation Ltd' and its subsidiaries, (collectively referred to as CNR in this determination). CNR is based in China.

[2] In early 2014 asbestos was located in the framework of many of the locomotives. Following that event employees of CNR have, from time to time, worked at various KiwiRail depots to remedy the locomotives and other rolling stock defects.

[3] The Rail & Maritime Transport Union Incorporated (the RMTU) has raised numerous claims in connection with the presence of CNR's employees on KiwiRail worksites. It alleges KiwiRail has contracted out work its members should be performing. That matter and other related concerns form the basis of claims that KiwiRail has breached the Multi-Employer Collective Agreement[1] (the MECA) in various ways and that KiwiRail has breached duties of good faith to it.

[4] The RMTU also seeks a determination that the Minimum Wage Act 1983 and the Holidays Act 2003 (referred to as a minimum code) applies to CNR employees when working at KiwiRail's worksites. It seeks compliance orders on all of these matters.

[5] KiwiRail rejects the RMTU's claims in their entirety. It says the work to repair the goods is not covered under the MECA and nor is it work that it would otherwise undertake. KiwiRail says CNR was obliged, pursuant to contractual warranties agreed when it purchased the locomotives, to remedy faults and is entitled to choose how it carries out that activity. KiwiRail says that in the absence of CNR's consent, if it carries out the work, the work is no longer warranted. KiwiRail denies it has breached obligations of good faith.

Non-publication order

[6] Pursuant to cl. 10 of Schedule 2 of the Employment Relations Act (the Act), any information provided to the Authority which details the commercial and financial arrangements between KiwiRail and CNR, and which is not otherwise already in the public domain, is prohibited from publication. Personal information relating to individual CNR employees is also prohibited from publication.

Background information

[7] Between 2009 and 2013 KiwiRail signed several Sale and Purchase Agreements (SPAs) to have CNR design, manufacture and deliver 48 locomotives (in total), and a large number of wagons. The machinery arrived in New Zealand, according to batch orders, between late 2010 and 2015.

[8] The SPAs contain terms and conditions, including commissioning services and warranties, that KiwiRail says are common to purchases of this nature. A small

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[1] 1 July 2014-30 June 2016

number of CNR employees have been engaged with commissioning the locomotives on New Zealand rail tracks since 2010. At the conclusion of a commission where no faults requiring rectification have been identified, CNR issues KiwiRail with an 'acceptance certificate' on a locomotive.

[9] Beginning from the date on which an acceptance certificate is issued, the defect liability provisions (the warranties) contained in the SPAs become operative and CNR is required to rectify goods that, within various fixed timeframes, are deemed defective.

[10] There is an additional extension to the defect liability period if the design of the product is faulty or does not meet specification. A 'final acceptance certificate' is issued when the entire contents of an order pursuant to a specific SPA have been deemed clear of faults. The cost of commissioning, the remedying of parts and defects, and the work required to rectify the goods is under warranty and borne by CNR.

[11] The detection of asbestos in 40 of the locomotives in late February 2014 was regarded by KiwiRail as a significant breach to the design specifications associated with the locomotives, and CNR was notified. CNR acknowledged its obligation to fix the goods and KiwiRail says it was CNR's preference to have employees travel to New Zealand to undertake the work.

[12] The RMTU was advised of the asbestos in early March 2014 and a series of meetings were held to discuss the issue. It was advised that CNR employees would carry out the correction work.[2]

[13] In early June 2014 formal arrangements as regards compensation were set out in a 'Settlement Agreement' between KiwiRail and CNR. The parties also executed a 'Rectification Agreement' whereby KiwiRail agreed to have CNR carry out the remedial work on the locomotives at its Hutt Valley workshop. The warranty provisions in respect of the locomotives were not affected by the Rectification Agreement.

[14] The first tranche of work undertaken by CNR occurred between May and November 2014. A "red zone" was assembled for deconstruction of the locomotives and removal of the asbestos. The locomotives are then transferred to a "green zone"

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[2] 6, 18-19 & 26 and 27 March 2014

and reconstructed. Neither CNR workers nor KiwiRail employees were directly involved with the removal of the asbestos which was undertaken by a New Zealand company specialising in asbestos removal and paid for by CNR.

[15] Prior to the discovery of the asbestos, rust had been located in some locomotives, as had a design flaw in the wagons. Additional defects in parts and components material to the operation of the locomotives have since been further identified. It is clear from the evidence that the work needed to remedy defects in the rolling stock has been greater than anticipated.

[16] In December 2014 the RMTU and KiwiRail executed a Multi-Employer Collective Agreement (the MECA).

[17] Work on the locomotives by CNR continued between April 2015 and October 2015 and resumed again in 2016. At the time of the Authority's investigation no final acceptance certificates had been issued.

[18] There is no dispute that RMTU members have performed work associated with the reconstruction of the locomotives. KiwiRail says those instances are limited to minor matters or where there has been urgency in having the work concluded and CNR employees have not been available. In these circumstances KiwiRail says there is usually an agreement with CNR for it to reimburse KiwiRail. With regards to KiwiRail employees who have worked in the red zone, KiwiRail says those individuals volunteered to operate forklifts or cranes which require New Zealand certification and the tasks do not directly involve dismantling of locomotives. I understand additional allowance payments were negotiated between the RMTU and KiwiRail for work performed in this area.

[19] In or about August 2014 the Ministry of Business, Innovation and Employment (MBIE) received a complaint regarding the working conditions of the CNR employees. The Labour Inspectorate investigated those matters and a report was issued on 17 April 2015.[3]

[20] The report stated that there was no evidence of a breach of minimum standards but that it was unable to determine whether CNR employees were paid the minimum wage because the employees declined to disclose information about individual wages,

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[3] MBIE report "*Summary of Labour Inspectorate Investigation of Alleged Breaches in Employment Standards of the Chinese Workers at KiwiRail's Workshops"*

stating the information was private, as did CNR. Information obtained by the Inspectorate suggested that CNR employees received paid sick leave and statutory holidays but it was unable to establish whether they received annual leave in accordance with New Zealand law. The report noted that CNR workers received appropriate meal and rest breaks and a per diem allowance to meet daily needs. The Inspectorate concluded that it was unclear whether New Zealand minimum code legislation applied in the circumstances but considered it more likely it would not.

[21] In June 2015 the RMTU raised claims against KiwiRail via a Statement of Problem lodged at the Authority.

[22] In July 2015 KiwiRail requested and received information from CNR as to how its employees were remunerated when working in New Zealand.

The Authority's investigation

[23] Pursuant to s 174E of the Act I have not recorded all the evidence and submissions received but have stated relevant findings of fact and law necessary to dispose of the matter.

[24] This determination has been issued outside the statutory period of three months after receiving the final submissions. As permitted by s 174C(4) the Chief of the Authority decided that exceptional circumstances existed to allow a written determination of findings later than the latest date specified at s 174C(3).

The claims

[25] The issues for determination are:

(a) whether KiwiRail breached the MECA at cl.29, cl.2.1 or cl. 11

(b) whether KiwiRail has breached its duty of good faith

(c) whether the RMTU is entitled to seek a determination as to whether the minimum code applies to CNR employees;

(d) if the RMTU is entitled to seek a such a determination, does the minimum code apply to CNR employees.

Has KiwiRail breached the MECA?

The law on contractual interpretation

[26] The objective in a contract interpretation dispute is to establish what the parties intended when they entered into a contractual agreement.[4] The inquiry involves an objective assessment of what a reasonable and properly informed person with all the relevant background knowledge would consider the words used by the parties to mean.[5]

[27] The context in which words are used, alongside the purpose of the agreement as a whole, are both important and necessary considerations in ascertaining meaning albeit the words used by the parties are a powerful but not necessarily conclusive indicator of what the parties meant.[6] It is useful to cross-check the words against the context.[7] Pre- and post-contract evidence may assist if it tends to establish a fact or circumstance capable of demonstrating objectively what the parties intended but is not relevant if it does no more than tend to prove what individuals subjectively intended their words to mean.[8]

Has KiwiRail breached cl. 29 of the MECA?

[28] Clause 29 provides the following:

> ***Contracting Out, Outsourcing or Sale***
>
> 29.1 KiwiRail prefer to utilise their own people and equipment for its ongoing business activity.
>
> 29.2 …the employer confirms its commitment in regard to contracting out, outsourcing or sale as follows:
>
> 29.2.1 That, wherever possible work falling within the scope of the positions in the Pay Schedule on which employees covered by this agreement are engaged, as at the commencement of this agreement, will continue until the expiry date of this agreement to be undertaken by its own employees.
>
> 29.2.2 Where it is not possible to undertake particular work using the employer's own employees in an efficient manner, at a reasonable cost, and to an acceptable level of quality, consideration may be given to contracting out, outsourcing or selling work currently performed by employees covered by this agreement to third party contractors or labour agencies.

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4 *Vector Gas Ltd v Bay of Plenty Energy* [2010] NZSC 5, [2010] 2 NZLR 444 at [19]
5 Ibid
6 Ibid at [63]
7 Ibid at [24]
8 Ibid at [31]

> It is acknowledged that employees of labour agencies may be engaged on an urgent or short-term basis.
>
> 29.2.3 For the term of this agreement KiwiRail undertakes to provide third party contractors with a schedule of KiwiRail's hourly rates for relevant work covered by this agreement and require them to assure KiwiRail management that they will pay at or above those hourly rates.

[29] The first of the RMTU claims concerns whether KiwiRail has outsourced work to CNR in breach of cl. 29. Next, it says that if KiwiRail is able to contract out the work it has breached cl. 29.2.3 by failing to obtain an assurance from CNR that it remunerates its employees at or above the hourly rate for work covered by the MECA.

[30] The RMTU claims that the work performed by CNR is work that should be undertaken by its members. It submits that the work at issue falls within the positions in the Pay Schedule of the MECA. The RMTU points to its members' involvement with the work as outlined at [18] and says KiwiRail employees have "deconstructed and reconstructed locomotives on hundreds of occasions" including historically to remove asbestos.

[31] The RMTU refers to two phrases expressed at various junctures of cl.29.2.1; "*wherever possible*" and "*will continue*", and submits that these words demonstrate a contractual commitment that the work performed by its members has a high threshold of protection against outsourcing.

Analysis and determination

[32] I find the express statement (at the beginning of cl. 29) that it is KiwiRail's preference to use its own people in "*its ongoing business activity*" provides critical context to the remainder of cl. 29.

[33] The content of cl. 29.2.1 provides furthers definition to the scope of the work referred to at cl. 29 with the words "*which employees are engaged, as at the commencement of the agreement*", and at cl. 29.2.2 which refers to the circumstances where "*work currently performed*" may be contracted out. I agree with the submission on behalf of KiwiRail that the natural and ordinary meaning of these words read together against the contextual background of "ongoing business activity" is that the work cl. 29 envisages is work that the parties viewed RMTU members as generally, usually and currently performing.

[34] The issue then is not whether the work is able to be performed by RMTU members but rather, can the work carried out by CNR be objectively characterised as *"ongoing business activity"* and therefore subject to the limitations to contracting out or outsourcing at cl. 29. On balance I do not consider it can.

[35] There was no evidence of RMTU members being excluded from work they would ordinarily carry out.

[36] The unchallenged evidence of KiwiRail is that the purchase of a fleet of the locomotives occurs infrequently, with the most recent similar purchase being in the 1980s. The discovery of asbestos in the locomotives in early 2014 was unwanted and unexpected. There is no real argument that the work required to remove the asbestos and reassemble the locomotives arose as a consequence of that event. The rectification work is work required to bring the machinery to an acceptable condition for the purpose it was designed whereas maintenance work is work undertaken to preserve the condition of the machinery. The distinction between those activities is an important factor to determining whether the work can be fairly characterised as *"ongoing business activity".*

[37] I am persuaded also by the absence of evidence demonstrating that the parties intended the rectification work to fall within the pay schedule positions or form part of the subject matter of cl. 29 when negotiating the 2014 MECA. CNR began work on the locomotives 6-7 months before the 2014 MECA was executed by the parties. Given the unique circumstances in which the remedial work arose I consider there would be clear evidence demonstrating that the parties agreed that the rectification work fell within the scope of cl. 29 (which is in substantially the same form as the previous MECAs prior to the discovery of the asbestos) if that is what they intended. There is no evidence of this nature.[9]

[38] I am not satisfied that a properly informed third party appraised of all the background material would reasonably conclude that the work that arose to remedy the CNR defective goods was work that the parties objectively regarded as *"ongoing business activity"* prior to or at the time the parties entered into the 2014 MECA.[10]

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9 The General Secretary of the RMTU accepted during questioning that no concern was raised about the work performed by CNR during negotiations for the MECA.

10 I was not provided with a copy of the 2012-2014 MECA but there is no evidence to indicate the wording of cl. 29 was not materially the same.

The work undertaken by CNR does not fall within the scope of cl.29 and is not work that has been contracted out.

[39] It follows that KiwiRail cannot have breached the obligation at cl. 29.2.3 to obtain assurance from CNR that its workers are paid at the same or better rates than those contained in the MECA schedule because the work covered by the MECA has not been contracted out.

Has KiwiRail breached cl. 2.1 and/or cl. 11.1 of the MECA?

[40] Clause 2.1 of the MECA states:

> Introduction
>
> 2.1 "KiwiRail …aspires to be a State Owned Enterprise leader and employer of choice by providing outstanding service, acting with integrity, and valuing people which contributes and supports KiwiRail's vision for the future."

[41] Clause 11.1 provides:

> 11.1 The parties are committed to developing and maintaining a harmonious relationship based on mutual respect. Our objectives include;
>
> - Being an employer of choice
> …

The RMTU's claims

[42] The RMTU says KiwiRail has benefitted and continues to benefit by the use of CNR employees. It says KiwiRail's failure to obtain an assurance from CNR that its employees are paid above the MECA or the minimum wage is a breach of its contractual obligations to be a "State Owned Enterprise leader" and corresponding obligations of "social responsibility". The Authority has no jurisdiction to determine claims under the SOE Act, but by reference to the words "*State Owned Enterprise leader*" the RMTU says KiwiRail has a contractual obligation of social responsibility.

[43] The RMTU further alleges KiwiRail has not complied with cl. 2.1 and cl. 11 to be "an employer of choice", to "act with integrity" or "value people". It says KiwiRail's conduct in inconsistent with its obligations to the RMTU and its members job security would be placed at risk by the use of exploited workers.

Analysis and determination as to cl. 2.1 and cl. 11

[44] Employment agreements frequently contain broad positively worded introductory statements which often reflect a desire to promote the relationship between the parties and the terms of the agreement. As has occurred at cl. 2.1 of the parties' MECA, difficulties can arise where the language used is so general and abstract in nature that it is unclear what action the provision requires and therefore whether it has been complied with or breached.

[45] The first notable issue with cl. 2.1 is the use of the word "aspires". The Oxford Dictionary defines the word as meaning "direct one's hopes or ambitions towards achieving something".[11] By its very definition a statement of aspiration provides no guarantee that the hope or ambition will be achieved. Applying the natural and ordinary meaning of the word I consider an agreement "to aspire" is a lesser requirement than a contractual obligation to complete an action.

[46] Turning to the aspirational subject matter; "*to be a State Owned Enterprise Leader and Employer of Choice*", I find the phrase idiosyncratic. No definitions were provided in the MECA as to what was meant by the terms 'State Owned Enterprise Leader' or 'Employer of Choice'. By way of illustration is not clear whether KiwiRail aspires to lead other SOEs or be an SOE exemplar. I note that there is no evidence comparing KiwiRail's conduct against that of another SOE to demonstrate whether either of the possible interpretations has been acted on or omitted.

[47] Assessing next the phrases "*acting with integrity*" and "*valuing people*" said to be implemented to achieve the aspiration I find each of these notions to be so highly subjective that I am not confident either pursuit is able to be objectively evaluated or measured.

[48] The phrase "s*ocial responsibility*" derives from s. 4(1)(c) of the SOE Act. Section 4(1) requires, as an principal objective, that an SOE shall operate a successful business. To that end an SOE shall, amongst other things, be:

> *"an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring accommodate or encourage these when able to do so".*

[49] The Court of Appeal in *Auckland Electric Power Board v Electricity Corporation of NZ*[12] examined s 4(1)(c) SOE Act and observed the term "social

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11 Online edition

12 [1994] 1 NZLR 551

responsibility is not readily susceptible of judicial assessment and determination…". It noted that "para (c) is not expressed in the conventional language of obligation".[13] The Court further observed that the accountability provisions of the SOE Act do not lie with it, but rather with the board/directors of an SOE to the shareholding Ministers and that "the performance of SOEs is thus supervised by the shareholding Ministers and politically through the parliamentary process. That shareholder and political accountability is the statutory means for assessing whether the SOE is meeting its principle objective under s 4(1)".[14]

[50] To have contractual force any agreement must be in terms which define, with a sufficient degree of certainty, the obligations which the parties are to undertake.[15] I find the language of cl. 2.1 is too imprecise as to its requirements, application and enforcement.

[51] Even if I am mistaken at to the efficacy of cl 2.1, the RMTU would need to demonstrate a complete and obvious failure to pursue the aspirations recorded at cl. 2.1.

[52] In respect to the claim that KiwiRail is in breach of social responsibility obligations there is nothing in the contractual terms at cl. 2.1 to suggest the parties agreed to alter the accountability obligations from those expressed in the SOE Act. There is no evidence that the relevant Minister has found KiwiRail not meeting the principal objective at s. 4(1) as a consequence of s. 4(1)(c) failings. I consider such evidence would be required to establish that KiwiRail had failed to aspire to act in accordance with s. 4(1)(c).

[53] The connection between the acts and/or omissions the RMTU claims as evidence of KiwiRail's breach of the MECA do not in my view establish a breach of cl. 2.1 to the level required.

[54] The allegation that the use of CNR employees demonstrates a breach of KiwiRail's obligation to be "an employer of choice" is not sustainable.

[55] The claims that KiwiRail has breached cl. 2.1 and cl. 11 are dismissed.

Has KiwiRail breached duties of good faith?

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13 ibid at p559

14 ibid

15 Section 3.7 of Burrows, Finn and Todd Law of Contract in New Zealand, 4th edition

[56] There is no dispute that the RMTU and KiwiRail have an employment relationship and must therefore deal with each other in good faith.[16]

[57] The Employment Relations Act requires parties to an employment relationship to "*be active and constructive in establishing and maintaining a productive relationship in which the parties are, amongst other things responsive and communicative*"[17], and to "*not do anything to mislead or deceive each other.*[18]

[58] The RMTU claims for breach of good faith are summarised as follows: The RMTU claims KiwiRail has proceeded to utilise CNR employees for its benefit without (i) obtaining confirmation from CNR; and (ii) confirming to the RMTU; or (iii) knowing whether CNR workers employees are, or were, being paid according to the MECA rates and/or the Minimum Wage Act (or minimum code entitlements).[19] The fourth claim alleges that, if CNR employees are being paid less than the MECA and/or the Minimum Wage Act, KiwiRail is breach of its statutory obligation of social responsibility and obligations of good faith.[20] The fifth claim alleges that KiwiRail's breaches of cl. 2.1 and cl. 11 of the MECA amount also to breaches of good faith.[21] The last of the claims is that KiwiRail has failed to adequately consult with the union in respect of the work performed by CNR employees.

Determination as to claims alleging breach of good faith

Did KiwiRail have a good faith obligation to confirm with the RMTU that CNR employees are paid pursuant to the MECA or minimum code entitlements

[59] The RMTU brings claims of a breach of good faith pursuant to the MECA and the minimum code on the footing that it is a breach of good faith for an employer to not comply with its legal obligations. I have found KiwiRail not to be in breach of any of the provisions in the MECA including a contractually implied obligation of social responsibility. It follows there cannot be a corresponding breach of good faith on those grounds. Claims alleging breach of good faith flowing from a breach of the MECA are dismissed.[22]

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16 s. 4(2)(b)
17 s. 4(1A)
18 s. 4(1)(b)
19 Amended Statement of Problem, para.1.14(i), (ii), (iii)
20 Amended Statement of Problem, para.1.14(iv)
21 Amended Statement of Problem, para.1.14(v)
22 claims at para.1.14(i), (ii), (iii) (iv) (v) of the amended Statement of Problem

[60] In respect of claims alleging a breach of minimum code it remains unclear on what basis KiwiRail would be in breach of good faith obligations towards the RMTU if the minimum code applies to CNR employees. As previously noted KiwiRail is not the employer of CNR employees. It has no legal obligation towards CRN employees under minimum code legislation.[23] If it were established that CRN employees are entitled to New Zealand minimum code entitlements, any liability would rest with CRN. This claim is dismissed.[24]

[61] Next the RMTU refers to the statutory obligations of good faith at s. 4(4) of the Employment Relations Act which sets out matters where good faith applies including:

> - any matter arising under or in relation to a collective agreement while the agreement is in force; s 4(4)(b);
> - consultation with the union about the employees' collective interests; s. 4(4)(c), and
> - a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees; s. 4(4)(d)
>
> …

[62] There is no discernible link between KiwiRail's statutory obligations of good faith to the RMTU and information about the remuneration of CNR's employees as a matter arising under or in relation to the collective agreement between KiwiRail and the RMTU or that it is a matter about the RMTU members' collective interests that requires consultation. I am unwilling to accept that the obligation of good faith between KiwiRail and the RMTU extends to requiring KiwiRail to obtain confirmation from CNR as to its employees' terms and conditions, or that it is obliged to pass that information to the RMTU. To apply the statutory requirements of good faith in this manner stretches the s.4 statutory provisions beyond what the legislation prescribes.

[63] If my assessment is mistaken I remain unpersuaded that KiwiRail is in breach of its good faith obligations. Underpinning the majority of the RMTU's claims are assertions that KiwiRail is obliged to ensure that the terms and conditions of CNR employees meet or exceed the MECA or minimum code requirements and, as a matter of good faith, KiwiRail is required to communicate that information to the RMTU. In

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[23] KiwiRail accepts it has obligations to CNR employees pursuant to the Health and Safety in Employment Act

[24] claims at para.1.14(i), (ii), (iii) (iv) of the amended Statement of Problem

essence the RMTU alleges that the KiwiRail's failure to provide that assurance results in the undermining of the MECA and puts RMTU members' job security is at risk.

[64] I have been unable to locate a legal basis to support the RMTU's claims. Nor is there any evidence to demonstrate the MECA has been diminished or that members are disadvantaged.

[65] KiwiRail was unaware of the RMTU's concerns about CNR's employees until it received the RMTU's statement of problem. On receipt of that document KiwiRail wrote to CNR requesting information about wages, holiday and sick leave entitlements, and detail about allowances given to the CNR's employees when working in New Zealand. That inquiry reflects good faith conduct.

[66] CRN responded in a general manner to each of the requests and set out the upper and lower range of wages paid monthly to its employees and the daily allowance quantum. I note that information tends to support a conclusion that CNR employees are paid above relevant minimum wage orders whilst in New Zealand.

[67] The RMTU says the material provided by CNR does not evidence payment of wages to (any of) CNRs employees and nor is it a wage record. Criticism as to the level of detail contained in a document does not, in and of itself, establish a breach of good faith. Good faith conduct requires a party to an employment relationship to provide information it holds or is reasonably able to obtain.[25]

[68] KiwiRail is not an employer of CNR's employees. It is not obliged to produce wage and leave records that an employer of employees would otherwise be required to provide. Nor does a union have a right to be provided with employees' wage and time records for its own purposes without consent from the individual(s) to whom the information relates.[26]

[69] I am unwilling to accept, as is intimated by the RMTU, that the information provided by CNR cannot be relied upon or trusted because the design specification of the locomotives had previously not been met by CNR.

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[25] Subject to matters of confidentiality

[26] Section 130 Employment Relations Act. The right to individual wage and time records is personal to an employee.

[70] There is no evidence to support a finding that KiwiRail had reasonable cause to doubt the information provided by CNR or that CNR had reason to misrepresent how it remunerated its employees. I am satisfied that KiwiRail furnished information it was reasonably able to obtain.

Claim of breach of good faith by a failure to consult

[71] The RMTU alleges KiwiRail has failed to consult with it when it decided to have CNR perform the remedial work and that it has consistently ignored or denied requests that RMTU members be involved in the work. By way of illustration it refers to meeting notes drafted by an RMTU Organiser during a two day meeting held on 18-19 March 2014 between KiwiRail and the RMTU that includes the following:

> DRAFT
> Agreed Outcomes from DL Discussions
>
> …
> g) KR will investigate the use of KR staff to do the refitting of equipment to the … locomotives that have had the asbestos removed. To include consideration on a voluntary basis to the dismantling of the locomotives, under necessary supervision.

[72] Turning first to the meeting notes of 18-19 March 2014, KiwiRail accepts it received an email with the notes attached but disputes it agreed to make the inquiries asserted. KiwiRail's omission to investigate and respond was likely an oversight. The author of the meeting notes accepts he did not pursue the matter and I do not accept the example establishes a breach of good faith.

[73] It is common ground that there were occasional discussions between the Hutt Workshop Manager and the (then) RMTU branch manager as to whether KiwiRail employees could be further involved with the reconstruction of the locomotives and trained in commissioning activities. However no additional evidence was furnished to demonstrate that the RMTU formally advised KiwiRail that it wished to be engaged in the remedial work such that KiwiRail was made aware of the matter until claims of breach of good faith were lodged in June 2015.

[74] I have no doubt that KiwiRail informed the RMTU, as evidenced by the various meetings in March 2014, of the strategy to dispose of the asbestos and CNR's obligations in this regard. I accept however that the purpose of the meetings was not to discuss whether RMTU members could perform the work. But I am persuaded that KiwiRail was obliged to consult on that issue where, as I have already found, the

work was not covered under the MECA. This was not a situation in which s.4(4) applied.

[75] There is evidence of RMTU membership making inquiry as to which work comprises warranty work and which work should be performed by KiwiRail employees.[27] That query was responded to and is not an instance which can be objectively regarded as a breach of good faith. I agree that KiwiRail could, as a means of maintaining a productive employment relationship with the RMTU and its members, have been more transparent with the RMTU about the extent of the warranty provisions connected to the CNR purchases and in particular warranty timeframes, but I do not consider the omission is a breach of good faith.

[76] In all the circumstances I am not satisfied that a breach of good faith for failure to consult has been established.

Is the RMTU entitled to seek a determination as to whether the minimum code applies to CNR employees?

[77] I am obliged to consider whether the RMTU has a legal right ("standing") to seek a determination as to the applicability of the minimum code to CNR's employees.

[78] In *Maritime Union of New Zealand Inc v Ports of Auckland* Chief Judge Colgan stated:[28]

> *Standing is a question in each case of the degree of involvement in, or proximity to the matter in issue a person seeking to affect by litigation an outcome which that person has arguably no interest."*

[79] The majority of the concerns on which the RMTU says it has standing to bring this claim, (such as the allegation that the MECA has been breached and in particular that CNR is performing work covered by the MECA, or that the MECA has been undermined by the utilisation of CNR employees) have not been found to be successful. The RMTU says the public interest in preventing the exploitation of workers in New Zealand workplaces gives it standing.

[80] The Employment Relations Authority is statutorily tasked with resolving employment relationship problems.[29]

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27 Email exchange dated 26-27 November 2015

28 [2010] NZEmpC 32 at [8]

[81] Section 5 of the Employment Relations Act defines an employment relationship problem as being "*A personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship…".*

[82] In *JP Morgan Chase Bank NA v Lewis* the Court of Appeal held that the "problem must be one that directly and essentially concerns the employment relationship*".*[30]

[83] It is clear the RMTU is interested to know whether the minimum code applies to CNR employees, but curiosity does not establish an actionable right or interest. There is no suggestion that any of the CNR workers is a member of the RMTU or that the RMTU has been authorised by CNR workers to act on their behalf.

[84] I am unwilling to accept that the existence of a commercial relationship between KiwiRail and CNR provides sufficient grounds for the RMTU to raise an employment relationship problem in respect of CNR's employees. The RMTU's application for a determination that the minimum code applies to CNR employees is not an employment relationship problem that "*relates to or arises out of*" the employment relationship between it and KiwiRail. It is not a matter that directly and essentially concerns the employment relationship between them.

[85] The RMTU has not established a sufficient interest in the subject matter it seeks to have determined. Its concerns about CNR's employment arrangements with its employees are not matters that can be answered in legal proceedings against KiwiRail. The RMTU does not have standing to bring this claim.

[86] The RMTU's claims in this application are dismissed.

[87] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

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29 Section 157(1) Employment Relations Act
30 [2015] NZCA 255 at [95]