

**Attention is drawn to the order prohibiting publication of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 115  
5556333

BETWEEN                      DEREK WAYNE GILBERT  
Applicant

A N D                              ETU INCORPORATED  
(FORMERLY CALLED NZ  
AMALGAMATED  
ENGINEERING PRINTING &  
MANUFACTURING UNION  
INC)  
Respondent

Member of Authority:        Peter van Keulen

Representatives:              Lou Yukich, Advocate for Applicant  
Anne-Marie McNally, Counsel for Respondent

Investigation Meeting:        28 and 29 November 2016 and 8 February 2017

Submissions Received:        8 and 23 March 2017, from the Applicant  
9 and 22 March 2017, from the Respondent

Date of Determination:        5 July 2017

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**DETERMINATION OF THE AUTHORITY**

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**A. Mr Gilbert cannot raise a personal grievance against Etū Incorporated.**

**B. I do not have jurisdiction to investigate whether Etū Incorporated breached the duty of good faith when it decided not to seek an injunction to prevent Transfield Services New Zealand Limited's proposed restructuring from proceeding. Mr Gilbert did not raise this**

**employment relationship problem within six years of the event occurring, pursuant to s 142 of the Employment Relations Act 2000.**

**C. Etū Incorporated did not breach the duty of good faith when it decided not to seek interim reinstatement for Mr Gilbert.**

**D. Etū Incorporated did not breach the duty of good faith when it decided not to advance Mr Gilbert's grievance in the Employment Relations Authority.**

**E. I reserve costs with a timetable set for submissions if required.**

### **Employment relationship problem**

[1] The applicant, Derek Gilbert, claims that the respondent, Etū Incorporated (formerly NZ Amalgamated Engineering Printing & Manufacturing Union Inc) (the Union) breached duties that it owed to him as a member. Mr Gilbert says the Union breached those duties when it made decisions about acting on his behalf, when his then employer, Transfield Services New Zealand Limited (Transfield), restructured his role and terminated his employment.

[2] Mr Gilbert says the Union failed to act for him appropriately during the course of the restructure. It then failed to act for him appropriately when it decided not to seek interim reinstatement for him and then decided not to represent him with his personal grievance.

[3] As the Union would not act for Mr Gilbert as he expected, he raised a personal grievance against Transfield and progressed that through the Employment Relations Authority and the Employment Court. In doing this, he had to obtain other representation and incurred fees.

[4] Mr Gilbert was successful in the Employment Court<sup>1</sup>.

[5] Mr Gilbert's claim is simply that the Union should have represented him throughout his grievance process and its decision not to is a breach of the duties it owed to him as a member of the Union. Mr Gilbert's claimed loss is the fees that he incurred in progressing his claim, less any contribution made by Transfield for that representation.

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<sup>1</sup> *Derek Gilbert v Transfield Services (New Zealand) Ltd* [2013] NZEmpC 71

[6] The Union opposes this claim primarily on the basis that it says it has not breached any duties it owed to Mr Gilbert.

### **Preliminary matters**

[7] This determination has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

[8] Mr Gilbert's first statement of problem set out claims based on a personal grievance, breach of the Fair Trading Act 1986 and a breach of the duty of good faith set out in s4 of the Employment Relations Act 2000 (the Act).

[9] The Union's statement in reply denied that it had acted in breach of the statutory duty of good faith and denied that it had acted in breach of the Fair Trading Act. The Union also said that Mr Gilbert was not an employee of theirs and therefore he could not raise a personal grievance against it.

[10] The Union claimed that I should dismiss Mr Gilbert's statement of problem because he could not bring a personal grievance against it and the allegations of breach of good faith and breach of the Fair Trading Act were frivolous and/or vexatious.

[11] I discussed the nature of Mr Gilbert's claim with him and counsel for the Union at a case management conference.

[12] Mr Gilbert accepted he could not bring a personal grievance claim against the Union, and that any allegations of breach of the Fair Trading Act were potentially weak. He also accepted that he had not claimed a penalty within 12 months of the date of the event occurring which gave rise to that claim and therefore potentially any breach of the statutory of good faith was limited because I might not be able to award him any remedies.

[13] However, based on the Employment Court decision in *Shaun McCartney v Atlas Concrete Ltd & Anor*<sup>2</sup> Mr Gilbert might have a claim for breach of contract based on the Union failing to meet the obligation of good faith when making a decision under its membership rules (the Rules).

[14] Because of the discussions around the nature of Mr Gilbert's claim and the threatened application to dismiss the statement of problem by the Union, Mr Gilbert agreed to amend his statement of problem. Mr Gilbert lodged an amended statement of problem with the Authority on 1 May 2016. Whilst this amended statement of problem still refers to the matter of a grievance arising under the employment relationship between the Union and Mr Gilbert and also refers to seeking an award for pain and suffering and humiliation under s123(1)(c)(i) of the Act, Mr Gilbert accepted that he could not pursue a personal grievance against the Union.

[15] In case there is any doubt, I determine that Mr Gilbert cannot raise a personal grievance against the Union.

[16] Mr Gilbert also withdrew his claim for a breach of the Fair Trading Act.

[17] Mr Gilbert's amended claim, which I investigated, is that the Union breached the statutory and implied duties to act in good faith when it made decisions about acting for him, pursuant to the Rules.

[18] The remedies that I have investigated as part of this claim are for losses arising out of the alleged breach of contract. I have not considered compensation under s 123(1)(c)(i) of the Act, as this is not a personal grievance, nor have I considered imposing a penalty, as any claim for a penalty is barred by the 12 month limitation imposed under s 135(5) of the Act.

[19] Mr Gilbert's amended statement of problem based his claim on three sets of allegations:

- (a) The Union failed to act during the course of the Transfield restructure to protect his interests and in particular it failed to seek an injunction to prevent the restructure from proceeding, despite requests from him and another member to do so;

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<sup>2</sup> [2014] NZEmpC 85

- (b) The Union failed to apply for an interim reinstatement order on Mr Gilbert's behalf when he requested this following the disestablishment of his role and the termination of his employment;
- (c) The Union decided not to represent Mr Gilbert in his personal grievance claim, which required him to progress the matter himself through other representation in the Authority and the Employment Court.

[20] In connection with these three parts of Mr Gilbert's amended statement of problem, the Union complains that the first part is statute-barred, as Mr Gilbert did not raise it within six years of the events complained of occurring or coming to Mr Gilbert's attention. That is, based on s142 of the Act Mr Gilbert is outside of the six-year period for lodging a claim.

[21] This arises because the events Mr Gilbert complains of in the first part of his amended statement of problem occurred on or around 27 September 2009. The allegation that this was a breach of good faith was first raised in the amended statement of problem lodged on 1 May 2016, this being more than six years after the event.

[22] Section 142 of the Act provides:

No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

[23] Pursuant to s 161(1)(k) of the Act, any matter relating to the failure by a union to comply with its rules is an employment relationship problem. It also follows from s 4(2)(b) of the Act that there is an employment relationship between the Union and Mr Gilbert and so there is an employment relationship problem<sup>3</sup>.

[24] Therefore, Mr Gilbert's claim for breach of the statutory and implied duties under the Rules is an employment relationship problem and Mr Gilbert should have commenced this claim in the Authority no more than six years after 28 September

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<sup>3</sup> Note however that the existence of an employment relationship and an employment relationship problem does not mean that there is a personal grievance or a basis to raise a personal grievance between a union and a member. A personal grievance pursuant to s 103(1) of the Act must be between an employee and the employee's employer or former employer.

2009 when it was clear that the Union was not going to act as Mr Gilbert had requested. He did not.

[25] On this basis, I do not have jurisdiction to determine this part of the amended statement of problem as set out by Mr Gilbert.

[26] My determination deals with the second and third allegations in the amended statement of problem, which Mr Gilbert had raised in the original statement of problem, within the six-year limitation period.

[27] In the course of my investigation into these two allegations I called for evidence relating to Mr Gilbert's claimed loss. This evidence included copies of records of settlement between Mr Gilbert and Transfield and information from the Manufacturing and Construction Workers' Union about the fees it charged to Mr Gilbert for representing him. That information was provided to the Union on the basis that it was used solely for the purposes of this claim and no other purpose. I made non-publication orders in respect of both sets of information pursuant to clause 10 of Schedule 2 of the Act.

[28] I confirm that the non-publication orders are to remain in place.

### **Facts**

[29] I note that all of the witnesses had some difficulty in remembering events that occurred in the relevant period. This is because my investigation took place over seven years after the events occurred and in the intervening period there have been the Christchurch earthquakes. The February 2011 earthquake caused damage to the Union's premises and the loss of some relevant information. It has been difficult to establish precisely what occurred in connection with some relevant events. I have been assisted by analysing what contemporaneous documents do exist and for some of the background information I have simply relied on the Employment Court's judgment.

### ***Historical employment and union background***

[30] Mr Gilbert worked for Transfield from 1970 until his employment was terminated in 2009.

[31] Mr Gilbert was an active union member during his employment. He first joined the Post Office Union in January 1970. When this union amalgamated with the NZ Electrical Union to become the Communication and Energy Workers Union (CEWU), Mr Gilbert transferred his union membership to CEWU.

[32] In 1996 the Engineers Printers and Manufacturers Union (EPMU) was created by an amalgamation of the Printers Union and the Engineers Union. Mr Gilbert joined EPMU in January 1996 after CEWU was wound up (for insolvency reasons).

[33] Mr Gilbert resigned from EPMU in January 1999 and then re-joined in March 2006. He was then a member of EMPU until Transfield terminated his employment in 2009.

[34] EPMU merged with the Service and Food Workers Union in October 2015 to create Etū.

### ***Transfield Restructuring***

[35] Changes to Transfield's business in June and July 2009 led Transfield to decide it needed to reduce costs. Management investigated and settled on a restructuring proposal. Transfield commenced consultation with staff on 17 August 2009 when it invited them to attend consultation meetings.

[36] Mr Gilbert attended a consultation meeting on 18 August 2009. In this meeting, Transfield advised employees that the proposed restructuring involved the potential disestablishment of 123 roles across the country. In Canterbury, where Mr Gilbert worked, the proposed restructuring affected 10 field staff positions.

[37] In a meeting with Union delegates at the beginning of September 2009, Transfield advised employees that consultation would occur in three stages. First, a selection process in which a selection of field staff in Canterbury would be placed into a review pool. Second, the selected staff would complete an online personality or psychometric assessment and the third stage was for all selected staff to be interviewed.

[38] Transfield selected Mr Gilbert and he was part of the review pool subjected to the second and third stages of consultation. The result of the consultation process was

that Transfield implemented the proposed restructure; it disestablished Mr Gilbert's position and then terminated his employment on 1 October 2009.

***Mr Gilbert's requests for assistance from the Union***

[39] On 5 October 2009 Mr Gilbert and a colleague, Bob Johnston, met with Kelvin Ellis, a union organiser. Mr Gilbert made it clear to Mr Ellis at that time that he wanted to raise a personal grievance and seek interim reinstatement.

[40] Mr Ellis emailed Greg Lloyd, the then general counsel for the Union, later on 5 October 2009 requesting advice on whether Mr Gilbert's circumstances gave rise to a personal grievance and the possibility of seeking injunctive relief (interim reinstatement). Mr Ellis' email includes the following:

It appears a deliberately vague process by the employer to remove outspoken or difficult employees. Bearing in mind that Bob and Derek are hugely experienced. I reviewed Bob Johnson's Personal Development Reviews and he scores very highly in terms of skill, productivity the works. There has been no genuine attempt to consult or engage with the union on this.

I can prepare a file and collect necessary statements as required. There is plenty of documentary information available.

Anyhow I eagerly await your advice – As you could imagine Transfield and their behaviour is a serious drain on resources right now but I feel we need to fight this if we can.

[41] There is no record of any reply email from Mr Lloyd. However, both Mr Ellis and Mr Lloyd say they did discuss the email and Mr Lloyd's advice was that interim reinstatement was not a suitable option but that personal grievances should be pursued.

[42] Mr Gilbert then met with Mr Ellis again on 13 October 2009. Mr Ellis advised Mr Gilbert that the Union would not be seeking interim reinstatement for him.

[43] However, Mr Ellis did then raise a personal grievance for Mr Gilbert in a letter dated 13 October 2009. That letter specified that Mr Gilbert sought reinstatement, as the primary remedy.

[44] On 18 October 2009, the Union raised personal grievances for 33 of its members who had been dismissed as a result of the restructure. This included Mr Gilbert.

[45] The letter of 18 October 2009 sent on behalf of the 33 members was part of the Union's collective strategy to advance claims on behalf of its members. That collective strategy involved raising personal grievances for all members listed and seeking to negotiate settlement collectively then if not successful through individual mediations.

[46] If settlement could not be achieved the Union would then pursue one claim in the Authority. That claim would be Mr Johnston's claim on the basis that it was considered by the Union to be the most likely claim to succeed. Success in the Authority would then be used to negotiate the remaining personal grievances.

[47] The Union would not seek interim reinstatement for employees, as interim reinstatement was not necessarily a suitable remedy for all members including all those who remained employed by Transfield and was not considered likely to be successful.

[48] On 17 November 2009, Mr Gilbert sent an email to Mr Lloyd stating:

Hi Greg,

As expected I understand that Transfield Services have refused to negotiate your combined approach.

I wish to proceed on an interim order to reinstate. You are no doubt aware that I have become very concerned that we have not already proceeded on this basis and that time has been passing to have the ERA approval.

Attached is a Statement of problem and an ERA Undertaking.

[49] The email goes on to set out comprehensively Mr Gilbert's views on why he believed he had a valid personal grievance and why interim reinstatement was appropriate.

[50] On 19 November 2009, Mr Gilbert lodged his own statement of problem in the Authority seeking interim reinstatement. The Union was not aware of this at the time.

[51] On 23 November 2009, Mr Lloyd sent an email to Ged O'Connell, the then Assistant National Secretary of the Union, and Mr Ellis. This email set out comprehensive advice on the personal grievances and the remedies that might be obtained and the appropriate process that the Union should take. Mr Lloyd's conclusion includes:

In summary, I think we [have] sufficient evidence to support a claim that both Derek and Bob have personal grievances. However I have serious doubts about being able to show that it was anything other than some procedural failings that would not have changed the outcome. In my view the most likely result in the Authority is compensation only.

[52] This advice was passed on to Mr Gilbert by Mr Ellis.

[53] On 8 December 2009, Mr O’Connell sent an email to Mr Gilbert stating the following:

Derek, I understand from a verbal conversation you had with Kelvin Ellis, which has been subsequently confirmed by Transfield that you have filed your grievance with the ERA. Our understanding is that you have chosen not to follow our advice, which of course you are entitled to do. As a consequence of your decision the Union is now closing this file and we wish you well.

[54] Having lodged his personal grievance seeking interim reinstatement with the Authority, Mr Gilbert pursued that matter with representation from the Manufacturing & Construction Workers’ Union. Mr Gilbert was not successful in his application for interim reinstatement<sup>4</sup>. Mr Gilbert was then unsuccessful in the substantive claim for reinstatement<sup>5</sup>.

[55] Mr Gilbert challenged the determination of the Authority. He engaged counsel, David Beck, to act on his behalf in the Employment Court. Mr Gilbert’s challenge was successful and he was reinstated to his position with Transfield.

## Issues

[56] In *McCartney*, the Employment Court was posed a preliminary question; “is the union’s policy not to act in cases of insufficient prospects of success [of a union member’s personal grievance] in accordance with its rules?” Chief Judge Colgan was satisfied that the union had the power to decide as it did under its rules but he stated further:

[13] ... I conclude that there are also statutory obligations at issue in cases such as this. The good faith requirements under s 4 of the Act apply to the “employment relationship” between a union and a member of a union: s 4(2)(c). Although the current issue in that employment relationship is not one of the matters specified in subsection (4), subsection (5) emphasises that the specified matters are examples and do not limit the

<sup>4</sup> *Derek Gilbert v Transfield Services (New Zealand) Ltd*, 15 January 2010 CA5/10

<sup>5</sup> *Derek Gilbert v Transfield Services (New Zealand) Ltd*, 14 May 2010 CA5A/10

good faith obligations set out in subsection (1). I conclude that in relation to Rules 54.2 and 54.3, the parties were engaged in dealings requiring both to act in good faith towards the other.

[14] The good faith obligations in s 4(1) require the parties (Mr McCartney and the union) to “deal with each other in good faith” and not, whether directly or indirectly, do anything to mislead or deceive the other or that is likely to mislead or deceive the other.

[15] The particular good faith requirements under subsection (1A) include requiring the parties to be “active and constructive in establishing and maintaining a productive employment relationship which the parties are, among other things, responsive and communicative”.

[16] Accepting, as I do, that the union was entitled under its rules to decline to represent Mr McCartney in pursuit of his personal grievance, nevertheless its decision had to be taken in compliance with those good faith obligations. In practice, that should have meant:

- Giving a proper consideration to Mr McCartney’s grievance;
- Undertaking proper inquiries to establish his probable chances of success;
- Assessing all of that information with an open and appropriately informed mind;
- Involving Mr McCartney in those inquiries in decision-making; and
- Giving him objectively assessable reasons for its refusal to act for him.

[17] ...

[18] The union must, in making a decision under Rule 54.3, act both objectively and reasonably and not arbitrarily. ....

[57] Therefore, it is clear from *McCartney* that a union can act pursuant to its rules and decline to represent a member in pursuing his or her personal grievance, if the rules permit this. However, the question is whether, in reaching its decision, the union has done so in compliance with its statutory and implied obligations.

[58] In this case then the issues are, did the Union have the power under the Rules to decline to pursue Mr Gilbert’s personal grievance in the terms he requested and to decline to represent Mr Gilbert in his personal grievance in the Authority? And, if it did, did the Union comply with the statutory duty of good faith when making those two decisions?

## The Union's powers under the Rules

[59] In section 5 of the Rules the objects of the Union are set out. This includes:

The objects for which the Union are established are:

### 5.1 Uniting and Organising Members

To unite all eligible members into one organisation and to organise them for the purposes of advancing their employment interests on a collective basis and generally attaining the objects of the Union.

### 5.2 ...

### 5.4 Promotion and Protection of Members' Industrial, Social and Economic Interests

To improve, protect and foster the industrial, social and economic interests of its members including:

#### 5.4.1 ...

5.4.4 To provide benefits and/or assistance, financial or otherwise, to members in such manner as the Union shall from time to time decide.

[60] The powers of the Union are set out in section 6 of the Rules. These include:

6.1 The Union shall have and exercise such powers as are necessary and/or desirable for the lawful promotion and advancement of its objects.

6.2 Without in any way limiting the generality or scope of its powers, the Union shall have specific power to:

#### 6.2.1 Represent Members

To represent members in respect of their employment interests, by way of collective bargaining and otherwise dealing with employers on their behalf, and by way of representing the Union and members in appropriate Courts and Tribunals in order to enforce employment agreements and other employment rights and entitlements.

[61] The Union has the power to act for or represent a member in pursuit of his or her grievance under rule 6.2.1. However that power is subject to the Union's objects under rule 6.1. And, specifically the Union has the power under its objects to decide if it will provide assistance to a member under rule 5.4.4.

[62] Therefore, the Union had the power under its Rules to decide if it would represent Mr Gilbert in pursuing his personal grievance.

**Did the Union breach the duty of good faith?**

[63] The duty of good faith set out in s 4 of the Act imposes a mutual obligation on both parties to deal with each other in good faith and not to do anything, whether directly or indirectly, to mislead or deceive each other or that is likely to mislead or deceive each other. The requirements under s 4(1A) are for the parties to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[64] Chief Judge Colgan highlights these aspects in *McCartney* before concluding that this means the union, when deciding whether or not to exercise a power under its rules, should have:

- (a) Given proper consideration to the member's grievance;
- (b) Undertaken proper enquiries to establish probable chances of success;
- (c) Assessed all of the information with an open and informed mind;
- (d) Involved the member in the inquiries and the decision;
- (e) Given the member objectively assessable reasons for refusing to act in respect of the member's grievance.

[65] The focus here is on investigating the substantive basis that informs the action, and then establishing, and carrying out, effective consultation between the parties that meets the obligation to be active and constructive, and responsive and communicative.

[66] However I note that not all of the requirements of s 4(1A) are applicable to the duty of good faith owed between a union and its members. Section 4(1A)(c) deals with the specific expectations that apply to an employer who is making a decision that will, or is likely to, have an adverse effect on the continuation of employee's employment. These requirements of giving an employee access to information and the opportunity to comment on that information before a decision is made is limited to the duty as it applies to an employer and an employee. It is notable that subsection

(1A)(c) and the subsequent subsections that refer to it reference employer, employee and employment where subsections such as s 4(1)(a) and 4(1A)(b) refer to the parties.

[67] In a similar vein the test for justification, set out in s 103A of the Act, does not apply to the duty of good faith owed between a union and its members. Justification applies to personal grievances and is a different, albeit similar concept, to the duty of good faith. To comply with the duty of good faith does not necessarily mean a party must comply with the test for justification<sup>6</sup> particularly the prescriptive test set out in s 103A of the Act.

[68] Why do I consider these distinctions important? Because it means the duty of good faith owed by a union to a member when exercising a discretion or making a decision under its rules does not require a prescriptive, formulaic process of consultation.

[69] The specific steps set out by Chief Judge Colgan in *McCartney* are particular to that case and the application of the duty in those circumstances. It cannot be the case that the duty of good faith requires a union to consult with all members on all matters it decides or acts on in accordance with its rules. Decisions about collective bargaining for example cannot involve every member having direct input and each member's input being considered. That would be unwieldy.

[70] The obligations that arise out of s 4 of the Act must be set at a lower threshold when considering a union's actions undertaken for the collective. After all, the power of a union is in its members acting as a collective body. Or as one, now notorious, email in this case from the then General Counsel of the Union to Mr Gilbert records "Unions work on a collective basis, not on the basis of the views of one or two individuals." It follows that individual rights, even those of good faith owed to them must be tempered by the need to act for the collective whole.

[71] So, in this case when considering whether to act for Mr Gilbert in pursuit of his grievance and specifically whether to seek interim reinstatement, the Union had to consider the position of 32 other members who had grievances. It also had to

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<sup>6</sup> Although the opposite does apply – to meet the test for justification an employer must comply with good faith – In *Jinkinson v Oceania Gold (NZ) (No. 2)* [2010] NZEmpC 102 the Employment Court stated at [42] "[t]he relationship between ss 4(1A)(c) and 103A is clear. A fair and reasonable employer will comply with its statutory obligations. It follows that a dismissal which results from a procedure which does not comply with section 4(1A)(c) will not be justifiable."

consider all of the other members who remained employed at Transfield that might be at risk of termination if one or more members were reinstated. To have to consult individually with hundreds of members, or even 33 members, over the pursuit of grievances for 33 members would be unwieldy and not what the duty of good faith requires in the circumstances.

[72] And, this is even more so when one of the objects set out in the Rules is for the Union to advance the interests of its members on a collective basis.

[73] That said the duty of good faith does require the Union to be active and constructive, and responsive and communicative when making decisions about the pursuit of the 33 grievances. It was required to analyse the substantive basis for its decision and communicate to some extent with the 33 members over decisions about advancing their grievances. Therefore, the issue is, did the Union do enough in terms of its analysis and then communication with Mr Gilbert, to meet the duty of good faith?

[74] Before I turn to answer this question there is a second aspect of the Union's decision, and its obligation to act in good faith in making that decision, to consider. The discharge of the duty of good faith when making a decision cannot be solely about the process of analysing, consulting and making the decision. It must include some substantive evaluation of the action.

[75] Often the issue of substantive justification for an action is considered in terms of justification grievances; the issue being whether the action was one that a fair and reasonable employer could have taken in all the circumstances. But, good faith is not assessed on the same basis as the test for justification, as I have noted. It is not about what a fair and reasonable employer could have done in all of the circumstances.

[76] The question of whether a decision has been made in good faith only, i.e. one that does not incorporate the test of justification, can arise in assessing the exercise of discretion by an employer. In *Dorset v Chemcolour Industries (NZ) Ltd*<sup>7</sup> the Authority determined that when exercising a discretion an employer is "... required to

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<sup>7</sup> Employment Relations Authority, 8 April 2004, AA 117/04

act in good faith... and not act arbitrarily, capriciously, dishonestly, covertly, or with ulterior motive”.<sup>8</sup>

[77] In *McCartney* Chief Judge Colgan refers to the union acting “objectively and reasonably and not arbitrarily.”<sup>9</sup> This is not just about the process of consulting and deciding how to act under the rules but also about the substance of the decision not to act and how a party comes to that decision.

[78] In the UK the exercise of discretion by an employer has been subject to significant case law<sup>10</sup>. The focus in the UK cases has been to assess whether the exercise of discretion was not arbitrary, capricious, perverse or irrational. In the recent case of *Braganza v BP Shipping Limited*<sup>11</sup> the Supreme Court has for the first time suggested the Court can review an employer’s decision by assessing if the decision making process is rational and the decision is made rationally. This imports concepts of “Wednesbury unreasonableness” into the test, so that a decision that is not arbitrary, capricious or perverse might be unreasonable and therefore in breach of the duties an employer owes to an employee when exercising its discretion.

[79] Whilst this body of case law is not binding, it is instructive for me when assessing what the Authority and the Employment Court has said about the duty of good faith applying to the substance of an action.

[80] In short this means I should consider whether the Union, in deciding not to pursue Mr Gilbert’s grievance as requested, did not act capriciously, arbitrarily, or unreasonably in the circumstances.

[81] So, in order to assess if the Union met the duty of good faith I will consider:

- (a) Was the Union active and constructive, and responsive and communicative toward Mr Gilbert, when deciding, under the Rules, not to represent Mr Gilbert in his grievance as he requested? Did it analyse the substantive basis that informed the decision and did it communicate appropriately with Mr Gilbert about the decision?

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<sup>8</sup> At [16]

<sup>9</sup> At [18]

<sup>10</sup> *Clark v Nomura International plc* [2000] IRLR 766, *Horkulak v Cantor Fitzgerald International* [2004] IRLR 942 and *Commerzbank AG v Keen* [2006] EWCA Civ 1536

<sup>11</sup> [2015] UKSC 17

- (b) Did the Union act capriciously, arbitrarily, or unreasonably, in deciding, under the Rules, not to represent Mr Gilbert in his grievance as he requested?

[82] First, the Union did consider interim reinstatement when it was first raised by Mr Gilbert:

- (a) Kelvin Ellis recorded his request for advice on Mr Gilbert's grievance and the possibility of obtaining interim reinstatement to Mr Lloyd. This was set out clearly in the email of 5 October 2009.
- (b) Mr Lloyd and Mr Ellis discussed Mr Lloyd's advice on interim reinstatement. The evidence from Mr Ellis and Mr Lloyd identified that the advice and the discussion considered the merits of Mr Gilbert's case and in particular the likelihood of obtaining interim reinstatement and whether interim reinstatement would be beneficial for the other 32 grievances and further, the other members who were employed by Transfield. The outcome of that discussion was that Mr Lloyd and Mr Ellis agreed that seeking interim statement was not the best option for Mr Gilbert or the Union's members.

[83] Second, Mr Ellis then discussed this advice and the Union's position with Mr Gilbert. Mr Ellis then raised a grievance but did not pursue interim reinstatement as a possibility.

[84] Third, the Union then considered advancing Mr Gilbert's grievance in the Authority as part of its overall strategy. The Union says it had various discussions and meetings when formulating the collective strategy. Mr Ellis, Mr O'Connell and Mr Lloyd all participated to varying degrees in those conversations. The evidence from all three was consistent albeit lacking particulars of what precisely was discussed and when. However, given the time that has elapsed, I do not consider this unreasonable and is just a reality. It does not affect the credibility of the witnesses and the reliance I place on their evidence. The witnesses were all consistent about discussions taking place, that all three were involved at various times and that the general thrust of what was discussed and agreed was the strategy I have described in [44] – [46] above.

[85] Mr Ellis and Mr O'Connell both say they discussed this proposed strategy with Mr Gilbert. They both recall a meeting taking place and that Mr O'Connell led the meeting using a whiteboard to outline points. Again, some of the detail is missing but they are both consistent in saying the collective strategy was discussed and outlining the general terms of that strategy; trying to settle either collectively or in individual mediations and if that failed then the strongest grievance would be advanced, that grievance being Mr Johnston's.

[86] Mr Gilbert disputes this evidence. He says the meeting did not occur and he was not advised of a collective strategy.

[87] I prefer the evidence of Mr Ellis and Mr O'Connell. It is clear there was a collective strategy; that is evident in Mr Lloyd's correspondence raising grievances for the 33 members and his subsequent correspondence seeking to meet with Transfield to try to resolve the grievances. It is also credible that the strategy was based upon advancing Mr Johnston's case as the strongest case. In his email of 5 October 2009 seeking advice from Mr Lloyd, Mr Ellis identifies the strengths of Mr Johnston's case. So it appears from that early stage that the Union had identified the strengths, which were not evident in other cases and the Union's evidence about the collective strategy is consistent with this.

[88] It is also clear that Mr Gilbert knew of the strategy. In his own email of 17 November 2009, he stated to Mr Lloyd "as expected I understand that Transfield Services have refused to negotiate your combined approach." The combined approach is consistent with and must be a reference to the collective strategy.

[89] Finally, on this point, I believe some of Mr Gilbert's evidence was affected by confirmation bias. For example, he was adamant that questions he and Mr Johnston formulated early on in the restructuring process were never put to Transfield but there was contemporaneous documentation that indicated this did occur and he had been told of it occurring.

[90] I am satisfied that the Union did discuss its decision not to advance Mr Gilbert's grievance in the Authority with him as part of its collective strategy.

[91] The fourth aspect of the Union's dealings with Mr Gilbert was that it responded to his specific request that the Union commence an application for interim reinstatement. When Mr Gilbert asked the Union to act on his behalf in pursuing his

grievance, and in particular seeking interim reinstatement, in the Authority, on 17 November 2009, the Union provided him with its legal advice on the merits of his case, verifying why it was not acting for him as he requested.

[92] In conclusion, based on the evidence I heard and the findings of fact I have made I determine that the Union did sufficiently investigate and analyse the substantive issues underlying the decision and then it did communicate appropriately with Mr Gilbert over that decision.

[93] Turning to the second part of my analysis of the Union's compliance with the duty of good faith, I am satisfied, based on the steps taken and the decision made, that in the circumstances, the Union did not act capriciously, arbitrarily or even unreasonably in making its decision:

- (a) The decision was influenced heavily by what the Union considered was best for its members; meeting the clear object stated in the Rules to promote its members' employment interests on a collective basis.
- (b) The decision was informed by a credible analysis of the relevant grievances based on sound advice, particularly in relation to interim reinstatement.
- (c) And, in the context of a membership of over 40,000 employees in 2009 and only 57 Organisers and 3 lawyers the Union had limited resources so it had to be careful about what grievances it did pursue.

[94] Overall, the Union did not breach the duty of good faith when deciding as it did, not to advance Mr Gilbert's grievance as he requested.

### **Determination**

[95] Mr Gilbert cannot raise a personal grievance against the Union.

[96] I do not have jurisdiction to investigate whether the Union breached the duty of good faith when it decided not to seek an injunction to prevent Transfield's proposed restructuring from proceeding, as Mr Gilbert did not raise this employment relationship problem within six years of the event occurring, pursuant to s 142 of the Act.

[97] The Union did not breach the duty of good faith when it decided not to seek interim reinstatement for Mr Gilbert.

[98] The Union did not breach the duty of good faith when it decided not to advance Mr Gilbert's grievance in the Employment Relations Authority.

**Costs**

[99] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[100] If they are not able to do so and a determination on costs is needed any party seeking costs may lodge, and serve, a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge, and serve, any reply memorandum. I will not consider any application for costs outside this timetable unless leave is sought and granted.

Peter van Keulen  
Member of the Employment Relations Authority