

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 680
3067093

BETWEEN	FIRST UNION INCORPORATED Applicant
AND	ALLIED PETROLEUM LIMITED Respondent

Member of Authority: Rachel Larmer

Representatives: Oliver Christeller, counsel for the Applicant
Janet Copeland, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and further Information Received: 8 November 2019 from Applicant
8 November 2019 from the Respondent
25 November 2019 from Respondent
27 November 2019 from Respondent
27 November 2019 from Applicant

Date of Determination: 28 November 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Allied Petroleum Limited (Allied) is a nationwide fuel distributor. Allied has applied to the Authority to remove matter 3067093 (“*the originating proceedings*”) to the Employment Court to determine in the first instance.

[2] First Union Incorporated (First Union) does not oppose Allied’s removal application.

[3] The originating proceedings were filed by First Union on 15 July 2019. First Union sought a compliance order against Allied, for alleged breaches of ss 32 (failure to bargain in good faith) and 43 (failure to draw bargaining notice to employees' attention) of the Employment Relations Act 2000 (the Act).

[4] The Authority's investigation into First Union's claims has not yet been started and there is no timetable for that to occur.

Material background

Bargaining Notice

[5] First Union says it initiated collective bargaining with Allied on 27 June 2019.

[6] First Union relies on the notice initiating bargaining dated 27 June 2019 ("*the Notice*"), that it claims met the requirements of s 42(2) of the Act.

[7] Allied claims that bargaining has not been properly initiated, because First Union's Notice was invalid. On that basis, Allied claims ss 32 and 43 of the Act do not apply to it.

Dispute over validity of Notice

[8] First Union's Notice identified the intended coverage clause as covering:

All employees employed by the employer and engaged in duties related to the distribution of petroleum and related products.

[9] Allied claims that s 41(3)(a) of the Act did not permit First Union to initiate bargaining, in terms of the Notice it gave, because Allied was already party (with another union) to "*an applicable collective agreement*".

[10] Allied says the existence of the other union's collective agreement, that is still in force and is more than 60 days away from expiry, meant that First Union could not initiate bargaining earlier than 60 days before that other existing collective agreement expired.

Relevant sections

[11] The s 5 definition in the Act says:

An applicable employment agreement means the collective agreement that is binding on the relevant union and employer, at the relevant point in time in relation to an employee of the employer who is a member of the union.

[12] Section 41(1) of the Act says:

If there is no applicable collective agreement in force between a union and an employer, the union or the employer may initiate bargaining with the other at any time.

[13] Section 41(3) of the Act says:

If there is an applicable collective agreement in force,—

- (a) A union must not initiate bargaining earlier than 60 days before the date on which the collective agreement expires:
- (b) [..]

[14] Section 41(4) of the Act says:

However, if there is more than 1 applicable collective agreement in force that binds 1 or more unions or 1 or more employers, or both, that are intended to be parties to the bargaining, then,—

- (a) A union must not initiate bargaining before the later of the following dates:
 - (i) the date that is 120 days before the date on which the last applicable collective agreement expires:
 - (ii) the date that is 60 days before the date on which the first applicable collective agreement expires:
- (b) [...].

[15] Section s 41(5) of the Act states:

For the purposes of this section, an applicable collective agreement is in force between a union and an employer if the agreement binds employees whose work is intended to come within the coverage clause in the collective agreement being bargained for.

AWUNZ Collective

[16] Allied has an exclusive national collective agreement currently in force with the Amalgamated Workers Union of New Zealand Incorporated (AWUNZI), which was ratified on 24 June 2019 and which expires on 26 June 2020 (“*the AWUNZI Collective*”).

[17] The AWUNZI Collective covers all Allied employees, within New Zealand, who are members of the AWUNZI and/or the Amalgamated Workers Union NZ (Southern) Inc, or intending members, and who carry out work associated with Allied’s operations within New Zealand.

Allied's position

[18] Allied says that First Union's bargaining Notice intends to cover employees who are already covered under AWUNZI's existing Collective, that has not yet expired, who are doing the same work that is already covered by the current AWUNZI Collective.

[19] Allied says that the timing provisions of s 41(3) of the Act apply, because there is an applicable collective agreement in force that covers the work that is proposed to be covered by First Union's bargaining notice.

[20] Allied claims that the effect of s 41(3) of the Act is that First Union's Notice was invalid as the AWUNZI Collective was not 60 days prior to expiry.

First Union's position

[21] First Union says that the existence of a collective agreement with a different union (such as the AWUNZI Collective) only prevents that union (AWUNZI), and not First Union, from initiating bargaining for a collective agreement, outside of the timeframe specified in s 41(3) of the Act.

[22] First Union say that because it has initiated collective bargaining for a new collective, when there is currently no collective agreement in force between it and Allied, then ss 41(3)(a) and 41(5) of the Act do not apply to First Union's Notice.

[23] First Union says that under s 41(1) of the Act, it is not constrained in its ability to initiate bargaining with Allied at any time.

[24] First Union claims that Allied's position regarding the Notice is incorrect and is a serious and sustained breach of good faith, that has and continues, to undermine bargaining. First Union is also concerned that Allied's position regarding First Union's Notice is intended to unlawfully resist and frustrate the collective bargaining it says it has lawfully and validly initiated.

Proposed strike action*Strike notice*

[25] On 15 November 2019 First Union issued a strike notice to Allied notifying it that continuous strike action, involving a total withdrawal of labour throughout New Zealand,

would commence on 2 December 2019 (this Monday) and continue until a collective agreement was settled.

Strike related injunction application

[26] On 25 November 2019 Allied filed a Statement of Problem with the Authority seeking an urgent interim injunction to restrain First Union members from taking strike action on Monday.

[27] Allied also sought a declaration from the Authority that the upcoming strike action was unlawful, it asked for a permanent injunction be issued to prevent First Union from taking strike action and for unspecified remedies.

No strike injunction jurisdiction

[28] Section 161(1)(l) of the Act specifically excludes the Authority's jurisdiction from covering injunctions related to strikes or lockouts.

[29] The Authority therefore informed the parties that:

- (a) It did not have jurisdiction over Allied's interim injunction claim; and
- (b) Any injunctive relief related to the proposed strike action had to be sought from the Employment Court.

Employment Court proceedings

[30] Allied advised the Authority today that it had filed urgent interim injunction proceedings with the Employment Court this afternoon. The Court advised the Authority that its proceedings involving these parties are lodged under EMPC 440/2019.

[31] The Authority has no role or involvement in any Employment Court proceedings involving these parties.

The issues

[32] The following issues are to be determined:

- (a) Are any of the s 178 grounds for removal in the Act established?
- (b) If so, are there any factors that make removal in this particular case inappropriate?

(c) What, if any, costs should be imposed?

Are any of the s 178 grounds for removal in the Act established?

[33] Section 178 of the Act gives the Authority discretion to remove a matter to the Employment Court if one or more of the four specified removal grounds in s 178(2) of the Act apply.

[34] Regardless of the parties' view that one, some or all of the removal grounds in s 178(2) have been met, the Authority must still independently satisfy itself that is the case.

[35] If the s 178(2) removal grounds are met, then the Authority must then go on to exercise its residual discretion, by considering whether there are any factors that weigh against removal in this particular case.

Section 178(2)(a) of the Act

[36] Section 178(2)(a) permits removal if “*an important question of law is likely to arise in the matter other than incidentally.*”

[37] Allied relies on s 178(2)(a) to justify removal. First Union does not oppose removal on this ground.

[38] Allied posed the intended question of law in its memorandum dated 27 November 2019 as:

Whether having an existing collective agreement in place with a union, with the same coverage clause as the intended collective agreement contained in the notice to commence bargaining issued by another union, means that there is an applicable collective agreement in place for the purposes of applying s 41 of the Act to determine whether bargaining has been issued?

[39] In an email to the Authority today, First Union did not comment on the proposed question of law, other than to say that its Notice is not the same coverage clause, as is implied by the question posed by Allied.

[40] First Union also stated, for the first time, that it did not consider the removal application was urgent. The Authority does not agree.

[41] The Court is holding a telephone conference with the parties to its proceedings tomorrow morning, so the Authority considers it beneficial that this determination is available by then. Furthermore First Union offered no undertakings that would have addressed the urgency concerns. Accordingly, the Authority considers it appropriate to issue this removal determination.

[42] Allied told the Authority that there has only been one previous case on s 41(3) – *National Distribution Union Inc v Spotless Services*.¹ First Union did not dispute that.

[43] The *NDU v Spotless* case involved a determination that was issued by the Authority on 5 October 2006. That case involved initiation of bargaining for a multi-employer collective agreement (MECA), covering all employees at a wood processing plant. The intended MECA coverage extended to all employees on site, including two cleaners employed by Spotless.

[44] At that time, Spotless was a party to the New Zealand Cleaning Contractors Collective Employment Agreement 2006-2007 (NZ Cleaning Contractors Collective) in which the union party was the Service and Food Workers Union (SFWU).

[45] The coverage of the NZ Cleaning Contractors Collective included the work of the two cleaners employed by Spotless. However, the two cleaners in that matter were members of the National Distribution Union (NDU) and not SFWU. The NZ Cleaning Contractors Collective expired on 31 December 2007.

[46] Spotless claimed that the NZ Cleaning Contractors Collective, which it was a party to, was the “*applicable collective agreement*” for the purposes of s 41 of the Act for their cleaner employees throughout the country, meaning that NDU could not initiate bargaining earlier than 60 days before the NZ Cleaning Contractors Collective expired on 31 December 2007.

[47] The dispute between the parties that the Authority had to determine in the Spotless case was whether the NZ Cleaning Contractors Collective was “*an applicable collective agreement*” for the purposes of s 41 of the Act.

¹ (2007) 8 NZELC 98,523.

[48] In *NDU v Spotless* the Authority determined that there was no applicable collective agreement between NDU and Spotless, meaning that the NZ Cleaning Contractors MECA was not “*an applicable collective agreement*” for the purposes of s 41 of the Act.

[49] Allied claims that the Authority’s 2006 determination in *NDU v Spotless*:

- (a) Can be distinguished from this matter;
- (b) Is out of date as a result of subsequent changes to legislation that has affected and impacted on today’s collective bargaining obligations;
- (c) Was wrongly decided, because it interpreted the definition in s 5 of the Act of “*applicable collective agreement*” too widely; and
- (d) Undermines other bargaining provisions in the Act (such as ss 41, 45-50, 56(1), 56A, 58, 62 and 63), because of the inappropriately wide, and incorrect, interpretation that was applied by the Authority.

[50] Allied says that the Employment Court has not dealt with the obligations that arise when a new union seeks to initiate bargaining for a collective agreement that covers the same work already covered by a collective agreement that is in force (and is more than 60 days away from expiring) with another union and employer.

[51] Allied claims that the *NDU v Spotless* case can be distinguished on the basis that all employees who may be covered by the intended coverage of First Union’s Notice are already covered by the current AWUNZI Collective.

[52] Allied says that the *NDU v Spotless* determination is not binding on the Authority meaning the law is as yet unresolved, because there is currently no definitive Employment Court decision on the question of law it has posed. First Union did not dispute that.

[53] Allied claims that the proposed question of law goes to the heart of much of the collective bargaining that occurs in New Zealand.

[54] It therefore says that the question of law it has posed is applicable to collective bargaining generally, because the law is currently uncertain (in terms of Employment Court precedent) regarding the obligations that arise where a second union initiates bargaining in respect of work already covered by a collective agreement in the same workplace, that is

already in force, and which does not fall within the timeframes specified by s 41(4) of the Act.

[55] Allied submits that it is in the overall public interest for the question of law it has posed to be determined by the Employment Court so that there is certainty for it, and others who may be involved in similar situations in future.

[56] The Authority is satisfied that the applicable question of law goes to the heart of this matter and is not incidental, because it will be decisive of the issues between the parties.

[57] Resolution of this question will also be decisive of First Union's claims that Allied has breached its obligations under ss 32 and 43 of the Act. It will also be decisive of whether First Union's Notice is valid, and that in turn affects the lawfulness of the upcoming strike action.

[58] Allied, its employees, First Union, First Union's members, AWUNZI, AWUNZI's members, other employers, unions and employees would all benefit from having the Employment Court address this question of law.

[59] It is also an important question of law because it relates to the bargaining obligations in the Act which apply to many employers, unions and employees throughout New Zealand.

[60] Accordingly, the s 178(2)(a) ground for removal in the Act has been established.

Section 178(2)(b) of the Act

[61] Section 178(2)(b) permits removal if "*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.*"

[62] Allied relies on this ground. First Union does not oppose this as a ground for removal.

[63] The Authority is satisfied that the ground for removal in s 178(2)(b) of the Act has been established. The proposed strike that is set to start in a few days makes this matter of such a nature and urgency that it is in the public interest that it be removed immediately to the Employment Court.

[64] Mr Alastair Tennent, Allied's General Manager, filed an affidavit with the Authority on 25 November 2019.²

[65] He pointed out that if First Union was not permitted to initiate bargaining until 60 days prior to the AWUNZI collective expiring, then First Union's Notice would be invalid and its members would not have the right to commence strike action from Monday, 5 December 2019 onwards.

[66] Allied says that because First Union's strike action is to be continuous, nationwide, for an indefinite period all of Allied's operations will be affected. There would be a particularly adverse effect on its North Island services, at its busiest time of the year.

[67] Mr Tennent says failure by First Union to withdraw its strike notice would result in significant disruption to its operations throughout all of New Zealand. That would have a major flow-on, adverse effect on other businesses and on the public and consumers, who rely on Allied's fuel distribution services.

[68] Mr Tennent's affidavit also identified other adverse consequences relating to costs, delays and reputational damage to Allied if the strike proceeded as scheduled. Mr Tennent claims that the upcoming strike action would not only be highly disruptive and detrimental to Allied's operations, but could also prejudice the safety of Allied's drivers, and of other road users.

[69] Allied said that if the planned strike proceeds, then it would have 24 fewer drivers than anticipated during December and the Christmas holiday period. That would result in 60 fuel stations a day not being provided with fuel by Allied.

[70] That deficit would continue for each day of the strike action, so over one week that would result in 420 service stations not being serviced by Allied. Mr Tennent said that would obviously have a major effect on fuel stations and on the travelling public over the extremely busy Christmas holiday period.

[71] Mr Tennent said that if the strike action occurred, then Allied would not have sufficient drivers to enable it to deliver on contracts during the strike period in Auckland, Mount Maunganui, Tauranga and Whangarei in the period up to Christmas, and over the

² Mr Tennent's affidavit was dated 22 November 2019.

holiday period, because its existing resource of drivers would be insufficient to meet customer demand.

[72] Mr Tennent points out that this would result in adverse consequences, not just for Allied and its drivers, but also for service station operators and their staff who would in turn be unable to provide fuel to customers, as well as to the travelling public who would not have fuel available as required.

[73] Mr Tennent also expressed concern about the fatigue of its existing drivers who would be called on to work extra hours over the strike period to cover the absences of the striking employees in what was already a peak working period for them.

[74] The Authority considers that the imminent strike action and the unresolved issues between the parties regarding the validity of First Union's Notice are matters that are of such a nature and urgency that it is in the overall public interest for these claims to be removed immediately to the Employment Court.

[75] Accordingly, the s 178(2)(b) ground for removal in the Act has been established.

Section 178(2)(c) of the Act

[76] Section 178(2)(c) of the Act permits removal where "*the court already has before it proceedings which are between the same parties and which involve the same or similar issues.*"

[77] Allied filed injunction proceedings with the Employment Court this afternoon under EMPC 440/2019.

[78] These Court proceedings involve similar issues, because in dealing with the injunction application the Court will have to also determine the validity, or otherwise, of First Union's Notice. It is therefore more timely, cost effective and efficient for this Authority matter to be removed to the Court.

[79] Accordingly, the s 178(2)(c) ground for removal in the Act has been established.

Section 178(2)(d) of the Act

[80] Section 178(2)(d) of the Act provides for removal if "*the Authority is of the opinion that in all the circumstances the court should determine this matter.*"

[81] Although the parties did not cite this ground, it is a ground that is within the Authority's purview to consider.

[82] The Authority is satisfied that the removal ground in s 178(2)(d) of the Act has been met.

[83] The originating proceedings potentially affect not just these parties, and First Union members who are employed by Allied, but many others such as service station owners in the North Island, Allied's non-union drivers, and petrol consumers in the North Island.

[84] The imminent strike action and the potentially very serious adverse consequences that could flow from the proposed strike action, means that the merits of each parties' position regarding First Union's ability to initiate bargaining and the validity of its Notice need to be finally resolved as soon as possible.

[85] The Employment Court is best placed to undertake that exercise. The underlying issues in the originating proceedings will form part of the Court's remit regarding the strike related injunction proceedings. They are so closely related that there is no benefit in the Authority resolving these claims in the first instance.

[86] To do so would inappropriately and unnecessary delay a final resolution (by way of an Employment Court decision) of these proceedings.

[87] Accordingly, the s 178(2)(d) ground for removal in the Act has been established.

Are there any factors that would make removal inappropriate?

[88] Although each of the four grounds set out in s 178(2) of the Act have been met in this particular case, the Authority still has a residual discretion to determine if there are any factors that would make removal in this particular case inappropriate. This discretion is to be exercised on a principled basis.

[89] Neither party identified any factors that would make removal inappropriate, and the Authority is not aware of any.

[90] Allied considers that this matter should be removed and that First Union does not oppose that view.

[91] The Authority considers this to be an appropriate matter for the Employment Court to determine given the urgency, and large number of people who would potentially be adversely affected if the underlying issues involved in this matter are not resolved expeditiously.

[92] The Employment Court's decision will also set a precedent for the Authority, as well as making it clear to all employers, unions and employees how the s 41 obligations in the Act are to apply.

[93] The overall public interest and urgent need for a final resolution of the matters that are currently in dispute between the parties are compelling factors for removing this matter.

Outcome

[94] The Authority is satisfied that, although only one ground for removal is required, all of the four possible grounds for removal in s 178(2) of the Act have been established. There are also no factors that would make removal inappropriate in this particular case.

[95] The Authority therefore exercises its discretion under s 178(2) to order that matter 3080012 is to be removed to the Employment Court immediately.

What, if any, costs should be awarded?

[96] Costs are adjourned sine die.

Rachel Larmer
Member of the Employment Relations Authority