

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 723
3065513

BETWEEN AMALGAMATED WORKERS
 UNION NEW ZEALAND
 INCORPORATED
 Applicant

AND HIGGINS CONTRACTORS
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Helen White, counsel for the Applicant
 Susan Hornsby-Geluk, counsel for the Respondent

Investigation Meeting: 22 November 2019 at Auckland

Submissions [and further 28 November 2019 from the Applicant
Information] Received: 6 December 2019 from the Respondent

Date of Determination: 19 December 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Amalgamated Workers Union New Zealand Incorporated (the Union) claimed that Higgins Contractors Limited (Higgins) has breached its good faith obligations in connection with collective bargaining.

[2] The Union has applied for a compliance order under s 137 of the Employment Relations Act 2000 (the Act) from the Authority, ordering that Higgins complies with Part 1 of the Act by honouring its good faith obligations.

[3] The Union also sought penalties against Higgins for what it said were serious and sustained breaches of good faith, in addition to costs associated with this application.

[4] Higgins denied that it has breached its good faith obligations or that there were any grounds for a compliance order or penalties.

Material facts

[5] Higgins is a contracting company that operates across a number of branches in the North and South Islands of New Zealand. The Union and Higgins are parties to two collective agreements in relation to the Higgins' Palmerston North and Wellington branches respectively.

[6] Each of the Higgins branches operates semi-autonomously in terms of making their own decisions regarding recruitment and employment issues. These independent decisions include setting the terms of employment and negotiating for collective agreements. The work undertaken, and way that occurs, as well as the manner in which each branch operates, differs from branch to branch.

Initiation of bargaining by Union

[7] The Union purported to initiate bargaining in respect of all employees working in the Higgins' North Island branches on 15 May 2019 ("*first notice*"). The Union then withdrew the first notice and substituted it with a second notice that same day ("*second notice*").

[8] Higgins says that the second notice of initiation of bargaining by the Union was invalid because it included coverage of employees at Higgins' Palmerston North branch who were already covered by an existing collective agreement, that was not due to expire within the timeframes provided for in s 41 of the Act ("*the Palmerston North collective*").

Email from Shelley Duke

[9] At 4:15pm on 23 May 2019, Shelley Duke, Higgins' People and Performance Business Partner for Higgins Group Holdings Limited, the corporate group that includes Higgins, asked the Union to withdraw its second notice on the basis there was already a current collective agreement in Palmerston North.

[10] Ms Duke's email of 23 May stated:

The initiation notice is not valid as it doesn't comply with section 41 of the Employment Relations Act. For example the Palmerston North agreement has concluded and gone through the ratification process some time ago. Can

you please resubmit your notice that complies with section 41 of the Act.
From here Higgins will distribute accordingly.

[11] The Union withdrew the second notice in writing on 23 May 2019. The Union's intention was to resubmit the bargaining notice without reference to Palmerston North employees.

Initiation of bargaining by Higgins

[12] On 24 May 2019 Higgins issued its own initiation notice for bargaining for the Wellington branch ("*the Wellington notice*"). This occurred within the initiation timeframe specified by s 41 of the Act.

Counter initiation of bargaining by Union

[13] On 29 May 2019 the Union reissued its bargaining notice for the North Island, but this time it excluded reference to the Palmerston North branch, but included reference to the Wellington branch ("*third notice*").

[14] On 29 May Mr Dion Liddell, union organiser, emailed Ms Duke the Union's third notice and asked her to withdraw the Wellington notice and instead draw the Union's third notice to the attention of relevant employees.

[15] Higgins responded that the Union's third notice was invalid, because it sought to act as a "*counter initiation*" of the Wellington notice.

[16] By the time the Union's third notice was issued the Wellington branch was already subject to bargaining, in accordance with the Wellington notice, initiated by Higgins five days earlier – on 24 May 2019.

[17] Because the Union's third notice had not met the timeframe requirements in s 41 of the Act regarding Wellington employees, Higgins said it was not legally required to draw the third notice to the attention of any of its employees.

Fourth notice

[18] In the Union's submissions, Ms White advised the Authority that the Union has now issued a fourth notice that recorded the correct legal name for the Union as being "*Amalgamated Workers Union New Zealand Incorporated*," ("*fourth notice*").

[19] The Authority has not seen the fourth notice.

[20] Ms White submitted that the issue regarding the correct legal name for the Union did not change its application for a compliance order that "[t]he respondent honour its good faith obligation by allowing the applicant reasonable time to supply a corrected notice before issuing its own initiation notice".

Alleged "representation" and estopple

[21] The Union claimed that Higgins' refusal to allow it to initiate bargaining for workers in Wellington on 29 May (because Higgins had already done so itself on 24 May) breached "*the representation*" Higgins made to it, as recorded in Ms Duke's email.

[22] The Union alleged that Ms Duke's reference to the fact that if its second notice was amended and resubmitted then Higgins would "*distribute accordingly*" was a misleading representation, that Higgins should be estopped from relying on.

Alleged estopple

[23] The Union's position is that it would be detrimental for it to have to bargain separately for Wellington workers, so it acted to its detriment, based on Ms Duke's email, when it withdrew its second notice.

[24] The Union said that the good faith requirements in Part 1 of the Act required Higgins to "*honour the representation it made*" (in Ms Duke's email) by:

- (a) Withdrawing its own bargaining notice for the Wellington branch; and
- (b) Instead accepting the Union's third notice as having initiated bargaining for all of the North Island, apart from the Palmerston North branch.

Alleged breaches of good faith

[25] The Union claimed Higgins has breached good faith in emails its employees had sent about the Union's bargaining notices and in connection with its initiation of bargaining for the Wellington branch.

[26] Higgins denied breaching good faith at all and said that even if it had, a compliance order or penalties were not necessary or appropriate.

Issues

[27] The following issues are to be determined:

- (a) Which bargaining notice is valid?
- (b) Did Higgins breach good faith?
- (c) If so, should a penalty be imposed for any breaches of good faith that may have occurred?
- (d) Should a compliance order be issued?
- (e) What if any costs should be awarded to the successful party?

Which bargaining notice is valid?*Relevant Legislation*

[28] Section 41 of the Act gives unions a 20 day head start on the

[29] A union may initiate bargaining 60 days before the expiry of a current collective agreement, while an employer cannot initiate bargaining earlier than 40 days before the expiry of a current collective agreement.¹

[30] Section 41(5) of the Act provides that an applicable collective agreement is "*in force*" if it binds employees whose work is intended to come within the coverage clause in the collective agreement being bargained for.

[31] Section 42 of the Act sets out how bargaining is to be initiated.

¹ Section 41(3)(a) and (b) of the Act.

[32] Initiation of bargaining involves the party that wants to initiate bargaining giving the intended party, or parties to the collective agreement, a notice that:

- (a) Is signed by the party giving the notice;
- (b) Identifies each of the intended parties to the collective agreement; and
- (c) Identifies the intended coverage of the collective agreement.

[33] Section 43 of the Act requires an employer that either initiates bargaining, or receives a bargaining notice, to draw the existence of it, and the coverage of the bargaining, to the intended parties to it and to all employees (whether members of the union party to the collective or not) whose work would be covered by the intended coverage clause.

Code of Good Faith and Collective Bargaining

[34] On 6 May 2019 a Code of Good Faith and Collective Bargaining came into force under s 35(1) of the Act (“*the new Code*”). The new Code replaced the previous Code of Good Faith and Collective Bargaining that had been in force since 6 March 2015.

[35] Under s 39 of the Act the Authority may have regard to the new Code in determining whether or not parties have dealt with each other in good faith in bargaining for a collective agreement.

[36] Clause 1.5 of the new Code defines bargaining as all interactions between the parties that relate to the bargaining. It includes negotiations, communications and correspondence that relate to the bargaining that occur before during or after negotiations. It also relates to interactions the parties have regarding a bargaining process agreement.

[37] Clause 3.6 of the new Code requires an employer, by no later than ten days after the initiation of bargaining, to draw to all employees who would be covered by the proposed coverage clause (regardless of whether or not they are union members) the notice that collective bargaining is being initiated. This time frame is extended to fifteen days if there are two or more employers identified as intended parties to the bargaining.

[38] Clause 3.8 of the new Code prohibits an employer from advising or doing anything with the intention of inducing an employee not to be involved in bargaining for a collective agreement or not to be covered by a collective agreement.

[39] Clause 3.12 of the new Code prohibits the parties from doing anything likely to undermine the bargaining or the authority of the other party or parties in the bargaining. It states that undermining behaviour is likely to be a breach of good faith and it gives examples of the sort of behaviour that would include.

[40] The Authority has had regard to the new Code in determining which initiation of bargaining notice is valid.

First notice and second notice are invalid

[41] The Union first purported to initiate bargaining at 6:01 p.m. on 15 May 2019 via a notice sent by Mr Maurice Davis to Higgins (this was the first notice).

[42] At 6:51 p.m. that same day Mr Dion Liddell emailed Shelley Duke and said “*please disregard letter and previous email. As attached is the letter of notice initiating bargaining*”, (this was the second notice).

[43] The first notice incorrectly referred to s 45 of the Act, so the second notice corrected that by referring to s 42 of the Act.

[44] The Union’s second notice sought coverage of “*employees across all of Higgins’ North Island branches*”.

[45] The Authority accepts Higgins’s submissions that the second notice was invalid because:

- (a) At the time that it was issued (15 May 2019), there was an existing collective agreement between the parties that covered employees employed by Higgins at its Palmerston North branch (the Palmerston North collective);
- (b) The Palmerston North collective was ratified by the Union’s members on 29 February 2019 and is not due to expire until 30 April 2021;
- (c) The Union’s second notice dated 15 May 2019 sought to initiate bargaining for a collective agreement that would have covered all employees employed by Higgins who worked in the North Island, including those employees who are already covered by the Palmerston North collective;

- (d) Section 41(3)(a) of the Act prevents a Union from initiating bargaining for a new collective agreement on a date that is more than sixty days before the expiry of an existing collective agreement, that binds the employees whose work is intended to come within the coverage clause in the new collective agreement that is to be bargained for;
- (e) As the Palmerston North collective was not due to expire for nearly two years, the Union could not, as at 15 May 2019, lawfully initiate bargaining for a collective agreement that would cover employee members who were already covered by the Palmerston North collective.

[46] During the Authority's investigation meeting Mr Liddell accepted that the Union's two bargaining notices issued on 15 May 2019 were invalid, because they said they intended to cover workers who were already covered by the current Palmerston North collective.

The 'Wellington notice' is the valid initiation of bargaining notice

[47] On 24 May 2019 Higgins initiated bargaining for a collective agreement that would only cover employees employed in its Wellington branch (the Wellington notice).

[48] The Wellington notice was valid because:

- (a) As at 24 May there was no other valid notice of initiation of bargaining relating to the employees who would be covered by the intended coverage clause that was set out in the Wellington notice; and
- (b) The Wellington notice was initiated by Higgins within the forty-day time frame for initiation provided for in s 41(3)(b) of the Act.

Union's third notice was invalid

[49] On 29 May 2019 the Union attempted to initiate bargaining for a collective that would cover employees across all of Higgins' North Island branches, except Palmerston North, meaning it included employees employed by the Wellington branch (this was the third notice).

[50] The Union's third notice was invalid because it sought to initiate bargaining for a collective agreement that would have covered employees who are employed in Higgins'

Wellington branch, and who were already covered by the Wellington notice dated 24 May 2019.

Counter initiation not permitted under the Act

[51] Because Higgins had already issued the Wellington notice to cover bargaining for those employed in the Wellington branch the Union's third notice amounted to a counter-initiation of bargaining.

[52] Counter initiation of bargaining is not permitted under the Act.

[53] The Employment Court in *Service and Food Workers Union v Auckland District Health Board*² held that although the Act did not expressly exclude cross or counter initiation, to allow that to occur (referring to subsequent initiations between the same parties) would be contrary to the scheme of the Act.

[54] The Court held that the scheme of the Act allowed bargaining for a collective agreement between parties covering the same employees to be initiated only once, because after bargaining had first been initiated the Act imposed an obligation on those parties (to the first initiation of bargaining) to conclude a collective agreement, unless there were genuine reasons based on reasonable grounds not to.

[55] The Court considered that counter initiation would have fundamentally undermined that requirement, so was not permitted under the scheme of the Act.

[56] In terms of the information produced to the Authority, the only valid notice of initiation of bargaining between the parties is the Wellington notice that was issued by Higgins on 24 May 2019.

Union's estoppel claim does not succeed

[57] The Court of Appeal in *Wilson Parking NZ v Fanshaw 136 Limited and Others* held that estoppel required:³

- (a) A belief or expectation that a party has created or encouraged by words or conduct;

² (2007) ERNZ 553 at [76].

³ [2014] NZCA 407 at [57].

- (b) To the extent an express representation is relied on, it is clearly and unequivocally expressed;
- (c) A party reasonably relied to its detriment on the representation that was created/encouraged by the other party; and
- (d) It would be unconscionable for the other party to depart from the belief or expectation it had created.

[58] Ms Duke's email at 4.51pm on 23 May 2019 said:

This initiation notice is not valid [...]
Can you please resubmit your notice that complies with s 41 of the Act. From here Higgins will distribute accordingly.

[59] Mr Liddell's response at 4:23 that same day (23 May) said:

Hi Shelley
Thanks for your email.
We hereby withdraw the previous notice and shall reinitiate accordingly.

[60] There were no additional communications, such as text or phone conversations, between the parties. The Union relies solely on Ms Duke's email to create an estoppel.

[61] The Authority does not accept the Union's claim that Ms Duke made a clear or unequivocal representation that it would not exercise its rights under s 41(4)(b) of the Act to initiate bargaining.

[62] Nor could that restriction reasonably be implied from Ms Duke's email.

[63] There was nothing in Ms Duke's email that caused or encouraged the Union to wait six days before it issued its third notice.

[64] The Union withdrew its first notice and issued its second notice simultaneously. There was no reason why it could not have also done that with its second and third notices. The Union's decision not to do that was solely its own decision. Higgins cannot be held legally responsible for that.

[65] The Union knew that Higgins had the right to initiate bargaining under s 41(4)(b) of the Act. It therefore had to have known that there was a risk that Higgins would exercise its right to initiate bargaining, if the Union had not already done so - by filing a valid bargaining notice that met the requirements of s 42 of the Act.

[66] The delay that occurred was entirely within the Union's control. There was no representation or conduct by Higgins that could have reasonably lead the Union to believe that Higgins had agreed to hold off exercising its statutory right to initiate bargaining and would instead simply wait for the Union to issue a valid bargaining notice, whenever that may have occurred.

[67] Mr Liddell accepted that he had made an assumption that Higgins would not exercise its rights under s 41(4)(b) of the Act to initiate bargaining. He based his assumption solely on Ms Duke's email.

[68] If it was important to the Union that Higgins did not initiate bargaining, then that was an issue that the Union could and should have raised with Higgins at that time. It was open to the Union to have asked Higgins to provide an undertaking that it would not initiate bargaining until after the Union had filed a third bargaining notice. However it did not do so.

[69] The Authority does not agree with the Union that Ms Duke's email of 23 May 2019 at 4:15 p.m. was a "*representation*". It was not an express representation because it did not clearly and unequivocally express what the Union claims it did. There was no reference to Higgins not initiating bargaining until the Union had resubmitted a valid bargaining notice.

[70] The email from Ms Duke was insufficient to create a belief or expectation in the Union that Higgins would refrain from exercising its rights under s 41(3)(b) of the Act.

[71] Ms Duke's email was simply a recitation of undisputed facts – the Union's second notice was invalid (that point was accepted by the Union) so the Union would need to resubmit a notice that complied with the requirements of s 41 of the Act, (the Union also accepted it was required to do that). If/when that occurred "*Higgins will distribute accordingly*", which just confirmed its obligation under s 43 of the Act to do that.

[72] It is significant that the Union did not advise Higgins as to when it intended to resubmit a third bargaining notice or what the intended coverage clause would be for any new notice. Leaving these matters open created a void that Higgins was legally permitted under s 41(4) of the Act to fill.

[73] The Union had already received a 20 day head start on the right to initiate bargaining, so it had already had more than enough time to have filed a valid bargaining notice, if it had

wanted to ensure that Higgins was never in a position of being legally entitled to initiate bargaining.

[74] Ms Duke's email essentially said that if a legally compliant bargaining notice is provided then Higgins would distribute it in accordance with the obligation it had under the Act to do so.

[75] Her email did not promise what if any action Higgins may or may not take regarding its own initiation of bargaining, so there cannot be said to have been any express or implied representation of any kind. Ms Duke's email did not create an estoppel.

Name used for Union in Wellington notice does not invalidate it

[76] During the Authority's investigation meeting Ms White suggested that the Union may not have been named correctly in its Statement of Problem, in the Statement in Reply or in any of the bargaining notices submitted by the parties.

[77] Ms White undertook to look into that further. As result of that Ms White has now filed a certificate of incorporation for the Union that records that from 6 September 1991 the Union's full legal name is "*Amalgamated Workers Union New Zealand Incorporated*".

[78] The Union identified itself in the Statement of Problem as "*The Amalgamated Workers Union Incorporated*". Higgins named the Union as "*Amalgamated Workers Union Incorporated New Zealand*" in its Statement in Reply.

[79] The Union identified itself as "*Amalgamated Workers Union NZ Inc (AWUNZ)*" in the first notice and as "*The Amalgamated Workers Union NZ Inc (AWUNZ)*" in the second notice.

[80] Higgins referred to the Union as "*The Amalgamated Workers Union Inc (AWUNZ)*" in its Wellington notice dated 24 May 2019.

[81] The Union's referred to itself as "*The Amalgamated Workers Union NZ Inc (AWUNZ)*" in its third notice dated 29 May 2019.

[82] Section 42 of the Act outlines how bargaining may be validly initiated. Section 42(2)(b) of the Act requires the bargaining notice to identify each of the intended parties to the collective agreement.

[83] The omission from the Wellington notice of the words “*New Zealand*” after the reference to “*Union*”, and before the “*Inc*” was remedied by the acronym “*AWUNZ*.” The failure to record the words “*New Zealand*” in full when naming the Union in the Wellington notice did not invalidate it because it was technical default, that did not affect the substance of the bargaining notice.

[84] The content of the Wellington notice was clear, so the parties could not have been misled in any respect about who the intended parties to the bargaining were.

[85] The name issue was not raised until halfway through the Authority’s investigation meeting. Up until then the parties had been engaging with each other on the basis that they both accepted that they were the parties named in these proceedings, and in the various bargaining notices that had been exchanged by them in May 2019.

Validation of Union’s name in Wellington notice

[86] Section 219(1) of the Act enables the Authority to validate something that is required but that has been done informally.

[87] The Authority finds that the failure to use the Union’s full legal title in the Wellington notice did not render it invalid because the requirements of s 42 were met, and in particular, the notice identified the intended parties to the collective agreement.

[88] There is no credible argument that the identification of the party “*Amalgamated Workers Union Inc (AWUNZ)*” in the Wellington notice did not clearly identify the union as an intended party to the bargaining. This is only reinforced by the fact that Union used that same description in its own Statement of Problem when it filed these proceedings with the Authority.

[89] Even if the Authority is wrong about that, and the failure to include the words “*New Zealand*” in full (while still referring to them in the acronym used on the bargaining notice) made the Wellington notice defective, then this is an appropriate case for the Authority to exercise its discretion under s 219(1) of the Act to validate the Wellington notice, by amending the Union’s name to reflect the same name that is recorded in its certificate of incorporation.

[90] Whilst the Union considers that the validity of the Wellington notice was “*irrelevant*”, the Authority did not agree.

[91] It is important that the legitimacy and validity of the various bargaining notices that have been exchanged in this matter is determined by the Authority, to ensure that the parties can proceed to bargaining in a timely and efficient manner.

[92] The Authority was advised during the investigation meeting that the Union has not wanted to embark on bargaining pending the outcome of these proceedings.

[93] As a result of discussions that occurred with the Authority and the parties during its investigation meeting, the parties agreed that they would begin to take preliminary steps towards agreeing on the bargaining process agreement and the like pending the issuing of the Authority’s determination in this matter.

[94] Further delay is undesirable.

[95] Higgins gave evidence to the Authority about the adverse effects that delays in concluding bargaining with the Union is having on the Wellington branch union members. This had been already been a problem in past bargaining, so further uncertainty or delay is undesirable.

[96] It is therefore in the overall interests of justice for the parties to have certainty regarding the validity of the Wellington notice.

[97] To make that clear, the Authority now finds that the Wellington notice did validly initiate bargaining for the Wellington employees in the Wellington branch who were waged employees and were members of the Union, and who were engaged in the six positions that were identified in the Wellington notice.

[98] Even if there was some technical issue with the way in which the Union had been named in the Wellington notice, the Authority has now corrected that by making it clear that the Union party identified in the Wellington notice is the same Union party involved in these proceedings and is the same Union as that named in the certificate of incorporation Ms White filed with the Authority on 29 November 2019.

[99] The Union’s request that its third notice take precedence over the Wellington notice does not succeed. It cannot “*take precedence*” because the reference in the third notice to the intended coverage of the Wellington branch employees whose work fell within the proposed coverage clause made it invalid.

Did Higgins breach its good faith obligations under the Act?

21 May 2019 email

[100] In an email on 21 May 2019 a junior, inexperienced, People and Performance Adviser (“*the junior advisor*”) emailed three of her colleagues a copy of the (invalid) second notice and said:

Can the attached please be put up on one of your notice boards – the Union is trying to initiate bargaining with the whole North Island of Higgins!

Don’t draw attention to it but we have to display this.

[101] The recipients of the email were not involved in the bargaining. The junior advisor who had sent the email was not involved in the bargaining. She had not previously had any involvement in collective bargaining and she was not involved in matters concerning the Union, or any issues relating to the initiation of bargaining in this matter.

[102] The junior adviser who sent the email on 21 May 2019 told the Authority that she was concerned about there being one collective agreement across all of Higgins’ New Zealand sites due to her personal knowledge of the complexity of the different terms and conditions and work requirements between each of the different Higgins branches.

[103] She said that was her personal view, based on her personal knowledge of the different branches – it was not something that had been communicated to her by Higgins, or its managers or Ms Duke or anyone else involved in the bargaining.

[104] The Union’s claim that the 21 May email was a breach of s 43 of the Act does not succeed. Because the Union’s second notice was invalid, the obligations under s 43 of the Act did not apply.

[105] The Union’s claim that the 21 May 2019 email breached s 4(6) of the Act does not succeed because the comment was not intended to induce any employee not to be involved in bargaining for a collective agreement or to not to be covered by a collective agreement.

[106] In terms of s 4(6) of the Act the employee who sent the 21 May 2019 email was not representing Higgins in making this comment because she had no involvement in the bargaining and had not been instructed or authorised to make this statement. Ms Duke had instructed the Advisor in an email on 21 May 2019 that “*we legally need to put this [second notice] on our notice boards, can you please send to your branches to put up*”.

[107] The content of the 21 May email that is challenged by the Union was not “*advice*” to any employee in terms of s 4(6) of the Act, nor was the email sent with the intention of inducing employees.

[108] The comment was an ill-advised throw away statement by a junior member of staff who was not experienced with, or involved in, collective bargaining. The email also included a legally compliant instruction to managers that they were required to display the second notice on notice boards, because at that time Higgins had not yet identified that the second notice was invalid.

22 May 2019 email

[109] On 22 May 2019 Tracy Shaw sent an email to three Hawkes Bay staff that stated:

Can you print this off and put it on the notice board. If anyone asks you we are in the process of negotiating a new collective with the HB Workers Union. The HB Workers Union will be presenting this to the team in due course.

[110] Ms Shaw told the Authority that ninety percent of employees at Higgins Hawkes Bay site were members of the Hawkes Bay Workers Union (“*the HB union*”). This is not an in-house union.

[111] When she sent the email on 22 May, Higgins and the HB union were in the process of negotiating a variation of their collective agreement. Ms Shaw was concerned that members of the HB union who saw the applicant Union’s second notice may have become confused or concerned about what that meant for their (variation) negotiations.

[112] Ms Shaw said she tried to head off any possible confusion with the instruction she gave to the two managers and HR Co-ordinator in her email about what to say if they were approached by HB union members about the second notice. The email also said that the information Ms Shaw had given was only to be provided to those who asked.

[113] As it turned out no HB union members had questions about the second notice, so no information was provided to any employee or union member.

[114] Accordingly, the elements of s 4(6) of the Act had not been met because no advice was provided to employees and there was no intention of inducing an employee not to be involved in bargaining for a collective agreement or being covered by a collective agreement.

[115] The advice Ms Shaw gave was incorrect because it referred to negotiating for a “*new*” collective when she meant negotiating for a “*variation*” to the existing HB union collective.

[116] The Authority accepted that was an error, and not an example of deliberate bad faith, as the Union had alleged.

[117] The error was intended to reassure members of a different union (HB union) that the collective agreement they were covered by was still valid and that their negotiations for a variation to it were continuing and had no bearing on the second notice.

[118] None of these workers could have been covered by the second notice anyway because they were already covered by a different current collective agreement, so s 58 of the Act applied.

[119] The Union’s claim that Ms Shaw’s email of 22 May 2019 breached s 4(6) of the Act does not succeed, for reasons discussed earlier in this determination.

23 May 2019 email

[120] The Union’s claim that Ms Duke’s email of 23 May 2019 was a representation or misrepresentation does not succeed.

[121] Ms Duke’s email also did not breach s 4(6) of the Act, because she did not promise, or agree, to limit Higgins’ rights under the Act. Ms Duke’s email on 23 May was just a factual record of the current position and no more. It did not amount to a breach of good faith.

Initiating of bargaining on 24 May 2019

[122] Higgins’ legal right to initiate bargaining under s 41(3)(b) of the Act was unrestricted, so its initiation of bargaining for the Wellington branch on 24 May was not unlawful or a breach of good faith.

[123] Whether or not Ms Duke advised the Union that its second notice was invalid, that was factually the position. There is nothing in the Act that prohibits a party from initiating bargaining simply because an invalid bargaining notice has already been issued by another party to the bargaining.

[124] Higgins was not required under the Act to inform the Union that it intended to initiate bargaining, or to advise the Union in advance of it doing so.

[125] There had been no agreement between Ms Duke and Mr Liddell that Higgins would not initiate bargaining. Likewise Ms Duke was not required to tell Ms Shaw that she could and should not initiate bargaining for the Wellington branch because the Union had indicated on 23 May that it would be re-initiating bargaining.

[126] The evidence produced to the Authority established that each Higgins branch acted autonomously in terms of negotiating terms and conditions of employment, so there was nothing unusual or untoward about Ms Shaw initiating bargaining for the Wellington branch.

[127] That is what had occurred in the past and what will continue to occur in future. Ms Duke was not involved in the bargaining relating to the Wellington branch. She could not reasonably have been expected to have prevented Ms Shaw from issuing the Wellington notice.

[128] Nor was Ms Shaw's failure to contact Mr Liddell about her intention to initiate bargaining for the Wellington branch a breach of good faith. There was no obligation on her to do so.

[129] Ms Shaw had been engaging with the Union's Wellington based organiser Robert (Rob) Popata, who Higgins had dealt with on all Wellington branch matters in the past, including previous rounds of bargaining.

[130] Ms Shaw and Mr Popata had been involved in a number of previous communications regarding the Wellington branch that had focused on their mutual desire to conclude bargaining for the Wellington branch in a timely way.

[131] Ms Shaw and Mr Popata had discussed bargaining because of problems that had arisen due to previous bargaining being so protracted that Wellington branch Union members had to wait longer than they had wanted to in order to receive their pay rise. That had created

problems for everyone, so Ms Shaw was proactively trying to avoid that situation occurring again.

[132] Ms Shaw had not had any involvement with Mr Liddell, so she did not believe she needed to engage with him about the Wellington bargaining. Ms Shaw therefore sent the Wellington notice to Mr Popata, as someone she had already, and had always, dealt with, in connection with Wellington bargaining.

[133] Ms Shaw's failure to copy the Wellington notice to Mr Liddell was not a breach of good faith. Mr Popata could reasonably have been expected to have passed it on to the Union, if there were others within the Union apart from him, who needed to see it. If he failed to do so then that was an internal Union issue, and not something that Higgins must bear liability for.

[134] Likewise, Higgins' refusal to withdraw its Wellington notice or to accept the Union's third notice were not breaches of good faith. There was no legal obligation on it to do what the Union had asked it to do and Higgins had good reasons, on reasonable grounds, for not agreeing to the Union's request.

Did Higgins act in bad faith and/or breach the New Code of Good Faith and Bargaining?

[135] None of the evidence the Authority heard established that Higgins had acted in bad faith and/or had breached any of its obligations under the new Code of Good Faith and Bargaining.

[136] The Wellington branch's collective agreement expired on 30 June 2019, so Ms Shaw had bargaining on her radar for the first part of this year. There had been a number of discussions with the Union organiser and other managers about the need for bargaining to be concluded in a timely manner.

[137] The parties had agreed that they were open to commencing negotiations over summer with their mutual preference being that a collective be concluded prior to 1 July 2019. The reason for that being so that Union members would receive the pay increases at the same time the rest of the employees across the Higgins' business did.

[138] The purpose of that was to avoid a situation where Union members in Wellington felt disadvantaged regarding the timeframe of their pay increase (because they had to wait for a collective to be concluded before they would get a pay rise) compared to colleagues who had already received their annual pay rise. There problem had occurred with the previous bargaining.

[139] Ms Shaw said that although she didn't recall specifically discussing with Mr Popata about which party would initiate bargaining, her assumption was that the Union would initiate first, but she had it in mind that if the Union did not do, so then Higgins would, with the aim of trying to conclude the bargaining before 1 July 2019.

[140] The Union had a twenty-day head start to be able to initiate bargaining. The fact that it did not do so could not reasonably prevent Higgins from exercising its rights to initiate bargaining under the Act.

[141] None of the matters identified by the Union amount to breaches of good faith by Higgins, so its breaches of good faith claims do not succeed.

Should a compliance order be issued?

[142] In the absence of any breaches of good faith, the Union's application for a compliance order does not succeed.

What if any costs should be awarded?

[143] Higgins as the successful party is entitled to a contribution towards its actual costs.

[144] The parties are encouraged to resolve costs by agreement. If that does not occur then Higgins has twenty-one days from the date of this determination to file costs submissions and the Union has seven days from the date of service of Higgins' costs submissions to file a response.

Rachel Larmer
Member of the Employment Relations Authority