

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 498
3058272

BETWEEN	MANUFACTURING & CONSTRUCTION WORKERS UNION INC. Applicant
AND	MIDLAND SCAFFOLDING & RIGGING LIMITED First Respondent
AND	ASHLEY BROWN Second Respondent
AND	LEONARD HUNTER Third Respondent

Member of Authority: Vicki Campbell

Representatives: Lou Yukich for Applicant
Matthew Dearing for Respondents

Investigation Meeting: 21 and 22 August 2019

Oral Determination: 22 August 2019

Record of Oral
Determination: 26 August 2019

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. The Manufacturing and Construction Workers Union Inc's application for penalties is declined.**
- B. Costs are reserved.**

Protection of witnesses

[1] During the course of the investigation into these proceedings the Manufacturing & Construction Workers Union Incorporated (MCWU) applied for and was granted authority to issue a number of witness summonses to employees of Midland Scaffolding & Rigging Limited (MSRL). Only one of those witnesses attended the Authority's investigation meeting. I was told the remaining witnesses were reluctant to appear to give evidence due to possible retaliation by MSRL.

[2] Witnesses attending an investigation meeting are protected under s 176(2) of the Act. The interests of justice require that there is a complete absence of any pressure not to give evidence.¹

[3] Mr Brown assured me no retaliation would be taken against any employee giving evidence to the Authority and I have accepted his assurances.

Employment relationship problem

[4] On 19 March 2019 MCWU received four applications for union membership from employees employed by MSRL. At that time MCWU were instructed to initiate bargaining for a collective agreement and to arrange a meeting for its members in the workplace.

[5] MSRL is a medium sized employer, employing about 40 trade employees. It has been in operation since 1996 and has had successive collective agreements with the Amalgamated Workers Union New Zealand Incorporated (AWUNZ). MSRL and AWUNZ reached agreement on the terms of a new collective agreement in April 2019.

[6] All four employees who joined MCWU on 19 March worked on a worksite operated by OJI at Kinleith. Mr Ashley Brown, General Manager for MSRL received the notice initiating bargaining by email on 19 March 2019.

[7] Since initiating bargaining the Union says it has lost members and that the loss of those members is as a result of approaches by MSRL. The Union claims MSRL, Mr Brown and Mr Hunter have breached the Act and seeks penalties and other orders.

¹ *Manoharan v Chief Executive Waiariki Institute of Technology* [2011] NZERA 427 followed.

Issues

[8] In order to resolve MCWU's application I must determine the following issues:

- a) Whether there have been breaches of ss 4(1A)(b) and 11 of the Employment Relations Act 2000 (the Act) by the respondents?
- b) If there have been breaches what if any penalties should be imposed?
- c) What if any other orders should be made?

[9] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Events leading to this application

[10] On 19 March Mr Lou Yukich the General Secretary for MCWU corresponded with Mr Brown to facilitate a meeting of employees during their lunch break on Thursday 21 March. MCWU says Mr Brown attempted to dissuade it from having a meeting.

[11] Mr Brown responded to Mr Yukich's request for a meeting by asking for an alternative date because 21 March was a planned Day-Shut. Mr Brown explained to me that having a Day-Shut requires parts of the plant to be shut down so that preventative maintenance can be undertaken. His uncontested evidence was that there is a lot of pressure on MSRL to work quickly to ensure the maintenance is completed within the day because it affects OJI's bottom line.

[12] In any event Mr Brown agreed for the meeting to proceed on 21 March but asked that it be restricted to the 30 minute lunch break between 1.30 pm and 2 pm which was the time requested by Mr Yukich.

[13] Emails provided to the Authority support Mr Brown's evidence that while he was reluctant to have the meeting on the date requested by MCWU due to workload issues Mr Brown did not prevent the meeting from taking place.

[14] The meeting took place as scheduled and Mr Yukich attended the workplace at 1 pm and was escorted to the lunchroom by site security personnel in accordance with the requirements set by MRSL. At the meeting three additional employees of MRSL completed Membership Application forms.

[15] Mr William Palmer, an employee of MSRL and a member of MCWU told me Mr Brown interrupted the meeting at 2.05 pm and instructed the employees to return to work. Mr Brown acknowledged he did instruct the employees to return to work because they were due back at 2 pm. I find Mr Brown did not interrupt the meeting. Mr Palmer told me by the time Mr Brown attended most people were packing up and preparing to return to work. I have concluded that apart from a few conversations taking place the meeting had largely ended.

[16] By 27 March there was only one member of the union still employed by MRSL. Four employees who resigned from the Union continued to be employed. Three other members had left the employment relationship.

[17] Mr Brown told me one of his supervisors was away and he was under the misapprehension that there was not enough work available to retain all of the employees working on a casual basis.

[18] Mr Robert Farrar was one of the union members affected by this decision and another union member was included in those let go because Mr Brown believed the employee was trialling for another job. He reached this conclusion because the employee had advised him he was unable to work on Saturday as he was attending a job interview in Tauranga. The following Monday the employee requested two weeks off which Mr Brown put down to the employee trialling for the new job.

[19] The sixth member of the union resigned and left his employment. There is no evidence that he also resigned from the union.

Credibility

[20] This matter is to be determined on issues of credibility. I have carefully evaluated the evidence I heard and have considered how reasonable, plausible and probable the evidence is. I have also taken into account what corroboration exists to support one version or another.

[21] The onus of proof is the balance of probabilities. This means the Authority is required to determine which version of events is more likely than not. I have found this very difficult especially in light of the failure of witnesses to attend the investigation meeting when they were under a summons to do so. Where there is a dispute in the evidence I have preferred the evidence of RSML as being, on balance, the most credible evidence.

[22] Mr Palmer's evidence contained a significant amount of hearsay evidence that has not been supported and was contradicted by the evidence from MRSL. He denied the company had a Day-Shut on 21 March however, MSRL has produced evidence confirming the Day-Shut did occur on that day.

[23] Further in his written evidence Mr Palmer relates a conversation in which he says an employee was told by Mr Hunter on 13 March that he needed to leave the union. However, that employee did not actually join MCWU until 19 March.

[24] I found the evidence of MSRL to be compelling and plausible, the witnesses did not waiver under examination and the evidence was corroborated by other witnesses.

Breach of section 11

[25] Part three of the Act expressly establishes the right for all employees the freedom to choose whether or not to be members of a union. Section 11 of the Act addresses undue influence and prohibits any person from exerting undue influence, directly or indirectly, on another person with the intention of inducing the other person to become, remain, cease to be, or not to become a member of a union or particular union.

[26] Undue influence is the unconscionable exercise of influence which:²

...focuses on improper exploitation of inequality between people in their dealings which equity and conscience will not condone.

[27] After recruiting four new members in March MCWU initiated bargaining for a collective agreement on 19 March 2019. This was followed by the meeting on 21 March where a further three employees completed membership forms.

[28] On 22 March 2019 the Union forwarded its seven membership forms and fee deduction authorities to Mr Brown for processing.

[29] Later that day an employee who had earlier signed a Membership Application form emailed the Union and advised that he was opting out of the Union.

[30] On 26 March the Union received an email from Mr Brown attaching two Membership Application forms advising that these employees had requested not to join MCWU. Each of the forms were annotated to that effect and signed by the employees.

[31] MCWU claims the new members were being approached by either Mr Hunter or Mr Brown and actively discouraged from membership of MCWU.

[32] Mr Palmer has worked for RMSL for more than ten years and has always been covered by the AWUNZ collective agreement. He told me that when the collective agreement expired in August 2018 they heard nothing from AWUNZ despite requesting a meeting.

[33] After making enquiries he approached Mr Yukich at MCWU seeking representation. By 19 March three employees of MSRL had joined MCWU and they instructed MCWU to negotiate a collective agreement which included a wage adjustment, on call availability allowances, motor vehicle expense reimbursement and certainty around their 40 hours work each week.

² *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783 (CA) at pages 786 and 795.

[34] Mr Palmer told me he rang Mr Leonard Hunter, Managing director, on 25 March and says he received a tirade of abuse and ridicule over the phone about his choice of which union to join. Mr Palmer says Mr Hunter accused him of trying to ruin his business and called him names and told him to “@\$#% off”.

[35] Mr Hunter acknowledged he had a conversation on 25 March but he says he did not discuss anything about union membership. He acknowledged that he did swear at Mr Palmer and told him to stop messing around. He told me that was in relation to Mr Palmer accusing Mr Brown of trying to run him over and not in relation to union business. Mr Hunter denies he accused Mr Palmer of trying to ruin his business.

[36] Mr Hunter says he told Mr Palmer that every supervisor he had worked with had had a run in with him and that if he didn't like working there he should “@\$#% off”. Mr Hunter told me he could have called him names.

[37] Mr Palmer's evidence contained a number of hearsay statements alleging Mr Hunter had told two employees that if they joined MCWU they would not have a job. Mr Hunter denies having any discussions with any of the employees who had joined MCWU about their membership. He said he was working on a different site and did not see any of the employees concerned.

[38] He told me he did have one discussion with an employee on the site he was working on who had asked him why everyone had left AWUNZ and joined the new union. Mr Hunter said he simply told this employee that not everyone had left AWUNZ.

[39] Mr Palmer told me that on 27 March he observed Mr Brown speaking to Mr Wetini. When Mr Palmer asked Mr Wetini what Mr Brown had said he was told Mr Brown had told him [Mr Wetini] to resign from MCWU.

[40] Mr Brown acknowledges he had a discussion with Mr Wetini. He said Mr Wetini approached him saying he was confused and asked him about MCWU. Mr Brown says he told Mr Wetini that he needed to speak with Mr Palmer or the union.

[41] Mr Palmer told me Mr Wetini advised him he was approached a few days later and was told if he didn't resign there would be no more work. Mr Wetini then resigned from the Union. Mr Wetini was summonsed to give evidence but failed to appear.

[42] On 31 March Mr Palmer was forwarded an email from Mr Yukich containing Mr Farrar's resignation from the Union and advising:

I was told last Wednesday that there was no longer work available, the next morning, I was offered my job back from Midlands Scaffolding Ltd, on the condition that I withdraw my membership from this Union. Please accept my apologies but I have a family to feed.

[43] Mr Farrar told me that on 26 March he was told by Mr Brown that there was a down turn in work and he was no longer needed. He told me the next day he sent a text to MSRL requesting a reference. After he received no response from this text he emailed Mr Barry Hosking, his supervisor, with his request. At that time Mr Hosking was absent on leave but he called Mr Farrar on 28 March when he returned. Mr Farrar told me Mr Hosking asked what was going on and told Mr Farrar he could come back to work but that he needed to get out of MCWU. Mr Farrar told Mr Hosking he would do whatever was necessary to get back to work because he had a family to support.

[44] He says he returned to work on Friday 30 March and agreed to withdraw from MCWU which he did on 31 March. His withdrawal occurred after these proceedings were lodged by MCWU.

[45] Mr Hosking gave evidence to the Authority by telephone. He confirmed he rang Mr Farrar on the 28 March to advise him that he had work for him if he was interested and that he would come back on the same terms and conditions of employment. Mr Hosking was adamant that he did not discuss Mr Farrar's union membership with him. He told me he only found out about the union issues after he got back and had been into his job for a couple of days or a week. He told me he is still unclear about what the issues are.

[46] Mr Brown told me he was not concerned about whether MSRL's employees were members of a union or not. He told me that on 30 March he spoke with Mr

Farrar himself and told him that he was not concerned about whether he joined a union or not. Mr Brown told me the discussion took place in the administration area. At first Mr Farrar denied he had been in the administration area that day. He then recalled that he did attend the administration area but denied he had a conversation with Mr Brown.

[47] Ms Denise Werahiko is the Office Administrator and has a desk next to Mr Brown's. She told me she recalled Mr Brown speaking directly to Mr Farrar and he told Mr Farrar he was free to join whatever union he wanted but he needed to sign an employment agreement. Mr Farrar was in the administration area to sign his employment documents so that he could start work.

Conclusion

[48] I have found this matter to be finely balanced. I have considered what is more plausible in all the circumstances. My determination of this matter has been made more difficult by the lack of evidence supporting MCWU's claims.

[49] I am not satisfied MSRL, Mr Brown or Mr Hunter have exerted pressure on its employees to the extent alleged to find there was undue influence. MCWU's application for penalties is declined.

Breach of section 4(1A)(b)

[50] Sections 4(1A)(b) of the act sets out obligations in relation to good faith and:

Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative;

In *National Distribution Union Inc v Carter Holt Harvey Ltd* the Court of Appeal noted:³

...Good faith connotes honesty, openness and absence of ulterior purpose or motivation. In any particular circumstances the assessment whether a person has acted towards another in good faith will involve consideration of the knowledge with which the conduct is undertaken as disclosed in any direct evidence, and the circumstantial evidence of what occurred.

³ *National Distribution Union Inc v Carter Holt Harvey Ltd* [2002] ERNZ 822 at [55].

[51] MCWU has failed to establish a breach of good faith on the part of the respondents to my satisfaction and its application for penalties is declined.

Other relief sought

[52] In its statement of problem MCWU has asked the Authority to make orders requiring the respondents to cease and desist in its actions and to issue a permanent injunction against Mr Brown and Mr Hunter from further breaching s 11 of the Act.

[53] Apart for the rather dubious nature of the application I have found no breaches of the Act have been established and therefore the application for further orders is declined.

Costs

[54] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so MSRL shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. MCWU shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[55] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority