IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2020] NZERA 78
3084632 and 3084733

	BETWEEN	TAXPRO INCORPORATED First Applicant
	AND	RAEWYN JECENTHO and OTHERS Second Applicants
	AND	THE CHIEF EXECUTIVE AND COMMISSIONER OF INLAND REVENUE First Respondent
	AND	PUBLIC SERVICE ASSOCIATION Second Respondent
Member of Authority:		Geoff O'Sullivan
Representatives:		Johanna Drayton, and Macaela Joyes, counsel for the First and Second Applicants Susan Hornsby-Geluk, counsel for the First Respondent Peter Cranney, counsel for the Second Respondent
Investigation Meeting:		21 January 2020 and 31 January 2020
Submissions Received:		17 January 2020 and 30 January 2020 from the Applicants 17 January 2020 and 31 January 2020 from the Respondents
Date of Determination:		20 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Taxpro Incorporated (Taxpro) has initiated bargaining with the Chief Executive and Commissioner of Inland Revenue (IRD). Taxpro and the IRD are currently covered by a collective employment agreement which expired on 30 September 2019 but which continues in force by virtue of s 53 of the Employment Relations Act 2000 (the Act). Bargaining for a new collective commenced on 2 August 2019.

[2] I am told that active bargaining halted at the request of the IRD on or about 31 October 2019. The stated purpose was to allow the IRD to conclude bargaining with the Public Service Association (PSA).

[3] IRD and PSA reached an agreement on the terms of a new collective agreement on 12 November 2019, however the agreement was subject to ratification.

[4] Taxpro and the IRD recommenced bargaining on 25 November 2019.

[5] As it transpired, the PSA became aware of benefits negotiated by Taxpro, namely a $950 lump sum payment and a $700 salary increase. It advised the IRD that it would not be ratifying its agreement as it would "not accept an inferior deal for PSA members". PSA and the IRD subsequently completed bargaining with a ratified collective employment agreement which included payments of $950 and $700 respectively. Taxpro considers the IRD has breached its duty of good faith which it owed to it, breached the prohibition on preference under s 9 of the Act by conferring a preference on PSA members simply because they are PSA members, and has discriminated against members of Taxpro in breach of s 104 of the Act.

[6] Taxpro and several of its members (the second applicant) have now filed an amended statement of problem dated 19 January 2020 setting out, amongst other things, substantive claims that the IRD has:

(a) breached the collective agreement between it and Taxpro;

(b) breached its duties of good faith;

(c) breached s 9 of the Employment Relations Act 2000 (the Act) by conferring an unlawful preference on the PSA; and

(d) Taxpro raises personal grievances under s 104 of the Act on the grounds its members have been the victims of discrimination as a result of involvement in activities of the first applicant union.

[7] Prior to the substantive hearing Taxpro have also applied to the Authority for:

(a) An interim injunction preventing the performance of certain terms of the collective employment agreement between PSA and the IRD which Taxpro states breaches s 9 of the Act and the terms of its agreement with the IRD;

(b) An order that the substantive matters outlined in the statement of problem be removed to the Employment Court; and

(c) An application for urgency in respect of the substantive matters.

[8] The application for the interim injunction is based on the premise that the respondents' behaviour breaches s 9 of the Act, and breaches terms of the collective employment agreement between Taxpro and the IRD in that the collective employment agreement also required the IRD to comply with its legal obligations including adherence to the law.

[9] Because the interim injunction application and the substantive action, insofar as it relates to s 9 of the Act, has the potential to impact adversely on the PSA as a party to a collective agreement between itself and IRD, the PSA was joined as a second respondent at its request.

[10] Having regard to s 174E of the Act I do not refer in this determination to all the submissions received during the investigation meeting. I record however I have fully considered them and the contents of the various affidavits filed on behalf of the applicants

[11] This determination deals with:

(a) Urgency;

(b) The application for an interim injunction;

(c) The application for removal of the substantive matter to the Employment Court;

I address these as follows:

Urgency

[12] The applicants have applied for urgency asking that the Authority deal with the substantive matter on an urgent basis.

[13] The grounds for urgency include:

(a) Taxpro had lost over one hundred members who had switched membership to the second respondent. The alleged reason for this was of course the purported breaches of s 9 of the Employment Relations Act by the first respondent coupled with the purported breaches of the Collective Employment Agreement between the first respondent and the first applicant;

(b) The tension between the unions had created a hostile environment causing significant stress and humiliation for members of the first applicant;

(c) The current applicable collective agreement had expired and could only continue until 30 September 2020.

[14] I was also told that failure to accord urgency would result in the further erosion of the Taxpro's membership.

[15] I do not accept that the applicants' arguments provide persuasive grounds to grant urgency. First, I was told that there will be no attraction for members of Taxpro to switch membership to PSA because in order to gain any benefit they would have needed to have done this in December 2019. Secondly, the argument creating a hostile environment by not granting urgency seems tenuous. In other words, if I were to decide ultimately for Taxpro, it is difficult to see how any hostile environment currently existing, would be lessened. The two union parties would simply trade places.

[16] In respect of the argument regarding the ultimate expiry of the current collective agreement between Taxpro and the IRD, bargaining can continue and in any event all things being equal the substantive hearing should be easily able to be heard and a determination issued prior to 30 September 2020.

[17] Accordingly, I decline the application for urgency, but note that due to the nature of the substantive action the applicants are pursuing, the Authority gives priority to issues such as this which have the potential to affect bargaining adversely.

Application for interim injunction

[18] I am not convinced that the Authority has the ability to grant the interim orders Taxpro seeks.

[19] In order for the Authority to consider an interim injunction it needs to be satisfied it has jurisdiction under s 162 of the Act. Taxpro say that section empowers the Authority because their claim is that under the applicable agreement the IRD has contracted to carry out all its legal obligations which include not conferring an illegal preference on another union in breach of s 9 of the Act.

[20] Another matter I need to consider is that Taxpro are asking the Authority to consider an interim injunction which effectively would stop the PSA and IRD honouring their agreement. Taxpro has no privity of contract. They are not party to that agreement.

[21] A further issue which I need to consider is the effect of any interim order. As a full bench of the Employment Court noted in *National Union of Public Employees (Inc)* v *Asure New Zealand Limited* (505) [1]:

> The consequence of finding a breach would have been, therefore, to have retrospectively deprived PSA-member employees of those remuneration arrangements and Asure of any reciprocal benefits which were the consideration for them. NUPE would not have achieved any increase in the remuneration of its members. It can not have been the intention of the legislature to have deprived parties to another employment relationship of mutually beneficial and concluded collective arrangements that appear to fulfil the statutory objective of building productive employment relationships. The absurdity of such an outcome reflects the erroneous interpretation NUPE seeks to put on s 9 and this enforces our interpretation of the section.

[22] Whilst the substantive matter remains to be heard and no doubt there will be further argument which may distinguish NUPE from the current case, nonetheless I am mindful that an interim injunction would deprive PSA members of monetary benefits until the substantive matter has been dealt with.

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1 [2004] 2 ERNZ at 487 (505).

[23] I am also mindful of a further difficulty namely, Taxpro, in order to bring the action within s 162 of the Act, states that the IRD has breached its agreement. The difficulty is that Taxpro seems to still be in bargaining and it has not ratified or indeed concluded a collective employment agreement.

[24] I need to consider the application of s 9 of the Act. Section 9 contains a prohibition on preference, however there is the significant difficulty in dealing with a claim of a breach on an interim basis. Section 10 of the Act provides that contracts, agreements or other arrangements have no force or effect to the extent that it is inconsistent with s 8 or s 9.

[25] I am not convinced the Authority has power to issue an interim injunction for a claim of statutory breach bearing in mind s 10 of the Act cannot come into operation until a substantive finding has been made on the issue of an illegal preference.

Legal Framework – Interim Orders

[26] The legal framework which I must follow in respect of applications for interim orders can be summarised as follows:

[27] Step One – an applicant must establish that there is a serious question to be tried.

[28] Step Two – consideration must be then given to the balance of convenience and the impact on the parties of the granting of or refusal to grant an order. The impact on third parties will also be relevant to the weighting exercise.

[29] Step Three – the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

[30] In respect of an arguable case or serious question to be tried, the bar is very low. In this case I consider Taxpro's claim is barely arguable. This is because:

(a) It is predicated on a breach of a collective employment agreement which is yet to be ratified; and/or

(b) It is predicated on a yet to be established prohibition on preference which again presents a difficulty when there is no ratified collective employment agreement which can be compared to the collective employment agreement between the PSA and IRD.

[31] Next, I find that the balance of convenience favours the refusal to grant the order. This is because it is PSA members who would be prejudiced. If ultimately, there is a finding of preference, then there would be a right on behalf of the IRD to call for a refund of payments made. I accept it is extremely unlikely that even in the event of a finding of an illegal preference, those moneys would be clawed back. I understand Taxpro's argument that for this round of bargaining at least PSA members may have gained the benefit of an illegal preference. I find however, the balance of convenience favours the non-granting of an interim injunction.

[32] Standing back and looking at the matter from the overall interests of justice, this also weighs against granting the orders sought. Overall justice does not favour the Authority interfering in a contractual arrangement between PSA and the IRD on an interim basis when the effect on those parties would seem to be far greater than the effect on Taxpro. This is because:

(a) An interim order would place those parties in breach of agreement; and

(b) It would have an adverse effect on payments which are due to be given to PSA's membership. On the other side of the coin, Taxpro may be prejudiced in the interim but it may well be any potential prejudice is avoided through continuing bargaining.

I decline the application for an interim injunction.

Application for Removal to the Employment Court

[33] The application for removal of the substantive matter to the Employment Court is based on the grounds that:

(a) An important question of law is likely to arise in the matter other than incidentally; and

(b) 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.

[34] Taxpro submitted that important questions of law likely to arise other than incidentally during any substantive hearing include:

(c) "Is it permissible to pass on member only benefits settled in bargaining, subject only to ratification to another union without notice, consultation or agreement…"?

(d) How is "benefit" for the purposes of s 9(3)(b) of the Act to be interpreted in the context of the facts of this case?;

(e) Is avoiding the negative consequence arising out of the relationship in which the collective is based, namely the disturbance of industrial action, to be equated with "a benefit" under s 9(3)(b)?;

(f) Can the size of a union by itself be considered a benefit for the purposes of s 9(3)(b) of the Act;

(g) How is a finding that a collective agreement confers an unlawful preference and therefore has no effect under s 10 of the Act to be practically enforced/remedied?

(h) How is Parliament's clear intention of s 10 of the Act to prevent employment agreements that confer unlawful preference to be applied by the Courts and given practical implementation and enforcement so that the parties are not prejudiced/what is the appropriate course of action for preventing the conferring of an unlawful preference before it occurs?

(i) How can the intention that contracts/clauses within contracts should not confer an unlawful preference be given effect if the only relief available is after the fact of the preference being conferred?

(j) Should the good faith and legal obligation references contained in the current collective agreement be considered express and/or implied terms in the face of the case?

[35] Taxpro also submitted that as s 104(1) of the act had been amended, there was no interpretation of the new anti-discrimination requirements provided under that section including an interpretation of the exceptions outlined in s 106.

[36] The removal of the substantive matter to the Court is resisted by the IRD and PSA. Their position is that there were no important questions of law likely to arise in this matter rather than incidentally. They submitted that the claims involved disputed matters of fact rather than important questions of law. They submitted that although the case may involve

an unusual factual situation, which arose in the context of Taxpro's and the IRD's particular bargaining, there is no likely broad application to other cases and that removal to the Court would be inconsistent with s 143 of the Act which recognises the judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements.[2]

[37] Despite the applicant's attempt to persuade me otherwise, I do not see any important question of law likely to arise other than incidentally. One of the points raised was the likelihood of a challenge. I find the arguments in that regard unpersuasive. I also note the Employment Court's observation in *Vice-Chancellor of Lincoln University* v *Stewart (No.2)*.[3]:

> An investigation by the Authority may give the parties insights that they did not have prior to that process or lead to a compromise they did not anticipate.

[38] Removal of the matter to the Employment Court has the potential to deprive both parties of rights they would normally enjoy. The submissions made on behalf of the applicants do not in my view outweigh that consideration.

Conclusion

[39] I have accordingly concluded that this not a matter that should, or in all probability given the law can, be removed to the Employment Court. Accordingly, I dismiss the application.

Summary of Orders

(a) The application for urgency is declined however, the Authority will treat the substantive application on a priority basis;

(b) The application for an interim injunction is declined;

(c) The application for removal to Court is declined.

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2 Section 143(f) of the Employment Relations Act 2000.
3 [2008] ERNZ 249 at 40.

Costs

[40] Costs are reserved.

Geoff O'Sullivan
Member of the Employment Relations Authority