

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 63
3131335

BETWEEN	UNITE INCORPORATED Applicant
AND	WENDCO (NZ) LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Mike Treen, advocate for the Applicant Justine Foden, advocate for the Respondent
Investigation:	On the papers
Determination:	19 February 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Wendco (NZ) Limited, operator of the Wendy's chain of restaurants, has asked the Authority to order officers and representatives of Unite Incorporated not to make any public comments about these proceedings until the parties have attended mediation and until any further direction of the Authority. Mediation is scheduled to take place on 8 March 2021.

[2] The proceedings concern an application from Unite for orders that Wendco comply with terms of the collective agreement between the union and company. Unite alleges Wendco is not correctly paying union members for alternative holidays due when those employees work on a public holiday that falls on a day that would usually be a working day for those employees. Wendco denies breaching those terms. It says the company has correctly assessed the entitlements due under the collective agreement and the Holidays Act 2000.

[3] In the usual way before the Authority considers any such applications, the parties were referred to mediation to see whether they could resolve their differences with the assistance of an employment mediator from Employment Mediation Services.

[4] Wendco applied for an order restricting public comments about the proceedings because Unite's national director Mike Treen criticised the company in a television news interview on 10 February 2021 and the union issued a media statement on 11 February 2021. The statement was headed: "Wendy's Workers subject to Wage Theft of Public Holiday Entitlements". The statement said Wendy's "appears to have started cheating workers" of public holiday entitlements and said "it seems many workers who worked the public holidays were also denied an alternative date as a holiday (a lieu day) when they were entitled to one".

[5] Wendco said Mr Treen had not provided sufficient supporting details of the union's claims and was making public statements to deter the company from defending itself against those claims. It said comments by union representatives about the proceeding could mislead the public, mislead employees who were not union members, damage the company's position and potentially undermine confidence in the judicial process.

[6] Mr Treen, replying on Unite's behalf, said the comments made did not warrant a "gagging order". He also noted Wendco had chosen not to speak to the journalist who had interviewed him and use that opportunity to correct any claims he made.

Power to prohibit publication

[7] The Authority does have the statutory discretion to prohibit publication of evidence, pleadings and names of parties and witnesses.¹ Such powers are to be exercised on a principled basis. This includes recognising the freedom of expression, including the freedom to impart information and opinions of any kind in any form.² This freedom is subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.³ In the employment relations context some limits to the free imparting of information and opinions arise from statutory obligations to deal with each other in good faith. Those good faith obligations

¹ Employment Relations Act 2000, Schedule 2 clause 10(1).

² New Zealand Bill of Rights Act 1990, s 14.

³ New Zealand Bill of Rights Act 1990, s 5.

include parties to the employment relationship not misleading one another.⁴ Other limitations include contractual and statutory obligations to observe confidentiality about information, including what is exchanged within or prepared for the purposes of mediation.⁵

[8] The Authority may, in suitable circumstances, make directions binding representatives as well as parties where the conduct of a representative is relevant to the Authority's obligation to the fair discharge of its statutory responsibilities.⁶ Similarly, the Authority may give directions stopping conduct designed to improperly pressure litigants. Such conduct may include direct contact with a party that goes beyond bona fide private persuasion and by making public statements that go beyond what is fair and temperate.⁷

[9] As a specialist institution the Authority also takes account of its knowledge of the realities of employment relationships, the object of the Employment Relations Act (2000) (the Act) to promote mediation as a primary problem-solving mechanism and to reduce judicial intervention, and to determine matters according to their substantial merits without regard to technicalities.⁸

The present situation

[10] Employment relationships include those between a union and an employer, as exists here between Unite and Wendco through the employment of union members and their collective agreement. They are consequently bound by the duty of good faith, including in relation to any matter arising under or in relation to a collective agreement while the agreement is in force.⁹

[11] In this case the referral to mediation was instigated by the Authority after Unite lodged an application in this forum and Wendco responded. The occasion of mediation is, in that context, part of the proceedings.

[12] Some account needs to be taken of the reality that robust exchanges routinely

⁴ Employment Relations Act 2000, s 4(1).

⁵ Employment Relations Act 2000, s 148.

⁶ *Bay of Plenty District Health Board v Culturesafe New Zealand Limited & Ors* [2020] NZEmpC 149 at [81] and [86].

⁷ *Bay of Plenty District Health Board*, above n 6, at [100]-[110].

⁸ Employment Relations Act 2000, s 157 and s 3(a).

⁹ Employment Relations Act 2000 s 4(4)(b).

occur between unions and employers where disputes arise concerning whether the terms of collective agreements have been properly observed. The *sub judice* rule, applying at least as a convention in respect of proceedings in the Authority, generally limits media and other public comment before or during an investigation meeting and earlier steps such as attending mediation.¹⁰ The purpose of that rule includes preventing improper pressure on a party and preventing the risk that such statements could pressure, or could be perceived to improperly influence, the Authority in reaching its decisions.

[13] In this case there was no real prospect Wendco would be overwhelmed into abandoning its defence as a result of the comments from Unite representatives. Similarly, given its general experience in putting aside the ‘cut and thrust’ of such comments often made by both unions and employers in such cases, the Authority is unlikely to be influenced by such exchanges if the matter is not resolved in mediation. Neither was this a situation where one party, whether it be a union or an employer, was particularly vulnerable and unable to defend itself against such comments. Wendco was free to respond publicly that it did not accept Unite’s comments were correct but that it considered the proper forum to discuss the detail and resolve what it saw as the union’s misunderstanding of the situation was in mediation.

[14] Against that background the comments made by the Unite representative were not of sufficient seriousness or established consequence to warrant making an order prohibiting either party making any further public comments about the subject of this proceeding unless in an agreed statement or until permitted to do so by the Authority. Wendco’s concern about what it saw as inaccurate comments was however understandable, including its concern those comments might damage the public standing on which it trades and which supports the jobs of its employees, including those who are union members. The company was, as it properly should, prepared to attend mediation and to seek to resolve their differences there. Both parties are strongly encouraged to make that the focus of their efforts. If the matter is not resolved in mediation, it will return to the Authority for investigation.

Robin Arthur
Member of the Employment Relations Authority

¹⁰ *Bay of Plenty District Health Board*, above n 6, at [129]-[130].