IN THE EMPLOYMENT COURT
WELLINGTON

[2011] NZEmpC 80
WRC 21/11

IN THE MATTER OF	proceedings for injunction orders removed from the Employment Relations Authority and for compliance orders
BETWEEN	NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION Plaintiff
AND	NEW ZEALAND FIRE SERVICE COMMISSION Defendant

Hearing: 5 July 2011
(Heard at Wellington)

Counsel: Peter Cranney and Anthea Connor, counsel for plaintiff
Geoff Davenport and Guido Ballara, counsel for defendant

Judgment: 8 July 2011

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This judgment determines whether proposed strike action by employees of the New Zealand Fire Service Commission in some non-emergency activities of the New Zealand Fire Service, should take place. The case turns on whether members of the New Zealand Professional Firefighters' Union are entitled in law to begin such strike action by giving statutory notice of it without first having attempted to settle new terms and conditions of employment in mediation.

[2] In all other respects, including compliance with statutory provisions for advance notice of strike action and other bargaining related thresholds, there is no question about the lawfulness of the proposed strike action. Rather, the case focuses on the content and effect of provisions in the parties' Bargaining Process

Arrangement or Agreement[1] (the BPA), a statutorily recognised document[2] in their collective bargaining for a new collective agreement.

[3] The relevant parts of the BPA dated 6 December 2010, and signed by the parties representatives, include the following (with the particular provisions in issue being underlined):

> **4. BARGAINING PRINCIPLES**
>
> Bargaining will be undertaken in good faith. The parties to the bargaining commit:
>
> a) To conducting the bargaining in an orderly, effective and efficient manner, and in accordance with this Agreement.
>
> …
>
> (i) To not undermining or doing anything that is likely to undermine the bargaining, or the authority of the other party to the bargaining.
>
> …
>
> **10. PROCESS TO APPLY WHERE AGREEMENT CANNOT BE REACHED**
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> a) If agreement cannot be reached in the course of bargaining the parties will discuss ways to address this, including consideration of the extent to which setting aside the point of disagreement could still leave the parties with an overall settlement agreement sufficient to meet their joint interests.
>
> b) If bargaining ceases to make progress then the parties will, prior to giving notice of, or taking, industrial action, attend mediation providing that the mediation can occur within a reasonable timeframe (a reasonable timeframe would normally be considered to be 14 days). The parties will agree on the mediation service and mediator to be used, and on the issues to be discussed.
>
> …
>
> **11. APPLICATION OF THIS AGREED PROCESS FOR COLLECTIVE BARGAINING**
>
> a) This agreed process shall bind the parties to this agreement.
>
> b) Where a party believes there has been or may be a breach of this agreed process or of the obligations of good faith set out in the Employment Relations Act, or any applicable Code of Good Faith issues pursuant to the Act, the party shall, wherever practicable, notify the other party of their concerns at any early stage so as to enable the defaulting party to

[1] The precise nature of this instrument is disputed and will be resolved in this judgment.
[2] Employment Relations Act 2000, s 32.

remedy the situation or provide an explanation for the action or inaction in question.

Relevant facts

[4] On 2 May 2011 the parties, not having reached agreement in the course of their collective bargaining commenced in late 2010, discussed ways to address this as required by cl 10(a) of the BPA. It was agreed that the Commission would prepare its form of collective agreement which the Union would put to a vote of members. As a matter of law, this would not have been a ratification vote because the parties had not settled a collective agreement and indeed had not agreed upon its contents. This 'draft' collective agreement was provided to the Union by the Commission on 2 May 2011. It was also forwarded directly to Union members on 3 May 2011 and, on the same day, was given by the employer to other employees who are not Union members. As a result of this, the Union took objection to these communications in a letter dated 10 May 2011 addressed to the Commission and the Union subsequently issued proceedings in the Employment Relations Authority alleging breach of the BPA. In any event, the draft agreement was voted on by Union members and rejected with the results of that vote being announced on 14 June 2011.

[5] Despite some earlier exchanges between the parties about potential dates for mediation to take place, this was not either agreed to or undertaken and, on 16 June 2011, the Union delivered notices of intended strike action to take effect 14 days later. As already noted, no objection is taken with the lawfulness of those notices or of the intended strike action except on the point of non-compliance by the Union with the BPA.

[6] Although mediation assistance was offered by the Chief Executive of the Department of Labour (albeit apparently almost at the end of the notice period as the strike was about to start), the Commission declined to attend unless the Union's strike notices were withdrawn. Mediations have, however, taken place on 23 and 30 June 2011 and, according to the Union, some progress in collective bargaining has been made at these.

[7] After a mediation session on 30 June 2011, the Union gave the Commission fresh strike notices which were materially identical to those given on 16 June 2011 except as to the strike commencement date which is 16 July 2011, immediately after the end of the intended strike notified on 16 June 2011.

Bargaining Process Arrangement or Agreement?

[8] Whether the instrument in which cl 10(b) appears is an "arrangement" or an "agreement" was the subject of prolonged and repeated disagreement between the parties including at the hearing. Although, ultimately, this may be more about form than substance so that the case will not turn on any distinction, I conclude that the document is an agreement for the following reasons.

[9] Although the good faith obligation of parties to collective bargaining under s 32(1)(a) requires them to "…use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner …", that subsection is not prescriptive as to the form of arrangement that may be reached. Whilst, in many cases and as this Court has recognised, parties' arrangements will simply be just that, I consider that what was entered into pursuant to s 32(1)(a) in this case was an "agreement" as that is recognised by s 32(3)(b). Section 32(3) sets out a number of matters that are relevant to whether a union and an employer bargaining for a collective agreement are dealing with each other in good faith and includes at s 32(3)(b) "the provisions of any agreement about good faith entered into by the union and the employer".

[10] The form and content of the instrument entered into by these parties are comprehensive and are in the nature of an agreement that is intended to have legal rights and obligations and to be enforceable. However, because it is unnecessary to so determine for the purpose of this case, and although I am inclined to think that the instrument falls short of constituting a contract as that term is known both in employment law and under the Act and at common law, I do not decide that issue.

[11] As noted above, however, whether the instrument constitutes an agreement or some presumably lesser form of "arrangement" may be less about substance and effect than about form or even label. In either case, the instrument sets out the parties' mutually agreed rights and obligations of conducting their collective bargaining in good faith and the statute both requires good faith conduct in such a relationship (ss 4(4)(a) and 32) and provides that this can be enforced (s 137).

Discussion

[12] The Union's position is that the mediation referred to in cl 10(b) of the BPA is a single mediation that may be satisfied by a s 92 facilitated mediation after notice of intended strike action has been given. The Union submits that in this case the s 92 facilitated mediation carried by the parties is the single mediation which satisfies clause 10(b). Alternatively, the Union's case is that the statutory right to undertake otherwise lawful strike action must trump the BPA's requirement under cl 10(b) for mediation before notice of intended strike action is issued.

[13] One possible interpretation of cl 10(b) of the BPA is that mediation must be attempted before notice of strike action is given in cases where notice is required and before strike action is taken in cases where notice may not be required. That interpretation has a logical attraction but only until one appreciates that, in the context of this collective bargaining, most if not all strike action must be on notice as all members covered by the proposed collective agreement work in an essential service.[3] The second scenario would, therefore, have no application in practice. The parties must be presumed to have known that and would be unlikely to have made provision for an eventuality that could not arise except rarely.

[14] Another possible interpretation of cl 10(b) is that mediation must be undertaken both before notice of strike action is given and, again, before such strike action takes place. That would involve two separate mediations under the terms of the clause on the same subject matter and it is unlikely to have been intended, despite the application of s 92, which still requires the Chief Executive of the

[3] Employment Relations Act 2000, s 90

Department of Labour to facilitate mediation between the parties after notice of strike action has been given.

[15] There are, of course, differences between the 'mediation' referred to in cl 10(b) and the 'mediation' referred to in s 92 of the Act. First, and in the latter case, the only obligation is on the Chief Executive of the Department of Labour to arrange mediation services. Parties cannot be compelled to attend mediation, much less to resolve their differences in that forum. By contrast, cl 10(b) requires the attendance of the parties at mediation and, as a matter of good faith between them, genuine attempts to settle their differences, although again they cannot be required to resolve these.

[16] So it is not correct to assert, as the Union does, that the mediation referred to in cl 10(b) can be the same mediation as facilitated by the Chief Executive of the Department of Labour under s 92 of the Act. That is because the s 92 obligations are only to facilitate mediation and not to require parties' attendance at a mediation so facilitated.

[17] The parties' agreement that the period of 14 days will usually be a reasonable one within which to undertake mediation, gives a clue to their intention in cl 10(b). That is because the period of notice of strike action under the Act in respect of these parties is 14 days, that is there can be no lawful strike action undertaken without at least 14 days' notice thereof being given (s 90(3)(a)(i)). The coincidence of those two 14 day periods tends to indicate that the parties intended the cl 10(b) mediation to be conducted before strike notice is given rather than simply before a strike commences.

[18] There is a further helpful pointer in cl 10(b) and this is the second difference with s 92 facilitated mediation. The parties in the BPA have agreed both that the mediation service to be used and the identity of the mediator are matters for discussion between them. This allows not only for the statutory Mediation Service of the Department of Labour to be selected, but also permits the parties to have a mediator of their choosing. That is to be contrasted with mediation facilitated by the Chief Executive of the Department of Labour under s 92 of the Act. As a matter of

practice, the Chief Executive will provide the parties with a statutory mediator from the Labour Department's Mediation Service. Again, as a matter of practice, of which this Court is well aware, the Chief Executive is very reluctant to allow parties to choose their own mediator amongst those employed by the departmental Mediation Service. So it is very unlikely that the final sentence of cl 10(b) contemplates, and includes compliance with, the previous sentences by the mediation facilitation process under s 92 of the Act.

[19] Before leaving the question of what and who may conduct mediations and as already noted, cl 10(b) mediation can be with a mediation service of the parties' choice and, likewise, with a mediator of choice, it is notable that there is no mechanism for resolution of disagreements about these options. But this case does not raise that scenario and I will not address it except as may be necessary in this case to facilitate a mediation taking place.

[20] I do not agree with the Union's argument that the Commission's interpretation of cl 10(b) would require the Union to give notice (when seeking to go to mediation) of its intention to give subsequent notice of a strike. Mr Cranney submitted that this would involve a giving of notice of a strike that is both not required by the Act and would indeed contravene it. However, the requirement under cl 10(b) to attend mediation is dependant on ceasing to make progress in the bargaining, not upon any giving of notice to the other party. A request to attend mediation in those circumstances, with an agreement by the other party in good faith to do so, together with a genuine attempt to resolve their differences in mediation, is all that is required to satisfy the requirement before statutory notice of strike or lockout can be given.

[21] Although not determinative of the interpretation of cl 10(b), the Union's relevant conduct in the period leading up to 16 June 2011, when notices of strike action were issued, was consistent with this interpretation of the BPA. The Union attempted to invoke or otherwise participate in mediation but ultimately elected to issue its strike notices before this took place.

[22] Finally, I should deal also with Mr Cranney's submission that the Commission's witness, its Employment Relations and HR Services Manager Larry Cocker, conceded in evidence, both in cross examination and re-examination, the Union's interpretation of cl 10(b). Although Mr Cocker appeared to do so, as Mr Cranney submitted, I consider on reflection that his answers to questions about what the Commission considers the clause means reflect a combination of a misunderstanding by the witness of the nuances of the argument and his repetition verbatim of the relevant words in the clause. In any event, I have not been assisted by the subjective views of the contestants in deciding what was intended by a less than well drafted clause, and I do not place any store by Mr Cocker's answers.

[23] Although by use of equivocal, even confusing, language, the parties (primarily the Commission whose drafting this was) have made this crucial issue unclear, I have determined that the intention of cl 10(b) is as follows. After bargaining ceases to make progress and before a party gives a statutorily-required notice of strike or lockout, it must attend mediation with the other to attempt, in good faith, to settle their differences in the bargaining before resorting to strike action and before giving notice thereof. It is not in dispute that the Union breached this requirement as I have interpreted it. But that is not the end of the story because equally as important are the consequences of that breach.

[24] The Union argues that if strike action is lawful as defined by the Act, the Court cannot prohibit its occurrence. It relies on the express provisions of ss 85, 99 and 100 of the Act. However, s 99 is inapplicable because this proceeding, in both the claims and counterclaims, is not founded on a tort as required by s 99(3). Section 100(3) is not engaged in this case, at least in respect of the Commission's claims to a compliance order. Section 85(1)(c) refers to action or proceedings including compliance orders being unavailable where there is lawful participation in a strike or lockout, but again that is inapplicable. That is because this proceeding addresses notice of strike action which is not the same as a strike,[4] and there has not yet been "participation in a strike" as s 85 requires, to dismiss a proceeding such as this. For these reasons, the Court is not precluded from considering the Commission's claims on their merits.

[4] *Heke v Attorney-General in Respect of the Department of Corrections* [1998] 1 ERNZ 583 at 586.

[25] Even if, contrary to my conclusions, any or all of these sections applied to the proceedings before the Court, I do not consider that these provisions should be interpreted so as to bar a remedy in this case. To do so would permit a union (or an employer in respect of a lockout) to act egregiously in bad faith and in breach of its solemn commitments to act in good faith in respect of the bargaining and/or strike or lockout action, and yet with impunity in the sense that the law would be powerless to interfere. The other parties (employer in the case of a strike, or union of employees in the case of a lockout) may have right on their sides but no remedy. Not only is that proposition abhorrent morally but it runs counter to the scheme of the Act, as was helpfully analysed by Mr Davenport in his submissions. I will simply refer to the relevant sections which, individually and together, emphasise and promote the benefits of mediation in collective bargaining and that parties themselves determine how problems are to be addressed. Those sections include, in statutory order, 3(a), 3(a)(v), 3(a)(vi), 4(1)(b), 4(1A)(b), 31(c), 32(3)(b), 143(a), 143(b), 143(c), 143(d) and 144(2)(e).

[26] Most importantly, when the issues in this case are considered, as they should be, as ones of collective bargaining conduct rather than through a strike legality lens, it is clear that the parties' agreement about how difficulties in collective bargaining are to be addressed is enforceable by compliance order. The consequences of such a breach cannot be sidestepped simply by asserting that the strike action (addressed by the parties in their agreement) is nevertheless otherwise lawful and that the right to strike trumps a breach of good faith. When so considered, it is not a case of constraining a right to strike but, rather, holding parties to their agreement that this right will be postponed for a period in the interests of good faith dealing and for the better prospect of achieving a collective agreement.

What orders should be made?

[27] Having interpreted cl 10(b) and found the Union to have breached it by issuing notices of intended strike action before mediation was undertaken free of the effects of those notices, it is still necessary to consider whether the discretionary orders of compliance and/or injunction should be imposed.

[28] First, I consider that compliance is the appropriate and preferable remedy to injunction. That is because it is the remedy created by the legislation including for breach of good faith obligations as in this case. Its effect is no less than that of an injunction and, following removal of the proceedings from the Employment Relations Authority to this Court, the power to order compliance is available in law.[5]

[29] It is always important in cases such as this to stand back from the rhetoric of such skirmishes and consider the big picture objective. That is the settlement of a collective agreement or agreements in collective bargaining which will be ratified and govern the parties' employment relationships for its duration. How can the Court best assist the parties to achieve that ultimate objective? Although, in one sense, it is strictly correct that the parties have recently attended mediation and indeed have made some progress in their collective bargaining, I do not consider that to be effective compliance with cl 10(b). As a matter of good faith, the Union should be held to the process to which it agreed. Such mediation as has taken place recently has not only been overshadowed by these proceedings but by notice of strike action that I am satisfied should not have been given before mediation first took place.

[30] I also consider that it would not be sufficient or just simply to declare a breach and to expect that the Union will act accordingly. It is clear from the evidence and submissions heard by the Court that the Union is intent upon taking strike action if only because it considers that this is the only way in which progress can be achieved in collective bargaining. The Union's undertaking until delivery of this judgment today not to act upon the strike notices already given, was clearly problematic and reluctant. That is not to be critical of the Union but is, rather, an assessment of the practicalities of the fraught employment relationship between the Union and the Commission at this time. The consequence of making compliance orders will not be to prevent strike action from taking place but, rather, to delay it and to enable the parties to continue to make progress in collective bargaining. It is not insignificant that the Commission will be aware that the Union continues to be intent upon taking strike action to strengthen its position in the bargaining as and when it can.

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[5] *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205 at [10].

[31] For these reasons I consider that it is in the interests of justice that the Union should be required by compliance order to attend mediation (and for both parties to participate in good faith to try to settle their differences) before notice of strike action is issued. It should not be entitled to act upon those notices given already, in breach of cl 10(b) of the BPA.

[32] In these circumstances, the course which holds the Union to its commitment and which provides the best, but by no means certain, prospect of a settlement in the bargaining is to now require mediation to take place without the shadow of notified strike action. At worst from the Union's point of view, this will delay strike action but does not prevent its occurrence if the parties' good faith arrangements are followed.

Orders

[33] Pursuant to s 137(1)(a)(ii) of the Act, I direct the plaintiff to comply with cl 10(b) of the parties' Bargaining Process Agreement. In particular, the plaintiff is to attend mediation on the issue or issues in dispute between the parties in collective bargaining before the plaintiff or its members give notice of strike action. Pursuant to s 137(2), the plaintiff and its members are to cease acting in reliance on notices of strike action issued on 16 and 30 June 2011. Pursuant to s 137(3) the plaintiff must comply with these orders:

(a) In respect of the requirement to cease acting in reliance on notices of strike action already given, forthwith.

(b) In respect of the requirement to attend mediation, within 14 days of the date of this judgment.

[34] Leave is reserved for either party to apply to this Court on short notice to determine the identity of the mediation service and/or of the mediator and/or of the particular issues to be the subject of mediation.

[35] Neither party is to have costs to date on this proceeding.

GL Colgan
Chief Judge

Judgment signed at 1 pm on Friday 8 July 2011