**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

AA 399/10
5303402

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| | BETWEEN | UNITE UNION INC<br>Applicant |
| | AND | WAIKATO DISTRICT HEALTH BOARD<br>Respondent |

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| Member of Authority: | K J Anderson |
| Representatives: | H White, Counsel for Applicant<br>A Russell, Counsel for Respondent |
| Investigation Meeting: | 11 June 2010 at Hamilton |
| Submissions Received: | 23 June 2010 for the Applicant<br>9 July 2010 for the Respondent |
| Determination: | 6 September 2010 |

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**DETERMINATION OF THE AUTHORITY**

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**The Claims**

[1] The applicant, Unite Union Inc ("the Union") brings several claims to the Authority for determination:

(a) That the Waikato District Health Board ("the Board") breached s 4(1A)(1)(b) of the Employment Relations Act 2000 ("the Act);

(b) That the Board breached s 97 of the Act;

(c) That the Board breached Schedule 1B (Code of good faith for public health sector), relevant to clause 3 of the Schedule and its reference to life preserving services;

(d) (i) That the Board breached clause 7.4 of the *Bargaining Process Agreement*; and

(ii) That there was an associated breach relevant to Schedule 1B, clause 10(2) of the Act;

(e) That the Board breached Schedule 1B, clause 9(d) of the Act, and

(f) That the Board breached s 4 of the Act.

**The Counter-Claims**

[2] The Board presents two counter-claims for determination:

(i) That the Union committed a breach of good faith under s 4 of the Act relating to organising and pursuing an unauthorised and illegal march through the premises of the hospital on 29th January 2010.

(ii) That the Union breached s 21(2) of the Act and there was an associated breach of s 4 of the Act; and the breach of s 21 also constituted an associated breach of Schedule 1B, clause 4 of the Act.

[3] The Authority received evidence for the Union from: Mr Jared Philips, Organiser, Mr Michael Treen, National Director, Mr Ross Crook, Workplace Delegate, and Mr Richard Moody, Hospital Attendant. For the Board there is evidence from: Mr Steve Coles, Service Manager, Ms Bernadette McKeany, Human Resources Consultant, Mr Gregory Peploe, Employee Relations Manager, Mr Dean Ria, Security Manager, Ms Melinda Ch'ng, Group Manager, and Ms Marie Dicks, Assistant Manager. In addition to the evidence from the witnesses, the parties provided a number of relevant documents and detailed closing submissions. All the material provided has been closely considered, albeit it may not be specifically mentioned in this determination. In regard to the matters before the Authority for determination, while the Union is the applicant party, given the chronological order of events, the respondent's counter-claims have been determined first.

**Background Facts and Evidence**

[4] During late 2009 and early 2010 the Union and the Board were engaged in bargaining for a new collective employment agreement for Waikato Hospital attendants. The negotiations reached an apparent impasse. The parties attended mediation in December 2009 without resolution. There was a strike for half a day on 24th December 2009. The Union subsequently gave notice of a one day strike to take place on 29th January 2010 and then on 9th March, gave notice of a further two day strike that would take place on 24th and 25th March 2010.

**The March on 29 January 2010**

[5] On or about 27th January 2010, the Board became aware that union members proposed to march through the Board's Waikato Hospital premises on the day of the impending strike; 29th January 2010. Consequently, Mr Peploe, the Board's Employee Relations Manager, wrote to the Union Organiser, Mr Jared Philips, on 27th January and (in summary) informed:

- The Board was aware of "*speculation"* that striking attendant staff were proposing to march through the Waikato Hospital premises.
- The Union and its members were informed that the Waikato Hospital campus is not an "*unrestricted public place*" and that the Board reserved the right to "*trespass*" unauthorised people, including striking staff, whom are unauthorised to be on the campus.
- That any Union member who is participating in the strike action should be aware that if they come onto the Waikato Hospital campus during the strike period, their actions may be investigated and they may face disciplinary action under the Board's policies and procedures.
- That the only legitimate reason for any striking staff member to be on the Waikato Hospital premises on 29th January 2010, will be to access emergency or medical attention, or if authorised by their line manager.
- That if the Union encourages such action [a march through the premises] then the Board will "*review its cooperation"* with the Union, including the release of delegates to attend delegate meetings.

The evidence of Mr Peploe is that he did not receive a response to his letter.

[6] The written evidence of Mr Philips is that when he received Mr Peploe's letter he did not know whether individual union members had discussed a march but he "*certainly was not instigating or planning such an action at the time."* The oral evidence of Mr Philips is that on 29th January, there was a gathering of striking workers on a picket line and a vote was carried that a march should take place. Mr Philips told the Authority that prior to the vote being taken, he disclaimed any responsibility "for officialdom" of the march going ahead and he told the workers that there could be serious consequences, such as disciplinary action, and that people in receipt of current warnings, should not participate in the march. Mr Philips also told

the Authority that once the vote was taken, it: "was fair to say that from this point on, I led the march."

[7] Mr Dean Ria, the Security Manager at Waikato Hospital, gave evidence about his observations of the march; "*a group of approximately 25 people*" made up of adults and several children "*with a large number of walkers wearing WDHB attendant's uniforms.*" The group were chanting as they marched and were on the hospital campus. Mr Ria also told about the attempts of the hospital Incident Controller, Mr Neil McKelvie, to enter into a discussion with Mr Philips, who continued to cue chanting from union members. According to Mr Ria, Mr Philips refused to acknowledge the attempts of Mr McKelvie to discuss the matter of the presence of the group on the hospital campus, in that it was in contravention of the earlier notice from Mr Peploe, and that they should not be there. Mr Ria says that after "*approximately five minutes*" the group moved on and exited out of the hospital campus.

[8] It is the position of the Board that the march was a breach of good faith pursuant to s 4 of the Act. The Board says that the action of the Union was:

(a) Misleading and deceptive (*s 4(1)(b)*;
(b) In breach of the obligations to be active and constructive in the employment relationship (*s 4(1A)(b)*; and
(c) In breach of the Union's obligations to be responsive and communicative in the employment relationship (*s 4(1A)(b).*

[9] In support of the above propositions the Board refers to Mr Peploe's letter of 27th January 2010 to the Union, specifically instructing that there was to be no access to the premises by striking employees, except for valid reasons. The Board says that this instruction was also made available in the form of a memorandum, in the attendant's room, and had been the subject of discussion by the attendants. It is further submitted for the Board that on the day of the march, Mr Philips refused to respond to the representations of the hospital security staff when he was informed that the march onto hospital premises was unauthorised. Rather, Mr Philips continued on with the march alongside the members of the Union.

[10] The Board submits that the actions of the Union were a breach of good faith pursuant to s 4 and due to the nature of the breach, a penalty should be awarded under s 4A of the Act. The Board says this is because the breach was deliberate, serious and sustained.[1] Firstly, the Board submits that the breach of good faith was deliberate because the Union had knowledge of the instruction not to access the Waikato Hospital premises but still went ahead with the march. Further, the breach was serious because the actions of the participants in the march potentially impeded the access of ambulances, acted as a disturbance to patients and disrupted others at the hospital. The Board submits that potentially, there could have been other serious safety implications as the march occurred in a busy precinct of the hospital. Finally, the Board submits that breach was sustained as it lasted for approximately 15 to 20 minutes and continued even after the representations from the hospital's security personnel that the march was unauthorised and contrary to the instructions issued by the Board. Alternatively, the Board submits that the march has undermined the employment relationship[2] between the participating hospital attendants and the Board in that participating in the march; "*in contravention of a direct instruction from the employer, with such instruction being lawful and reasonable, can only compromise and undermine the employment relationship.*"

[11] The Board also submits that the march initiated a breach of the *Code of good faith for public health sector*. The code is set out within Schedule 1B of the Act. The Board points to clause 4 of the code and says that the Union failed to:

(a) Engage constructively (*clause 4 (1)(a);*
(b) Participate fully and effectively (*clause 4 (1)(b);*
(c) Behave openly and with courtesy and respect towards each other (*clause 4 (2)(a);*
(d) Create and maintain open, effective, and clear lines of communication, including providing information in a timely manner (*clause 4 (2)(b)*;
(e) Use their best endeavours to resolve, in a constructive manner, any differences between them (*clause 4 (4).*

[12] The Union does not accept that the march through the hospital grounds was unlawful. But in any event, the Union adds, even if the march was unlawful, this is

[1] Section 4A (a), Employment Relations Act 2000.
[2] Section 4A (b)(iii) of the Act.

not a matter that falls within the jurisdiction of the Authority, as the unauthorised presence of the march participants, on the hospital grounds, could have been treated as a trespass and hence a potential tortious action. The Union points to s 99 of the Act and the jurisdiction of the Employment Court, rather than the Authority, in regard to proceedings founded on tort issued against a party to a strike or a lockout that is threatened or occurring. I conclude that it is unlikely that the provisions of s 99 have any relevance to the matters at hand as no issue has been raised about the lawfulness of the strike that took place on 29th January 2010. In response to the Union's submission, the Board says that the issue is not whether the actions of the Union were a trespass; rather, the issue is: whether the actions of the Union, relating to the march, breached the good faith requirements set out within the Act. I accept that the Board's submission on this matter is correct and that this is the first issue to be determined by the Authority.

***Did the actions of the Union, relating to the march on 29th January 2010, constitute a breach of any of the relevant provisions of section 4 of the Act and/or Schedule 1B of the Act?***

[13] Before turning to the relevant provisions of s.4 and Schedule 1B, it seems appropriate to first acknowledge the relevant provisions of s 3(a) of the Act. This is one of the *Key provisions*[3] of the Act, along with ss 4 and 4A.

> **3. Object of this Act**
> The object of this Act is –
> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship-
>
> (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and
> (ii) … … …
> (iii) by promoting collective bargaining; and
> (iv) … … …
> (v) by promoting mediation as the primary problem-solving mechanism; and
> (vi) by reducing the need for judicial intervention.

Without engaging in an academic discourse it seems appropriate to recognise that the thrust of the Employment Relations Act 2000 is about building productive employment relationships *in all aspects of the employment environment and of the*

[3] Part 1, Employment Relations Act 2000.

*employment relationship*. And it is the intention behind the Act, that this can be achieved via the requirement for good faith behaviour, as well as promoting collective bargaining, and also promoting mediation as the primary problem solving mechanism, while reducing the need for judicial intervention. Given the plethora of claims that reach the Authority pertaining to alleged breaches of good faith, it is arguable that the need for "judicial intervention" has been increased rather than reduced, nonetheless under Part 1 and as a component of s 3, this is one of the key provisions of the Act and one that parties to disputes should be cognisant of.

[14] A further key provision of the Act is s 4 whereby the parties are bound to deal with each other in good faith. Relevant to the matters in hand is the following:

> (1) The parties to an employment relationship specified in subsection (2)-
> (a) must deal with each other in good faith; and
> (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything-
> (i) to mislead or deceive each other; or
> (ii) that is likely to mislead or deceive each other.
>
> (1A) The duty of good faith in subsection (1)-
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
> (b) 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; and
> (c) … … …

And at s 4(2) it is confirmed that an employment relationship exists between a union (Unite Union Inc) and an employer (the Waikato District Health Board).

[15] Finally, Schedule 1B to the Act provides a code of good faith for the public health sector which applies to the parties to this matter. The most relevant provisions pertaining to the matters before the Authority are found at clause 4 of the schedule and these have been referred to above (para [11]). Further relevant clauses are:

> **22 Notice of breach**
> If a party believes that another party has breached the duty of good faith in section 4, it must bring this to the attention of the party in breach at an early stage
>
> **23 Obligation of a party in breach**
> A party in breach must-
> (a) if the breach can be made good, make good the breach by making every endeavour to restore the other party to the position the other party was in before the breach; or

(b) if the breach cannot be made good, provide an explanation to the other party.

[16] Returning to the question of whether a breach of good faith pursuant to s 4 was committed by the Union, while I do not accept the claim advanced by the Board that the Union was misleading and deceptive as there is no tangible proof of this proposition, I do find that the Union was in breach of its obligations to be active and constructive in the employment relationship. I did not find Mr Philips explanation pertaining to his lack of knowledge of the intention of union members to march through the hospital premises to be convincing. But even if he were to receive the benefit of any doubt on that point, it is clear that he actively participated in and stimulated the march in full knowledge that it was prohibited by the Board. Indeed, it appears that the Union had no real intention of engaging with the Board about the possibility of the march, prior to it taking place and most certainly the Union (represented by Mr Philips), refused to engage with the Board, via Mr McKelvie, whilst the march was actually taking place. While Mr Peploe's letter of 27th January 2010 was hardly conducive to obtaining a cooperative response, given its less than veiled threat regarding the Board "*reviewing its cooperation*" with the Union, including the release of delegates to attend delegate meetings, I find that the Union breached its obligation under s 4(1A)(b) of the Act to be "*active and constructive*" in "*maintaining a productive employment relationship*" and to be "*responsive and communicative"* in regard to acknowledging the Board's concerns about the march.

[17] Some might say that the actions of the Union and its members, regarding the march, were simply a part of the legitimate right to take strike action and behaviour associated with the strike. However, given that it was aware that the march onto to hospital premises was prohibited, and the fact that the Union actively participated in the march, the Union put itself at odds with the requirements of s 4(1A)(b) of the Act. I also find that the actions of the Union were in breach of some of the provisions of clause 4 of Schedule 1B to the Act[4] in that the Union failed to engage constructively[5], and to behave openly and with courtesy and respect[6] towards the Board. While the Board submits that the Union also breached the provisions of clause 4(1)(b)(d) and

[4] The Code of good faith for the public health sector
[5] Clause 4(1)(a)
[6] Clause 4(2)(a)

(e), I conclude that in the context of the circumstances regarding the march, these provisions are not really applicable.

**Remedies**

[18] In regard to a remedy for the breach of good faith pertaining to s 4, the Board seeks that a penalty be awarded pursuant to s 4A of the Act. It provides that:

> A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if-
> (a) the failure was deliberate, serious, and sustained; or
> (b) the failure was intended to undermine-
> (i) bargaining for an individual employment agreement or a collective agreement;
> (ii) and individual employment agreement or a collective agreement; or
> (iii) an employment relationship
> (c) … … …

[19] While I accept that the failure by the Union to comply with the duty of good faith in s 4(1) of the Act, pertaining to the obligation to be "active and constructive" in "maintaining a productive employment relationship" and to be "responsive and communicative," was, more probably than not, deliberate, I find that there is insufficient evidence to show that its actions relating to the march were serious. And given the evidence about the overall time frame involved, the actions were not sustained. Nor do I find that the actions of the Union were intended to undermine the employment relationship as urged upon me for the Board. Similar to the findings in *Waikato District Health Board v NZ PSA Inc* [2008] ERNZ 80, the facts of this case do not meet; "the very high tests of egregious bad faith required under s 4A of the Act before a penalty can be imposed for a breach of good faith."

[20] In regard to the breach of the relevant provisions of clause 4 of Schedule 1B to the Act, there are no provisions for a penalty to be awarded. Rather at clause 23, following notice of a breach being brought to the attention of the party in breach, that party must:

> "if the breach can be made good, make good the breach by making every endeavour to restore the other party to the position the other party was in before the breach;[7]

Or: "if the breach cannot be made good, provide an explanation to the other party."[8]

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[7] Clause 23(a).
[8] Clause 23(b).

[21] It seems to me that neither of these remedies is now available or particularly realistic in the circumstances. Nor is there any specific provision in the code for the involvement of a third party in the event that a party in breach fails to remedy such, i.e. by not providing an explanation to the other party. However, Part 8A of the Act provides specifically for *Codes of employment practice and code of good faith for the public health sector.* Firstly, at s 100A(4) of the Act it is provided that:

> The purpose of a code of employment practice is to provide guidance on the application of this Act -
> (a) generally; or
> (b) in relation to particular types of situations; or
> (c) in relation to particular parts or areas of the employment environment.

Then at s 100C of the Act, the Authority (or the Court) may have regard to a code of practice:

> The Authority or the Court may, in determining any matter within its jurisdiction, have regard to a code of employment practice that –
> (a) was in force at the relevant time; and
> (b) in the form in which it was then in force, related to the circumstances before the Authority or the Court.

Further, at s 100D of the Act, there is a specific reference to Schedule 1B and the code of good faith for the public health sector. Of particular relevance is subsection (4). It provides that:

> It is a breach of the duty of good faith in section 4 for a person to whom the code applies to fail to comply with the code.

This in turn, by implication, would appear to then lead to the application of s 4A, in that in the event that a breach of the code is established and the criteria relating to the appropriateness of imposing a penalty, in that a breach must be *deliberate, serious, and sustained.* Therefore, while I have found that the Union was in breach of clause 4 of Schedule 1B in that it failed to; "*engage constructively*" and to; *behave openly and with courtesy and respect* towards the Board, and hence pursuant to s 100D(4), there is *a breach of the duty of good faith in s 4*, and those actions were more probably than not deliberate, I find that they were not also serious and sustained, hence a penalty is not appropriate.

**The strike on 24th and 25th March 2010 and associated issues for determination**

[22] A further strike by members of the Union took place on 24th and 25th March 2010. The Board received notice from the Union of this strike on 9th March 2010. The

evidence of Mr Steve Coles, Service Manager for the attendants, is that from 11th March 2010, there were regular meetings of an emergency management planning team that had been set up in response to the pending strike. Mr Coles says that during these meetings the team discussed what it would be possible to do (or not do) in regard to the work to be carried out during the strike. It was decided that the Board could engage contractors from ISS Facility Services (ISS) to carry out the role of attendants for the purposes of safety or health. The evidence of Mr Coles is that due to the uncertainty as to the parameters of legitimate alternatives during the strike action, the advice from the Board's human resource people was to be "*conservative*" with the use of contracted staff. Mr Coles says that with a conservative approach and the limited availability and nature of suitable contracted staff, this meant that a "*large number*" of duties were not able to be carried out. Ms Melinda Ch'ng, Group Manager, Clinical & Support Services, issued a memorandum on 18th March 2010 explaining where and how services throughout the hospital would be affected from midnight on 24th March to midnight 26th March, a total period of 48 hours.

[23] The second aspect of the Board's claims is that during the strike, the Union did not act in a reasonable way as required by s 21(2) of the Act. The subsection provides that:

> A representative of a union exercising the right to enter a workplace-
> (a) may do so only at reasonable times during any period when any employee is employed to work in the workplace; and
> (b) must do so in a reasonable way, having regard to normal business operations in the workplace; and
> (c) must comply with any existing reasonable procedures and requirements applying in respect of the workplace that relate to-
> (i) safety or health; or
> (ii) security.

[24] The Board submits that the Union did not act in a "reasonable way" as required by s 21(2). The Board says that the following matters in particular, constituted unreasonable actions by the Union while accessing the premises on 24th March 2010:

(a) Having four men from the Union access the premises when a lesser number could have carried out the same role without the level of intimidation and despite a request by the Board to have a lesser number of Union people.

(b) Subjecting employees/contractors to a barrage of questions, including those employees (attendants) going about their legitimate business and obstructing

these people.[9] The Board received complaints from Ms Janice Morgan and Ms Sheryl Olsen. The Authority heard evidence from Ms Bernadette McKeany about her observations pertaining to these complaints.

(c) Taking photographs of the contractors/employees without their consent. Ms Melinda Ch'ng gave evidence to the Authority of the actions of Mr Michael Treen pertaining to him taking photos of staff in the hospital mail room, and of three women relocating to the toilet to hide.

(d) Refusing to desist from such actions when requested by authorised representatives of the Board, resulting in a scuffle with security personnel.

[25] It is the submission of the Board that the evidence regarding the complaints received, supports its concerns that the Union failed to act in a reasonable way as required by s 21(2) of the Act.

[26] The evidence of Mr Treen, National Director of the Union, is while acknowledging that he attempted to take some photos, ostensibly for the purpose of supporting the Union's contention that the Board was in breach of its obligations under s 97 of the Act, he does not accept that hospital staff and/or contractors were intimidated by the actions of the Union representatives in regard to taking photos or questioning staff, and that the Union's presence was reasonable at all times. The evidence of Mr Philips is that he does not consider that the actions of the Union were unreasonable or antagonistic or harassing of workers. He says that the Union representatives were "*polite and low key*" in their approach.

***Was there a breach of s 21 of the Act by the Union?***

[27] I find it difficult to accept that the presence and actions of the Union representatives within the hospital on the 24th March 2010 were as innocuous as the Union would have me believe. It is not reasonable that workers going about their legitimate business should be subjected to inquiry as to their role and presence in the workplace. Nor is it remotely reasonable that workers should be subjected to having their photos taken by the Union without their consent or co-operation. I conclude that the totality of the Union's conduct goes considerably beyond the behaviour expected

[9] It is the understanding of the Authority that not all Waikato hospital attendants are members of the Unite Union and that some attendants are members of the Service and Food Workers Union.

by the provisions of s 21(2) of the Act in regard to union officials exercising the right to enter a workplace for purposes related to the employment of its members, or for purposes related to a union's business, as provided by the s 20 of Act. I find that the actions of the Union constituted a breach of s 21(2) in that the Union failed to act in a *reasonable way having regard to normal business operations in the workplace.*

[28] Section 25 of the Act provides for a penalty for certain acts in relation to entering a workplace:

> Every person is liable to a penalty, imposed by the Authority, who, without lawful excuse,-
> (a) … … …
> (b) … … …
> (c) wilfully fails to comply with section 21.

The Board has not sought that a penalty be imposed for the breach of s 21(2) but in any event, on the evidence available to the Authority, it is unlikely that the actions of the Union in regard to the breach, meet the relatively high threshold of a wilful failure to comply.

**The Claims of the Union**

(a) ***Was there a breach of s 97 of the Act?***

[29] The evidence of Mr Philips is that on the evening of 23rd March and on 24th March 2010, he accessed the Waikato hospital premises, to, in his words; "*check for strike breakers*." Mr Philips told the Authority that on both occasions he observed that there were ISS contracted employees present in the room occupied by the attendants where they await calls for their services. More relevant to the claims of the Union is that during his visit on 24th March, Mr Philips says that he saw an ISS employee using a trolley to move the personal items of a patient. Mr Philips told the Authority that he considered that this type of work is normally carried out by a striking attendant and that it was not necessary for a contracted employee to carry out this work for health and safety reasons, as allowed by s 97(4) of the Act.[10]

[30] Essentially, the position of the Union is that the use of the ISS employee, on 24th March 2010, contravened s 97 of the Act, which sets out a number of provisions

[10] There was also some reference to ISS employees working in the mail room but there is no tangible evidence of this.

applicable to the alternative performance of duties, normally carried out by striking or locked out workers. Subsection (2) provides that:

> An employer may employ or engage another person to perform the work of a striking or locked out employee only in accordance with subsection (3) or subsection (4).

Then:

> (3) An employer may employ or engage another person to perform the work of a striking or locked out employee if the person -
>
> (a) is already employed by the employer at the time the strike or lockout commences; and
>
> (b) is not employed principally for the purpose of performing the work of a striking or locked out employee; and
>
> (c) agrees to perform the work.
>
> (4) An employer may employ or engage another person to perform the work of a striking or locked out employee if -
>
> (a) there are reasonable grounds for believing it is necessary for the work to be performed for reasons of safety or health; and
>
> (b) the person is engaged to perform the work only to the extent necessary for reasons of safety or health.
>
> (5) A person who performs the work of a striking or locked out employee in accordance with subsection (3) or subsection (4) must not perform that work for any longer than the duration of the strike or lockout.
>
> (6) An employer who fails to comply with this section is liable to a penalty imposed by the Authority under this Act in respect of each person who performs the work concerned.

[31] The Union appears to accept that under subsection (4), the ISS employees could be engaged during the period of the strike to perform the work of striking attendants "to the extent necessary for reasons of safety or health." However, the Union says that moving the personal possessions of a patient does not fall within the "*reasons of safety or health*" criteria.

[32] Ms Marie Dicks, the Assistant Manager for the attendants, attested that the contract attendants performed "*one or two patient transfers*" - from an operating theatre to a patient ward. This action was required to "*free up*" bed space for other patients. Ms Dicks also confirmed that when a patient transfer occurs, the patient's personal "luggage" is transferred with them. In essence, the position of the Board is that the transfer of a patient is a safety or health matter and that the transfer of the patient's possessions is collateral to this. It is submitted for the Board that it is "absurd" [for the Union] to assert that even though the patient may be transferred, their possessions, belongings and luggage may not, due to the operation of s 97(4).

The Board suggests that not only could the patient's possessions contain medication and health support necessary for safety or health, but the prohibition on moving such items would create logistical and systemic problems in terms of patient flow and treatment. I accept that submission, particularly given that on the evidence available, the Board took a "conservative" approach to the use of contracted labour. On the unchallenged evidence of Ms Dicks, there were only one or two patient transfers and that the ISS attendants may have been responsible for shifting the patient's possessions.[11] I conclude that in the circumstances that prevailed on 24th March 2010, in regard to the transfer of patients and their possessions, the Board were reasonably entitled to apply s 97(2) of the Act in a manner that took into account that there were; *reasonable grounds for believing it is necessary for the work to be performed for reasons of safety or health.* I also accept that the ISS employee, as observed by the Union, was; *engaged to perform the work only to the extent necessary for reasons of safety or health.* As was held by the Supreme Court in *Air Nelson Limited v New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc* [2010] NZSC 53:

> Parliament has carefully legislated to provide a balance between the interests of employers in continuing to carry on their business during lawful strikes and lockouts and the interests of employees and their unions in ensuring that strikes are effective and the consequences of lockouts are controlled.

It seems to me that acceptance of the approach taken by the Board in regard to the transfer of patients possessions in the circumstances in question, provides a fair and reasonable balance between the interests of the Board as a public health provider, with safety or health obligations to its patients, with that of the striking employees and their union, in that the effectiveness of the strike was unlikely to have been diluted by the transfer of the personal possessions of one or two patients from an operating theatre to a hospital bedside.

[33] In summary, I find that the Board did not breach s 97 of the Act. It follows that I also find that the claim of the Union, that the Board transgressed in regard to clause 3 of Schedule 1B of the Act, pertaining to its reference to "*life preserving services"* as provided in clause 12 of the Schedule, is not upheld. In any event, there is no evidence that the parties entered into any contingency discussions about the provision of life preserving services to cater for the strike or that the preservation of life was ever an

[11] Notably, neither party has specifically identified the nature of the possessions that were transferred with the patient.

issue. Finally, in regard to the Union's claims in regard to the application of s 97, and its association with clause 9(d) of Schedule 1B of the Act,[12] I find that there is insufficient evidence that the Board contracted out services "*with a view to undermining or influencing the collective bargaining.*"

(b) ***Did the Board breach clause 7.4 of the Bargaining Process Agreement and/or clause 10(2) of Schedule 1B of the Act?***

[34] The parties entered into a *Bargaining Process Agreement* on 2nd July 2009. Clause 7.4 of the agreement provides that:

> Should the parties be unable to reach agreement, the Employment Relations Service may be used in an attempt at reaching agreement. Either party will attend mediation with regard to any issues that arise during the bargaining if they are asked to by the other party.

[35] Clause 10(2) of Schedule 1B to the Act provides that:

> If agreement cannot be reached or the collective bargaining is in difficulty, the parties must give favourable consideration to attending mediation without delay, and must consider third party decision-making.

[36] The Union says that the Board refused to participate in mediation before 24th March 2010, when strike action was imminent, and by such refusal, breached the above two provisions. The evidence of Mr Peploe is that on 16th February 2010, he notified the Union of the Board's position in regard to resuming negotiations, following strike action in December 2009 and on 29th January 2010. Mr Peploe conveyed (via an email) that:

> Unless your members have a revised proposal to table, I don't see any point in continuing with negotiations. I believe Waikato DHB has responded to all your proposals and in turn you have responded to our proposals. Unless you wish any clarification or believe that we have not responded to any claims then Waikato DHB does not believe any negotiations with the fixed position taken by Unite to be productive.

Mr Peploe says that he did not receive any response until 16th March 2010, when the Union "*belatedly*" asked the Board to attend mediation with a Department of Labour mediator. He attests that, as there were no new proposals for the Board to respond to, and the fact that the Union had given notice on 9th March of an intention to strike on 24th and 25th March, the Board did not consider it likely that mediation was going to resolve any of the issues between the parties prior to the strike. However, the Board

[12] *Code of good faith for public sector health*

was prepared to attend mediation after the strike was over, and on 1st April, the Board agreed to a mediation date of 23rd April 2010.[13]

[37] It seems to me that the Board were not entitled to unilaterally refuse to attend mediation on the basis of a belief (correct or otherwise) that there was nothing further to discuss, this is particularly so given that mediation was agreed to shortly after the strike. While mediation generally requires the consent of the parties, in this case, the Board and the Union were compelled, firstly, by the *Bargaining Process Agreement* which provides that: *Either party will attend mediation with regard to any issues that arise during the bargaining if they are asked to by the other party.* And there is a second compulsion provided by clause 10(2) of Schedule 1B, in that if agreement cannot be reached, or the collective bargaining is in difficulty, the parties: … *must give favourable consideration to attending mediation without delay, and must consider third party decision-making.* [Emphasis added.]

[38] However, the same compulsion applies to the Union and it seems to me that it did not come with clean hands in regard to its request to attend mediation. Notice of strike action had already been given before a request to attend mediation was made, and while not quite at the eleventh hour, it was close to it, albeit it is possible that the Department of Labour would have provided a mediator at short notice. Furthermore, it seems to me that there was no attempt made by either party to seek an agreement for strike action to be postponed while mediation, and possible third party decision making, was allowed to take place pursuant to clause 10(2) as set out above. While I conclude that the Board was obliged to attend mediation when requested by the Union under clause 7.4 of the *Bargaining Process Agreement,* there was also a statutory obligation, under clause 10(2) of Schedule 1B, for both parties to *give favourable consideration to attending mediation without delay* (emphasis added). Neither party saw fit to initiate this even after strikes in December and January, albeit I accept that the parties had attended mediation in December. But in any event, none of the actions complained of by the Union meet the overall requirements of s 4A in regard to a penalty being appropriate (as set out above).

[13] The parties also subsequently attended mediation at the direction of the Authority but without success.

[39] There also appears to be some contradiction between the provisions of clause 10(2) of Schedule 1B and s 32(2) of the Act, in that the latter provides:

> Subsection (1)(b) does not require a union and an employer to continue to meet each other about proposals that have been considered and responded to.

As I understand it, the parties had considered and responded to the respective proposals and hence there appears to be no requirement under s 32(2) to continue to meet with each other, via mediation or otherwise. But I am unable to provide a conclusion in regard to this and it may have to be determined on some other day in appropriate circumstances. Nonetheless, the value of mediation should not be underestimated as often a skilled mediator can often assist the parties by suggesting options that may not have occurred to the parties.

(c) ***Did the Board breach s 4 and/or s 4(1A)(1)(b) of the Act***

[40] Section 4(1A)(1)(b) of the Act provides that the duty of good faith:

> Requires the parties to an employment relationship to be active and constructive in establishing an employment relationship in which the parties are, among other things, responsive and communicative…

The Union asserts that the Board failed to be responsive and communicative in that the Board failed to answer its questions as set out in a letter from the Union's barrister dated 30th March (not 6th April) 2010. The questions related to the use of contractors during the strike on 24th and 25th of March 2010. The Board did respond on 14th April with reference to its right to employ other people pursuant to s 97(4) of the Act. Apparently the answers were not to the Union's satisfaction and a further request was made via an email from Ms White on 15th April. While the Board indicated further consideration of the request would take place, it appears that the Union remains dissatisfied with that response.

[41] While I accept that the Union may be dissatisfied with the response, and perhaps the Board could have been more forthcoming, I do not find that the Board's actions constitute a breach of good faith under any of the provisions of the Act.

**Determination**

[42] In summary, in regard to the claims of the Board, for the reasons set out above, I find that:

1. In regard to the actions of the Union and its involvement in the march onto the Waikato Hospital premises on 29th January 2010, the Union breached its obligations under s 4 (1A)(b) of the Act, to be active and constructive in maintaining an employment relationship and to be responsive and communicative. While I find that the actions leading to the breach were more probably than not deliberate, they were not also serious and sustained; hence the awarding of a penalty pursuant to s 4A of the Act is not appropriate.

2. The actions of the Union in regard to the march on 29th January 2010 were in breach of clause 4 of Schedule 1B to the Act because the Union failed to engage constructively and failed to behave openly and with courtesy and respect towards the Board. While these actions were more probably than not deliberate, they were not also serious and sustained; hence a penalty pursuant to s 4A of the Act is not appropriate.

3. The actions of the Union in regard to its presence within the Waikato Hospital on 24th March 2010, were in breach of s 21(2) of the Act in that the Union failed to act in a reasonable way having regard to normal business operations in the workplace. The awarding of a penalty has not been sought by the Board but in any event, this would not be appropriate as the relatively high threshold of a wilful failure has not been met.

[43] In regard to the claims of the Union, I find that:

1. The Board did not breach s 97 of the Act by the use of ISS staff to transfer patient's possessions on the occasion in question, as pursuant to s 97(4), the Board had reasonable grounds for believing it was necessary for this work to be performed for reasons of safety or health. The claim that the Board transgressed in regard to clause 3 of Schedule 1B of the Act is not upheld.

2. There is not sufficient evidence to show that the Board contracted out services with a view to undermining or influencing the collective bargaining, pursuant to clause 9(d) of Schedule 1B to the Act.

3. The Board breached clause 7.4 of the *Bargaining Process Agreement* in that it refused to attend mediation at the request of the Union. However, I do not find that the Board breached clause 10(2) of Schedule 1B to the Act, as both parties failed to give favourable consideration to attending mediation without delay, or consider third party decision making.

4. The Board did not breach s 4 or s 4(1A)(1)(b) of the Act.

**Costs:** Given the outcome of the investigation of this matter, it is appropriate that costs should lie where they fall. It is so ordered.

**K J Anderson**
**Member of the Employment Relations Authority**