

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 94
5279361

BETWEEN STEPHEN WILLS and 82
 OTHERS
 Applicants

A N D ALLIANCE GROUP LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Greg Lloyd, Counsel for Applicants
 Kerry Smith, Counsel for Respondent

Investigation Meeting: 22 February 2011 at Invercargill

Date of Determination: 29 June 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants (the applicants) allege through their union, the New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc (the Union) that the respondent (Alliance) has discriminated against the applicants because of their involvement in the Union, thus breaching ss.104 and 107 of the Employment Relations Act 2000 (the Act) and further that Alliance has breached its good faith obligations as they are contained in s.4(6)(b) of the Act by inducing the applicants not to be covered by a collective agreement and that Alliance has also breached s.11(b) of the Act by exerting undue influence on the applicants to cease being members of the Union.

[2] Alliance says that it decided to pay a discretionary bonus to some employees but not others and that the determination of who received the bonus and who did not was decided by reference not to union membership but by reference to whether the

employees were or were not *staff*. Employees who were *staff* received the bonus while those who were not *staff* did not.

[3] The investigation meeting commenced in Invercargill on 22 February 2011, the day the second Christchurch earthquake struck. Once I was notified of the earthquake having happened, and after discussion with counsel, I adjourned the hearing part-heard to enable parties, witnesses and their representatives (together with the Christchurch-based Authority member) to return urgently to their homes. Subsequently, counsel have helpfully agreed that the matter can be decided on the basis of the evidence already heard and the full submissions which counsel have filed in relation to the matter.

[4] The genesis for the Union's claim is a decision by the Alliance Board of Directors in 2008 to pay a \$1,000 bonus to *staff*. That decision was implemented by Mr Kerry Stephens, the Group Human Resources and Communications Manager for Alliance who gave evidence at the investigation meeting.

[5] Mr Stephens gave evidence of the broad meaning of the concept *staff* in Alliance's operation. Alliance employs over 5,500 employees across nine plants at the peak of the season. Historically, those workers were broadly grouped into three categories, namely seasonal meatworkers (around 86% of the total staff numbers), tradesmen and engineers (3%) and staff (11%). Staff typically were managers and clerical workers, although that historical formulation has shifted somewhat in recent years.

[6] Historically, staff were full time, employed on a salary, had uniform terms and conditions of employment which, in particular, included leave entitlements, a performance appraisal system, superannuation and a company-subsidised medical insurance scheme. As a matter of philosophy, being on *staff* meant being part of management. This was so even where, strictly speaking, the role occupied by an individual might not be, strictly speaking, a managerial role at all. Furthermore, as time passed, new groups of employees, particularly from the trades area, became part of the *staff* group. That last mentioned change clearly involves workers who are in no sense part of management but their inclusion within the *staff* group meant that their terms and conditions of employment were derived from the same principles which informed the terms and conditions of employment for management.

[7] Mr Stephens made clear in his helpful brief of evidence that it was a conventional progression for workers in the meat industry to aspire to move from the seasonal production workforce to a more secure and stable environment *on staff*. He refers in his brief of evidence to the use of terms such as *a blue hatter* and *working for the company* as phrases used to denote an employee who is *on staff*. The importance of the change from the potentially seasonal basis of remuneration to the more stable *staff* basis, cannot be underestimated. It would not be uncommon for employees moving onto *staff* to actually lose money because they would lose access to penal rates and remuneration based on the seasonal production cycle. However, those losses would be compensated for by changes to the terms and conditions of employment. In particular, *staff* had available a company-subsidised medical care scheme for the employee and for the employee's family, there were superannuation differences and, at the relevant time, annual leave differences as well. Those differences in the terms and conditions of employment are critical markers to the different relationship between *staff* and others, but the other key differential which I derive from Mr Stephens' evidence, is that the employees on staff are paid salaries which are reviewed annually on 1 October against a performance appraisal system which applies to all staff. Unlike the bulk of the workforce employed by Alliance, *staff* have their remuneration increases determined by an appraisal system rather than by an annual negotiation round.

[8] It is common ground that Alliance has paid discretionary bonuses of this sort in the past, although on all but one previous occasion, the discretionary bonus was not just paid to *staff*. Whatever the history of the discretionary bonus payments, Alliance maintains that it has the right to make such payments, that it is an appropriate exercise of management discretion and that the fact that in 2008 it chose to make bonus payments exclusively to *staff* and made no like payments to other worker groups, is not a matter that can be subject to legal challenge.

Issues

[9] The only question for the Authority to determine in the present case is whether the Union has established if the payments made by Alliance were in breach of the Act or not and in particular whether those payments were designed to discourage union membership, discourage coverage by a collective employment agreement or discriminate against a worker by reason of his choosing to be a member of a union.

[10] It will be convenient if the Authority considers the following matters:

- (a) The statutory framework
- (b) Has Alliance behaved correctly?

The Statutory Framework

[11] Section 104 of the Act provides for discrimination in relation to a personal grievance and deals with a situation where the grievant can demonstrate discrimination on a number of grounds, but for our purposes, the discrimination relied on by the applicants is ...*involvement in the activities of a union in terms of s107*. Section 107 sets out a definition of what that *involvement* means.

[12] The nature of the discrimination contemplated by s.104 is one of three sorts, namely discrimination about terms and conditions of employment, or discrimination resulting in the dismissal or retirement of a worker. None of the applicants were dismissed or caused to retire so the only live issue to consider is whether any of them suffered adverse terms and conditions of employment because of their union activities, as those activities are defined by s.107.

[13] Section 107 prescribes the nature of the union involvement which is required. Membership *per se* is not enough. The statute requires some leadership role in the union. Mr Lloyd seeks to interest me in the view that any union involvement will do; I am satisfied Mr Smith's submissions on the point are to be preferred and that had Parliament intended mere membership to be enough, it would not have devoted time and energy to defining what *involvement in the activities of a union* means. If Parliament intended that *involvement in the activities of a union* was enough, by itself, then s.107 is otiose.

[14] The evidence is clear that not all of the applicants fall within the terms of s.107 because not all of them have had leadership roles in the Union within 12 months of *the action complained of*. Conversely some of the applicants clearly do fall within the terms of s.107 in that, within 12 months of the bonus being paid, they were in some leadership role in the Union. It follows that, in principle anyway, if those applicants can satisfy the Authority that Alliance's failure to pay them the bonus infringes s.104(1)(a) they can succeed in their claim.

[15] To assist the position further, the Union refers to s119 of the Act which contains a rebuttable presumption that employees were discriminated against in terms of s.104(1) where the employee establishes that discrimination and alleges it was because of union involvement.

[16] So, in order to get the benefit of the presumption, the applicants, or some of them, must first *establish* the discriminatory breach from s.104(1) In that regard, I agree with counsel for Alliance's submission that the test required is proof that Alliance behaved in the way proscribed by s.104(1).

[17] In practical terms this means that the applicants, or some of them, must prove that they are in *the same or substantially the same circumstances* as employees who did receive the bonus.

[18] Alliance's evidence was simply that they differentiated between *staff* or *blue hatters* to use their colloquial description, on the one hand, and other kinds of employees on the other. While staff received the bonus, other workers did not. To succeed, the applicants must bring themselves within the class of employee known as *staff* and yet claim discrimination by Alliance because of their union involvement.

[19] And the short point is that none of the applicants have satisfied me on their evidence that they are within the class of employee described broadly as *staff* at Alliance. Indeed, as Mr Smith suggests, the converse is true. The applicants' evidence suggests they were not employed on individual terms of employment, not subject to annual performance reviews and not part of the Alliance Medical and Superannuation schemes for staff.

[20] The Union's penultimate claim is that Alliance has breached s4(6)(b) which provides that it is a breach of good faith for an employer to advise or induce an employee not to be covered by a collective agreement.

[21] There is simply no evidence to support this alleged breach. In particular there is no nexus between the payment and any evidence of an improper nature. In the Authority's decision in *Griffin v The Southland Times* [2004] 7NZELC 97 (Member Cheyne), there was such a nexus and that is clearly the fulcrum on which the Authority's decision rests in that case.

[22] The final Union claim is that the respondent employer has been guilty of undue influence in exerting pressure on employees to cease to be members of a union, thus constituting a breach of s.11 of the Act.

[23] It is clear that influence itself is not enough. The influence must be *undue*: *NZ Dairy Workers Union v NZ Milk Products Ltd* [2004] 1 ERNZ 367 (Court of Appeal).

[24] But even plain influence, in the present case, seems to be lacking. There is no evidence before the Authority that Alliance took any steps to influence union membership and nothing in the bonus setting process would seem to suggest any improper intent. Amongst other things, the relationship between Alliance and the Union seems settled and tranquil; collective negotiations were completed some months before this dispute arose and nothing suggests this was problematical in any way.

Has Alliance behaved correctly?

[25] I conclude that there is no evidence whatever before the Authority to justify the conclusion that the payments made by Alliance were for the avowed purpose of minimising or reducing the effectiveness of the Union, its strength of membership or the number of members covered by the collective employment agreement to which it is a party.

[26] There is no doubt that Alliance made discretionary payments. Historically, I accept the evidence that these payments have been made regularly over the last decade or so. Most commonly, these payments have tended to include elements of payment to waged workers as well as to salaried workers. Indeed, in almost every other case a similar payment has been made to all staff. The only exception is the year 2001 where a \$1,000 payment was made to staff and \$500 payments were made to meatworkers and to trades staff respectively. In 2006, a \$500 payment was made to staff and to tradesmen but no like payment was made to meatworkers.

[27] While the 2008 payment appears to be the only occasion in the last decade when Alliance has made a payment exclusively to *staff*, there is, as I have noted, an earlier occasion when a larger payment was made to *staff* than to other workers, and again an earlier occasion when no payment was made to seasonal meatworkers while a payment was made to the other two classes of employee.

[28] Either way, the evidence before the Authority is plain that Alliance has exercised its discretion to make a one-off payment to *staff* and that that decision must be seen as part of a decision-making continuum dating back at least 10 years. I am satisfied that what Alliance did was make a positive decision to reward its *blue hatters* rather than make a negative decision to dissuade union membership or collective employment agreement coverage.

[29] Nothing in the evidence satisfies me that when the Board of Directors of Alliance made its decision on the bonus, or indeed when the Board of Management of Alliance considered the issue, those respective decisions were activated by impure motives of the sort alleged by the Union. Case law is clear that employers have a right to manage their businesses in accordance with their own skill and judgment, but subject to complying with the law of the land.

[30] The facts disclose that Alliance made a decision to pay a bonus to *blue hatters* which was a decision it had made previously, that it chose to make that bonus payable only to *blue hatters* as a further benefit to that group of workers, and there is nothing whatever in the evidence to suggest that Alliance sought, by its decision, to influence members of the Union in any way. Alliance's decision, I am satisfied, was to reward management staff and not to penalise or influence unionised staff. In order for the Authority to be satisfied that Alliance had sought to exert undue influence on the applicants to cause them to stop being members of the Union, there would need to be evidence of Alliance having turned its mind to that eventuality and allowed that to influence or cloud its judgment. No such evidence was before the Authority.

[31] Looked at in a commonsense way, Alliance's intention was to reward its management. There was no evidence before the Authority that it intended to influence Union members away from the collective employment agreement; there was not even evidence that either the Board of Management or the Board of Directors turned their minds to that possibility. The good faith obligation does not entitle workers to expect an employer to exercise its discretion in the same way to every worker. That would give the lie to the very concept of a discretion.

[32] There is no evidence at all that Alliance considered union membership when it made the decision it did. What it considered was giving a positive benefit to its management staff. As a matter of fact, some members of that management staff are unionised and they received the benefit, not because they were unionised but because

they were members of management. Equally, other unionised workers did not receive the discretionary benefit, not because they were members of the Union but because they were not members of management.

Determination

[33] I am satisfied that the Union has not made out its claim that Alliance has either breached s.104 and s.107 of the Act or breached s.4(6)(b) of the Act or breached s.11(b) of the Act.

[34] It follows that the Union's claim is dismissed.

Costs

[35] Costs are reserved.

James Crichton
Member of the Employment Relations Authority