

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 45
5287815

BETWEEN PAUL CHIVERS AND 30
 OTHERS
 Applicant

A N D FOODSTUFFS SOUTH
 ISLAND LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Peter Cranney, Counsel for Applicants
 Neil McPhail, Advocate for Respondent

Submissions Received: 23 December 2010 and 4 February 2011 from Applicants
 7 February 2011 from Respondent

Date of Determination: 29 March 2011

FURTHER DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By substantive determination dated 15 July 2010, the Authority disposed of the central issue between these parties with a finding that the Union's resolution to take strike action at a point or points in the future was not itself a strike within the meaning of the law and therefore Foodstuffs acted illegally in suspending workers in reliance only on the strike resolution.

[2] The substantive determination of the Authority directed the parties to confer to establish the loss sustained by each of the applicants, and to resolve the issue of penalties, while costs were reserved.

[3] The losses sustained by the individual employees affected by Foodstuffs' action have been resolved between the parties but the issue of penalties remains. That is the sole issue for the present determination.

Are penalties applicable?

[4] Foodstuffs maintains that the pay withheld by it pursuant to s.87(4) of the Employment Relations Act 2000 does not constitute a *deduction* in terms of the Wages Protection Act 1983. It relies on the Court of Appeal decision in *Spotless Services New Zealand Ltd v. Service & Food Workers' Union* [2008] ERNZ 609. But that decision emphasises that the question for the Authority or the Court will always be whether wages were payable in terms of the relevant employment agreement. That case concerned weekly workers and the relevant employment agreement specifically provided that those workers were to invariably receive no less than their weekly wage.

[5] The present case is different and distinguishable on its facts. The workers in the present case are traditionally hourly rate workers. There is nothing in the relevant employment agreement in the present case which seems to me to preclude the operation of the provisions the Union relies upon in the Wages Protection Act.

[6] Those provisions are clear enough. Section 4 of the Wages Protection Act broadly prohibits deductions from wages and requires that wages be paid to workers in full. Section 13 provides for penalties to be awarded where there has been an unlawful deduction.

[7] By force of the Authority's substantive decision issued on 15 July 2010, the deductions were held to be unlawful because Foodstuffs made those deductions in reliance on s.87(4) of the Employment Relations Act 2000 (the Act). As the suspension imposed on these workers was unlawful, it must follow that the provision in s.87(4) allowing an employer to not pay wages to suspended workers cannot apply.

[8] I am satisfied then that there is nothing in law to preclude the application of penalties under the Wages Protection Act 1983. I agree with the Union's submission that the Authority's jurisdiction is based both on s.13 of the Wages Protection Act 1983 and also on s.161(1)(m) of the Act.

Should penalties apply?

[9] Foodstuffs maintains that penalties should only apply where the breach was flagrant rather than inadvertent and relies on, inter alia, an earlier decision of mine in *McCullough v. Otago Sheet Metal & Engineering Ltd* (CA153/08) when I said:

The law on penalties is clear. A penalty is imposed to punish wrongdoing. The Authority must distinguish inadvertence from flagrancy.

[10] Foodstuffs maintains its behaviour was inadvertent and not flagrant.

[11] The Union, on the other hand, urges on me the proposition that Foodstuffs' actions were a *deliberate conscious deduction of money belonging to workers (after having notice this was wrong)*. The notice referred to is simply the Union's protest on behalf of its members to Foodstuffs that the action Foodstuffs proposed to take was illegal; it is expecting a bit much of an employer to immediately fold his tent and steal away when he is told by the union that he has got it wrong.

[12] The issue remains whether Foodstuffs' conduct was sufficiently blameworthy to justify punishment. This was an issue where Foodstuffs responded to a Union action and, on the determination of the Authority (which was not appealed), acted inappropriately. The Union's argument that Foodstuffs deliberately set about to deprive working families of money that was rightfully theirs does, I fancy, rather over-egg the pudding. The employer simply got it wrong and as a consequence of that workers were deprived of wages to which they would otherwise have been entitled.

[13] While I am not satisfied that this was a case of flagrant or blatant disregard of the rights of the other party, I do think it is available to the Authority to consider the imposition of a penalty.

What quantum of penalty ought to apply?

[14] In accordance with the statutory provisions, penalties imposed on parties can either be paid into the Crown account or can be made available to the party who has suffered the breach.

[15] I think the proper course of action in the present case is to consider the application of the penalties to each of the individual workers affected and, as a

starting point, to reflect on what figure might be appropriate for each of those affected workers to receive as part of the redress they are entitled to look to from their employer.

[16] I do not think this is a case where a significant global sum ought to be awarded against Foodstuffs to discourage bad behaviour or to otherwise emphasise the wrong that was done.

[17] I agree with Foodstuffs' submission that the appropriate way to review this matter is to look at the context in which the events complained of happened. That context broadly is that the matter arose during a period of industrial disputation of some longstanding and I am satisfied that although the employer, Foodstuffs, responded inappropriately to the resolution concerning strike action passed by the Union, Foodstuffs' inappropriate response was not activated by malice but was simply a misguided attempt to respond appropriately to decisions taken by the Union. The fact that workers suffered financial losses as a consequence of that decision is, I consider, more a by-product of Foodstuffs' attempt to respond to the Union than a desired outcome on its own.

[18] I am influenced, and I think appropriately so, by the fact that Foodstuffs is a large and successful company and the workers affected by Foodstuffs' action are low paid employees and that the unlawful deduction included a component of statutory holiday pay.

[19] Having rejected the Union's proposals that the Authority should apply a global amount, and preferring to consider the matter on the footing of what figure could appropriately be received by each of the affected employees as a partial compensation for the wrong done to them, I think it appropriate that Foodstuffs pay to each of the affected workers the sum of \$1,000 and that figure in aggregate represents the penalty which the Authority awards against Foodstuffs and in favour of the Union in respect of the Authority's powers under the Wages Protection Act 1983.

Determination

[20] Foodstuffs is to pay to each of the affected employees (the applicants) the sum of \$1,000 free of deductions and that sum in aggregate is to constitute the penalty awarded against Foodstuffs by this decision of the Authority in respect of the powers so to do under s.13 of the Wages Protection Act 1983.

Costs

[21] Costs remain outstanding. The parties are urged to seek to resolve matters between themselves but failing that, leave is reserved.

James Crichton
Member of the Employment Relations Authority