



# New Zealand Employment Relations Authority Decisions

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## First Union Inc v Bidfood Limited (Auckland) [2018] NZERA 333; [2018] NZERA Auckland 333 (29 October 2018)

Last Updated: 7 December 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 333  
3031311

BETWEEN FIRST UNION INC Applicant

AND BIDFOOD LIMITED Respondent

Member of Authority: Eleanor Robinson

Representatives: Oliver Christeller, Counsel for Applicant

Jeff Goldstein, Counsel for Respondent

Investigation Meeting: 10 October 2018 at Auckland

Submissions received: 10 October 2018 from Applicant and from Respondent

Determination: 29 October 2018

**DETERMINATION OF THE AUTHORITY**

### Employment Relationship Problem

[1] The Applicant, First Union Inc (the Union), claims that the notice initiating collective bargaining with the Respondent, Bidfood Limited (Bidfood) is valid.

[2] Bidfood claims that the Notice Initiating Bargaining is invalid because the Union has initiated bargaining with the wrong party and further that notice has not been given to the intended party, Bidfood Limited.

### Issues

[3] The issues for determination are whether or not:

- The notice initiating collective bargaining between the Union and Bidfood is valid
- Bidfood breached the duty of good faith by failing to meet with the Union for the purposes of bargaining

### Background Facts

[4] Bidfood is part of a global foodservice business owned by Bid Corporation Limited. It was incorporated in New Zealand as Bidvest New Zealand Limited in March 2000, and after a number of name changes has been known as Bidfood Limited since September 2016.

[5] Bidfood has 4 key divisions in New Zealand, Foodservice, Fresh, Processing and Logistics, 30 separate locations and approximately 1600 employees. There are 26 business units or branches contained within the four key divisions, each business unit operating autonomously, each having its own General Manager, management structure and employees.

[6] Bidfood has a National Support Office based in Auckland. It contains the National Account sales team, National Procurement, IT and Finance which includes Accounts Payable, Accounts Receivable, Financial Reporting and Payroll.

[7] The Union has members employed by Bidfood at various locations throughout New Zealand, not all of which are covered by a collective agreement.

#### *Collective Agreements*

[8] Historically the Union has negotiated regional or single site collective agreements with Bidfood. These have included collective agreements with the Hamilton branch of Bidfood, Palmerston North, Rotorua and Wellington branches.

[9] The Union has previously bargained separately for each of the agreements as this had been the stated preference of its members. There are currently three collective agreements, being with the Rotorua branch of Bidfood, the Wellington branch of Bidfood, and the Auckland branch of Bidfood.

[10] The parties in each of the collective agreements with a particular branch of Bidfood has been identified as being between the Union and:

- The Rotorua Branch of Bidvest New Zealand Ltd (hereinafter referred to as the “Employer”)
- The Hamilton Foodservice Branch of Bidvest New Zealand Limited (hereinafter referred to as the “Employer”)
- The Palmerston North Branch of Bidvest New Zealand Ltd (hereinafter referred to as the “Employer”)
- The Wellington Branch of Bidvest New Zealand Ltd (hereinafter referred to as the “Employer”)
- The Auckland branch of Bidvest Fresh New Zealand Ltd (hereinafter referred to as the “Employer”)
- The Auckland branch of Bidvest New Zealand Ltd (hereinafter referred to as the “Employer”)

[11] Mr Jared Abbott, one of two Divisional Secretaries for the Union, said that in his division which included Bidfood, his focus had been to reduce the amount of collective agreements for which the Union bargains for reasons of efficiency.

[12] His understanding was that Bidfood was one legal entity and the employer of union members. His understanding was based upon the fact that:

- Most union members were recruited to the Union after they had commenced employment on individual employment agreement (IEAs) which identified the employer as Bidfood Limited
- Union members received payslips which identified the employer as ‘Bidfood Limited’ and
- The Employee Handbook noted under the section headed ‘The Purpose of the Handbook’ that: *“Throughout this handbook, any reference to the Company or the Employer is a reference to Bidfood New Zealand Limited”.<sup>1</sup>*

#### *Mr Wright’s position*

[13] Mr Martin Wright is the General Manager of the Auckland Foodservice Branch of Bidfood and reports to the CEO of Bidfood Limited. He said that in his role as General Manager of the Auckland Foodservice Branch of Bidfood he has complete autonomy to set the strategic direction of the Bidfood branch for which he is responsible. He prepares the Auckland Foodservice Branch annual budget which is discussed and agreed with the Bidfood

CEO. The budget includes the payroll component which is also subject to CEO approval.

<sup>1</sup> A previous name of Bidfood Limited

[14] Mr Wright has delegated authority to negotiate supply agreements for goods and services in relation to the Auckland

Foodservice Branch, sets the sale targets, measures performance and makes all key operational decisions for the Auckland Foodservice Branch.

[15] Mr Wright said the Auckland Foodservice Branch, which has approximately 207 employees, employs its own sales, operational, procurement, finance and human resources staff. Employees are recruited by the Auckland Foodservice Branch using a recruitment and induction process developed during the period in which Mr Wright has been the General Manager.

[16] New employees for the Auckland Foodservice Branch are included in the payroll system after approval by Mr Wright who submits timesheets for processing and payment by the payroll team in the National Support Office.

[17] Mr Wright said he had engaged the legal firm, Goldstein Ryder Limited, to draft up an IEA for the Auckland branch. He had made this format available to other branches at their request.

[18] Mr Wright said he negotiated with the Union whenever the Collective Agreement with Auckland Foodservice Branch expired. During the years that he has been engaging in the process there had been instances when Bidfood had been mistakenly identified as the employer. On these occasions he had written to the Union in order for it to correct the mistake, which it had acknowledged and agreed to alter.

[19] Mr Wright is also a member of the Bidfood National Executive Team which influences the business operation and the overall company focus. However its recommendations formed a guide and not a mandatory requirement to be adopted by the individual branches.

[20] As a member of the Bidfood National Executive Team Mr Wright said his responsibilities include supporting other branch General Managers in the areas of Food Safety and Health and Safety.

#### *Initiation of Bargaining May 2018*

[21] On 18 May 2018 Mr Wright received an email from Mr George Schwenke, Organiser, attaching a Notice Initiating Collective Bargaining dated 18 May 2018 (the Initiation Notice).

[22] The Initiation Notice included statements which had been crossed out and the remaining wording stated :

ATTN: MANAGER & TO WHOM IT MAY CONCERN

FIRST Union, hereby initiates bargaining for a Collective Agreement in accordance with [s. 42](#) of the [Employment Relations Act 2000](#).

The intended parties to the Collective Agreement are Bidfood Limited and

FIRST Union Inc.

The proposed coverage clause for the Collective Agreement is

#### *Agreement Coverage*

*This Agreement shall apply to all employees, who are employed by the employer; performing all types of work in New Zealand excluding employees employed in Rotorua and Porirua.*

[23] Mr Wright placed the Initiation Notice on the notice board of the Auckland Foodservice Branch to notify all the Auckland branch employees of the initiation of collective bargaining. As he did so he realised that the parties named in the Initiation Notice were different to the Parties in the Auckland Foodservice Branch collective agreement.

[24] The most recent Auckland Foodservice Branch collective agreement dated 1 July

2017 – 30 June 2018 states in the Preamble at clause 1.2 that it is between “*The Auckland branch of Bidfood Ltd) And FIRST Union*”. The coverage clause in it states:

3.1 This agreement shall cover any employees engaged by the employer who are Union members and carry out a range of duties and functions associated with a warehouse operation.

3.2 The duties include but shall not be limited to Receiving Storage Despatch or delivery of goods for the employer, which includes the keeping of records associated with the above functions.

3.3 This Agreement shall not apply to supervisor level and above.

[25] Mr Wright said he had assumed that because Mr Schwenke had been employed for a few months only he had made the same mistake as in previous years. This assumption had been strengthened by the fact that the Initiation Notice had been poorly presented, showing marked up changes from an earlier notice.

[26] Mr Wright emailed Mr Schwenke on 8 June 2018 stating: *“I see your proposed coverage clause is materially different to the coverage clause in the current collective. Is that your intention or is it a mistake?”*

[27] It was Mr Abbott who replied to Mr Wright’s email stating: *“We are intending to expand the coverage of the collective agreement as proposed in our initiation letter”*.

[28] Mr Abbott said that the notice had been sent to Mr Wright rather than to the Bidfood National Office because he was aware that Mr Wright was part of the National Executive Team, and his expectation was that Mr Wright would forward the Initiation Notice to the appropriate person if he did not have the requisite level of authority to negotiate on behalf of Bidfood Limited.

[29] He agreed in cross examination that the Initiation Notice had been raised in Auckland because the Auckland branch collective agreement had contained advantageous terms for Union members than the collective agreements in other Bidfood branches.

[30] Mr Wright said that he did not have authority to negotiate a collective agreement with any other Bidfood branch. He sought legal advice from Goldstein Ryder Limited. He had informed the CEO about the Initiation Notice for a collective agreement between the Union and Bidfood Limited, but only after he had sought advice from Goldstein Ryder.

[31] The involvement of Goldstein Ryder resulted in correspondence between it and the Union but did not resolve the issue.

### **Is the notice initiating collective bargaining between the Union and Bidfood valid?**

*(a) Has the Union initiated bargaining with the wrong party?*

[32] The Initiation Notice had been delivered to Mr Wright who was the General Manager for the Auckland branch of Bidfood Limited which had been party to an expired collective agreement.

[33] [Section 40](#) of the [Employment Relations Act 2000](#) (the Act) identifies which parties may initiate bargaining, these are (1 or more) unions with (1 or more) employers, or (1 or more) employers with (1 or more) unions. However the employer may not initiate: *“ unless the coverage clause will cover work ... that is or was covered by another collective agreement to which the employer is or was a party.”*

[34] This prohibition on initiation is only binding upon the employer and not the union party.

[35] In accordance with [s 40](#) of the Act initiation by a union must be with an employer. The Initiation Notice was addressed: *“ATTN: MANAGER & TO WHOM IT MAY CONCERN”* and was sent to Mr Wright, the General Manager of the Auckland branch of Bidfood.

[36] Mr Wright is not a director, shareholder or the CEO of Bidfood, although he is part of the National Executive team which provides operational focus and direction for all the branches. He reports to the CEO and, whilst Mr Wright has a significant degree of control over the management of the Auckland branch, the Auckland branch budget is subject to the approval of the CEO.

[37] The Initiation Notice was marked for the attention of the Manager, but also had a wider attention purview being *“TO WHOM IT MAY CONCERN”*.

[38] Mr Wright did not bring the Initiation Notice to the attention of the CEO despite it concerning a collective agreement between Bidfood and the Union until after he had consulted Goldstein Ryder. This was despite the email from Mr Abbott dated 8 June 2018 in which Mr Abbott explained that the Union were intending to expand the coverage of the collective agreement.

[39] The initiation must be by the union with an employer. The Initiation Notice stated that the intended employer party was Bidfood Limited. Section 5 of the Act identifies an employer as being *“a person employing any employee or employees; and includes a person engaging or employing a homeworker”*.

[40] In examining whether the Initiation Notice which had been raised with Bidfood had been raised with the employer I note the following:

- Bidfood Limited is the registered on the Companies Register, the individual branches do not have a legal identity
- Employees are engaged on IEAs which identify the employer as Bidfood Ltd
- Employees are provided with payslips which identify the employer as

Bidfood Limited and

• The Employee Handbook issued to an Auckland branch based union member specifically stated that references to the Employer were to Bidfood New Zealand Limited, and not to the Auckland branch of Bidfood.

[41] I find that whilst employees were employed to work at a specific branch of Bidfood, Bidfood is the employer.

[42] Although the Union did not send the Initiation Notice to the National Support Office of Bidfood or the CEO, I find that the intended recipient included not only Mr Wright as

‘Manager’ but also by indicating it was addressed to: *“TO WHOM IT MAY CONCERN”* included an appropriate person with authority to represent the employer if that was not Mr Wright.

[43] I consider the view expressed by Mr Abbott that the Union expected Mr Wright in his senior management position to forward the initiation notice to that appropriate person in a timely manner, especially in light of the explanation by Mr Abbott that the Union intended to expand the coverage clause as stated in the Initiation Notice, to have been reasonably held.

[44] I find that bargaining had been initiated by the Union with the employer pursuant to s

40 of the Act.

*(b) Has bargaining been initiated in accordance with the requirements of s 41 of the Act?*

[45] Section 41 of the Act addresses when bargaining may be initiated by the parties:

#### **41 When bargaining may be initiated**

(1) If there is no applicable collective agreement in force between a

union and an employer, the union or the employer may initiate bargaining with the other at any time.

(2) ...

(3) If there is an applicable collective agreement in force, neither a union nor an employer may initiate bargaining earlier than 60 days before the date on which the collective agreement expires.

(4) However, if there is more than 1 applicable collective agreement in force that binds 1 or more unions or 1 or more employers, or both, that are intended to be parties to the bargaining, then neither a union nor an employer may initiate bargaining before the later of the following dates:

(a) The date that is 120 days before the date on which the last applicable collective agreement expires; and

(b) The date that is 60 days before the date on which the first applicable collective agreement expires.

(5) For the purposes of this section, an applicable collective agreement is in force between a union and an employer if the agreement binds employees whose work is intended to come within the coverage clause in the collective agreement being bargained.

[46] In this case the applicable collective agreements affected by s 41(3) would be are Rotorua and Wellington, however these two branches of Bidfood are excluded from the ambit of the proposed collective agreement.

[47]

[48] The Initiation Notice specifically excludes employees employed in Rotorua and

Porirua.

[49] I find that bargaining had been initiated in accordance with the requirements of s 41 of the Act.

*(c) Has bargaining been initiated in accordance with the requirements of s 42 of the Act?*

[50] Section 42 of the Act sets out the essential requirements of an initiation notice:

#### **42 How bargaining initiated**

(1) A union or an employer initiates bargaining for a collective

agreement by giving to the intended party or parties to the agreement a notice that complies with subsection (2)

(2) A notice complies with this subsection if:-

- (a) It is in writing and signed by the union or the employer giving the notice or its duly authorised representative; and
- (b) It identifies each of the intended parties to the collective agreement; and
- (c) It identifies the intended coverage of the collective agreement.

[51] In order to comply with s 42(2) the notice must firstly be in writing and signed by the duly authorised representative of the party providing the notice.<sup>2</sup> The Initiation Notice was in writing and had been signed by Mr Schwenke identified as the Union's: "*duly authorised representative*".

[52] Secondly the notice must identify each of the intended parties to the collective agreement.<sup>3</sup> The Initiation Notice identifies the intended parties as Bidfood Limited and

FIRST Union Inc.

<sup>2</sup> S 42(2)(a) of the Act

<sup>3</sup> S 42(2)(b) of the Act

[53] Thirdly the notice must identify the intended coverage of the collective agreement.<sup>4</sup>

The Initiation Notice identifies the intended coverage as being "*all employees who are employed performing all types of work in New Zealand excluding employees employed in Rotorua and Porirua.*"

[54] I find that bargaining been initiated in accordance with the requirements of s 42 of the Act.

[55] I determine that the notice initiating collective bargaining between the Union and Bidfood is valid.

**Has Bidfood breached s 43 and s 32 of the Act by failing to meet with the Union for the purposes of bargaining?**

[56] Once an employer receives a valid notice initiating bargaining it must draw the existence and coverage of the bargaining and the intended parties to it to the attention of all employees pursuant to s 43 of the Act within the time frames specified in s 43 (2) of the Act.

[57] Once bargaining has been initiated, pursuant to s 32(1)(a) to (c ) of the Act:

32 (1):

- (a) the union and the employer must 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; and
- (b) the union and the employer must meet each other, from time to time, for the purposes of bargaining; and
- (c) the union and the employer must consider and respond to proposals made by each other

[58] Bidfood has not complied with s 43 of the Act, although I accept that this arose from Mr Wright's understanding that the Initiation Notice was not valid rather than a failure of good faith.

[59] I note also that he had, acting in good faith, consistent with his initial belief that it was a notice initiating bargaining for the Auckland branch of Bidfood, posted the Initiation Notice on the Auckland branch notice board once he received it as had been his usual practice

over the years.

<sup>4</sup> S 42(2)(c ) of the act

[60] However once Mr Abbott had made it clear that there was no error in the Initiation

Notice, I find that Bidfood was bound by the requirement to act in accordance with s 43 and s

32 of the Act by drawing the attention of all employees to whom the coverage clause applied, by entering into a bargaining process arrangement, and by meeting to consider and respond to proposals. It did not do so.

[61] I determine that Bidfood breached s 43 and s 32 of the Act.

[62] I order that Bidfood comply with s 43 and with s 32 of the Act by drawing the attention of the employees to the initiation of bargaining, and by acting in good faith by entering into a bargaining process arrangement and by meeting with the Union to consider and respond to proposals made by the other.

[63] Compliance is to take place within 28 days of the date of this determination pursuant to s 137 of the Act.

### **Costs**

[64] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[65] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**

**Member of the Employment Relations Authority**

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