

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN National Distribution Union of 120 Church Street, Onehunga, Auckland (Applicant)

AND General Distributors Limited of 80 Favona Road, Mangere, Auckland (Respondent)

**ORDER FOR REMOVAL OF MATTER
TO THE EMPLOYMENT COURT**

Employment relationship problem

[1] The National Distribution Union (“NDU”) represents certain employees employed by General Distributors Limited (“GDL”). GDL operates supermarkets on behalf of Progressive Enterprises Limited, including Countdown, Foodtown Woolworths and Price Chopper, as well as stores at Gull service stations.

[2] The parties have concluded negotiations for the following collective employment agreements:

- (a) an agreement covering NDU employees at Countdown, Foodtown Woolworths and Price Chopper supermarkets (“the supermarket agreement”); and
- (b) an agreement covering NDU employees at Gull service stations (“the Gull agreement”).

[3] Both agreements include a bargaining fee clause. Pursuant to the respective clauses, ballots on whether there should be a bargaining fee were conducted during July 2005. In both ballots, the majority was in favour of including a bargaining fee. Again pursuant to the respective clauses, the next step was for employees who were not members of the NDU to elect whether to pay the fee and receive benefits under the applicable agreement, or opt not to pay the fee and not receive the relevant benefits. The parties agreed on a process under which affected employees would make their elections.

[4] Regarding the supermarket agreement, the NDU has these concerns.

- (i) Further to the ballot on the inclusion of a bargaining fee, the wording GDL proposed for a question and answer sheet to be circulated in association with the ballot indicated an intention to pass on the benefits of the agreement anyway - although the NDU acknowledged the wording was changed after it objected.
- (ii) Further to the process for electing whether to opt out of paying the bargaining fee, management staff encouraged employees to opt out on the basis that they would receive the negotiated pay rise whether or not they paid the fee.
- (iii) Written material, including a poster and notes in a supermarket communication book, also amounted to encouraging employees to opt out.
- (iv) Correspondence with the General Manager Human Resources in June 2005 supports an inference that GDL intended to pass on the negotiated pay rise anyway, with the intent of undermining the bargaining fee.

(v) The negotiations yielded a flat hourly rate pay rise, which amounted to an increase of 5.2% for union members receiving the general rate of pay established in earlier negotiations. Employees who were not union members were to receive increases of 5% (at Foodtown Woolworths) and 5.2% (at Countdown).

(vi) Of over 12,800 employees who were not union members, 2,578 chose not to opt out.

(vii) There are reports of low morale at stores, with union members questioning the point of belonging to the union and people who are paying the bargaining fee saying they will opt out next year.

[5] Regarding the Gull agreement, the NDU says it has not received reports of passing on, but seeks to ensure that no passing on occurs outside the bargaining fee arrangement.

[6] The NDU believes that GDL substantially passed on the benefits of the supermarket agreement through the increase in pay for employees who were not union members, did not bargain in good faith with those employees, and acted in such a manner as to undermine the bargaining fee arrangement.

[7] The NDU also believes GDL breached the provision in the supermarket agreement to the effect that employees who opt not to pay the bargaining fee "will not receive the terms and conditions contained in this collective agreement".

[8] Accordingly the NDU has applied to the Authority for:

- (a) a declaration that GDL has breached its good faith obligations;
- (b) penalties for, -
 - . breach of the duty of good faith in s 59B of the Employment Relations Act 2000, and
 - . breach of employment agreement
- (c) damages for breach of employment agreement and for undermining the bargaining fee arrangement in the employment agreement;
- (d) orders restraining GDL from passing-on pay increases that are substantially similar to the increases paid under the collective employment agreements, and
- (e) orders requiring that good faith negotiations be entered into with individual employees.

[9] The application was made under urgency because the NDU anticipated that the pay rises of concern to it would be paid on 31 August 2005, with backpay to 1 August 2005 becoming payable in the week beginning 29 August. The Authority promptly convened a conference call between the parties during which the parties agreed to attend mediation at an early date, and an application was made under s 178 of the Act to remove this problem to the Employment Court. The application was not opposed.

Grounds for removal to the Employment Court

[10] The grounds on which the application for removal were made were:

- (a) that important questions of law arose in the proceeding, namely, -
 - (i) the extent to which advice to employees with regards to opting out of a bargaining fee as per s 69R(1)(c) can give rise to a breach of good faith,
 - (ii) the meaning and extent of s 59B(2) with particular reference to these words, -
 - . 'the employer does so with the intention of undermining the collective agreement', and
 - . 'the effect of the employer doing so is to undermine the collective agreement.'

(b) the case is of such a nature that it is in the public interest that it be removed, particularly as the points in (a) above have not yet been judicially determined.

[11] I accept the grounds raised by counsel and am of the opinion that the Employment Court should determine the matter.

Order for removal

[12] Pursuant to s 178 of the Act, I therefore order that this employment relationship problem be removed to the Employment Court for hearing and determination.

DATED: 30 August 2005

R A Monaghan
Member, Employment Relations Authority