Determination Number: AA 134/01
File Number: AEA 398/01

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	National Distribution Union (Applicant)
AND	Sawmill Services Limited (First Respondent) **AND** Waipa Forklift Services Limited (Second Respondent) **AND** Waipa Log Transfer Limited (Third Respondent) **AND** Koromiko Forklift Services Limited (Fourth Respondent)
REPRESENTATIVES	Jock Lawrie, Advocate for Applicant Mark Beech, Counsel for Respondents
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	30 July 2001
SUBMISSIONS RECEIVED	13 and 23 August 2001
DATE OF DETERMINATION	17 September 2001

DETERMINATION OF THE AUTHORITY

Employment relationship problem

The applicant, the National Distribution Union, ("NDU") served a notice initiating bargaining for a multi-employer collective agreement ("meca") on Waipa Forklift Services Limited, Waipa Log Transfer Limited and Koromiko Forklift Services Limited – the second, third and fourth respondents. The companies took the view that they did not wish to be parties to a multi-employer document and following a series of discussions, to be detailed later in this determination, attempts to further a negotiation process reached a stalemate.

The NDU says the companies have:

(a) failed to deal with it in good faith by issuing various requirements concerning the bargaining process, and by approaching the bargaining with a closed mind;
(b) misled or deceived the union by refusing to negotiate for a multi-employer agreement at the 'eleventh hour';
(c) refused to meet with the union for the purpose of bargaining; and
(d) failed to consider and respond to the union's proposals.

As a result the union seeks orders requiring the companies to comply with the good faith provisions in ss 4 and 32 of the Employment Relations Act 2000.

Sawmill Services Limited

The union believed that the first respondent, Sawmill Services Limited, was a parent company of the other three. That is not the case. There is an individual who is closely associated with all four companies as well as several others, but he is neither the sole shareholder in nor sole director of them. None of the directorships or shareholdings lead back to Sawmill Services Limited to indicate it is the parent company of a group, although it is part of a group. While a key employer representative communicated with the union in writing on that company's letterhead, there does not seem to be any firmer connection than that.

Since the company was not cited in the notice initiating bargaining either, there are no grounds for including Sawmill Services Limited as a respondent in this application. I therefore strike it out as a party under s 221 of the Employment Relations Act 2000.

Background

By a notice dated 20 February 2001, the NDU initiated bargaining in the following terms:

> "The intended parties to the collective agreement are members of the National Distribution Union and are employed by one of the following companies:
>
> Waipa Forklift Services Limited
> Waipa Log Transfer Limited
> Koromiko Forklift Services Limited
>
> The proposed coverage clause for the collective agreement is:
>
> 'This collective agreement shall cover any employees employed by Waipa Forklift Services Limited, Waipa Log Transfer Limited and Koromiko Forklift Services Limited who carry out a range of duties and functions associated the companies operation of forklifts, loaders and any other associated machinery and documentation.'"

The notice went on to confirm that the secret ballots required under s 45 of the Employment Relations Act had been conducted at each of the three sites and resulted in a unanimous vote in favour of bargaining for a single collective agreement. Those balloted were the nine union members employed by Koromiko Forklift Services Limited, three union members employed by Waipa Forklift Services Limited and one union member employed by Waipa Log Transfer Limited.

Ken Young, the NDU's local Wood Sector Organiser, was the union representative in the bargaining process. He moved promptly to contact Paul ("Jimmy") Conway to arrange for the bargaining process to begin. Despite the titles given to him in the correspondence, Mr Conway is an employee of a company which provides human resources and business consultancy services to the three respondents. There was no dispute that he was the authorised representative of the companies.

On 22 February 2001 Mr Young wrote to Mr Conway with a proposal for the conduct of the bargaining. The proposal covered the following:

. the need to advise on the identity of each other's bargaining team;
. identifying the nature and limits of the authority to reach agreement;
. procedure for making claims and counter-claims;

. communication and signing off procedures to be agreed prior to commencement of bargaining;
. time to be made available for meetings;
. frequency of meetings;
. venues for meetings and who should bear the cost;
. facilitating the involvement of workplace representatives, and who should bear the cost;
. new proposals and revocation of offers;
. restriction on inflammatory proposals;
. respect for cultural differences and addressing matters of importance to Maori;
. records to be signed off by both/all parties; and
. employers to meet the costs relating to requests for information under s 34 of the Act.

On 28 March 2001 Mr Conway set out in a letter to Mr Young the companies' proposals for the conduct of the negotiations. The letter followed an agreement to that effect between Messrs Conway and Young, and contained additional details building on the points set out above. It concluded by suggesting that the parties meet to commence bargaining at 3.00 pm on 20 April 2001. Mr Young responded by a further letter dated 6 April 2001 in terms that indicate the parties had agreed on the bargaining procedure to be followed, and that there would be a meeting on 20 April.

A formal 'log of claims' was received by post on 19 April 2001. The log of claims took the form of a full draft collective employment agreement, and Mr Conway did not receive it until the end of the day. There was a minor and unnecessary disagreement between Messrs Young and Conway over the form in which the claims were provided, but the key point is that Mr Conway, as the companies' representative, took the view that he did not have enough time before the 20 April meeting to properly consider the contents of the draft collective employment contract. It was reasonable for him to seek further time to consider the document as he did. Mr Young acknowledged the short time the companies had to consider the draft agreement. Accordingly there was agreement that the meeting would begin instead on 27 April.

After having sought legal advice, by letter dated 26 April 2001 Mr Conway advised Mr Young that the companies did not wish to enter into one collective agreement for the different worksites. He added:

> "The companies also do not wish to negotiate collective agreements for their individual sites without a precise coverage clause being agreed. The proposed coverage clause is unacceptable. This does not of course interfere with their desire to negotiate with the National Distribution Union on a collective basis even if that results in individual employment agreements."

The meeting planned for 27 April went ahead. The union's and the companies' negotiating teams attended, including Messrs Young and Conway. Both men took notes of the meeting and the notes were produced at the investigation meeting. Mr Conway's notes were the handwritten notes he took at the meeting, while Mr Young's were a typewritten set which he completed after the meeting ended. Overall, taking into account the notes and the oral evidence, there was relatively little real dispute about the content of what was discussed at the meeting. There were some differences as to the order in which various statements were made, and a significant difference in emphasis.

At or near the beginning of the meeting (according to the oral evidence including his own), Mr Young read out the following statement:

> "Given that notices initiating bargaining for the three sites has (sic) been received by the companies and further that a good faith agreement has been entered into between the parties the union views the company correspondence of 26 April 2001 as being a breach not only of the good faith provisions contained in the Employment Relations Act 2000 at s 32, but also in breach of the separate good faith agreement as entered into

> between the parties including clause 5 of good faith agreement as set out in Jimmy Conway's 28 March 2001 letter.
>
> That the union formally request (sic) that Jimmy Conway, as the bargaining agent for the three employer companies, provides the union with written advice confirming the withdrawal of the previous 26 April letter and confirming the companies intentions to continue with the negotiations in line with both its statutory obligations and in line with the good faith agreement as entered into and confirmed in the companies 28 March 2001 correspondence."

Notwithstanding the tone of that statement, it was common ground that the companies gave their reasons for not wishing to enter into a meca. They believed they were not obliged to do so, and that each of the three sites carried out different types of work so that a meca was not appropriate. A spokesperson for the companies, Chris Savage, elaborated on the companies' views of why the operations were different and why they needed the flexibility they believed would be afforded by separate agreements.

The companies then asked the union to explain why it sought a meca. Mr Young replied by saying that employees' conditions had deteriorated under the Employment Contracts Act 1991 and that the union sought to improve these by bargaining collectively. He also believed that the companies had a sufficient community of interest to warrant an attempt to bargain with them as a group.

Discussion continued along those lines for some time, without any headway being made by either party. The meeting ended on that basis.

By letter dated 3 May 2001 Mr Young wrote to Mr Conway saying "we note our availability to commence negotiations proper on Friday 11 May 2001." By that Mr Young meant the union was prepared to begin negotiations on the substantive claims it was making in the context of its attempt to negotiate a meca. The tone of the letter was to suggest that, despite the parties' inability to agree on whether there should be a meca at all, the companies were obliged in terms of the good faith agreement to meet to negotiate on those other matters.

Mr Conway replied by letter dated 7 May, offering to enter into bargaining on a site by site basis and saying the companies had not been dissuaded from their views regarding a meca. By way of further response Mr Young advised that the union would approach the mediation service of the Employment Relations Service on the matter. Mr Conway then wrote to a mediator by letter dated 15 May 2001, setting out the companies' views on why they did not favour entering into a meca and seeking suggestions on how to move forward.

No further progress was made, the matter remained at a stalemate, and the present application was filed in June 2001.

Determination

Since I conducted the investigation meeting in respect of this matter I have had the opportunity to consider a determination of my colleague in **NZ Amalgamated Engineering etc Union v Independent Newspapers Limited & Ors** (WA 51/01, 3 August 2001, G J Wood). The issues raised by both cases were so similar that the applicant's submissions in this case were identical to those of the applicant in the **INL** case except to the extent minor variations were necessary as a result of differences in the facts.

In both cases the applicant union provided the respondent employers with a full set of claims for a meca and sought to negotiate about all of the claims. In general the respondent employers took the view that they were not obliged to enter a meca and they did not wish to do so. In both cases, in general, the parties sat down at the bargaining table, discussed their reasons for wishing – or not

wishing – to enter into a meca, and because of the nature of their disagreement were unable to proceed to discuss any other points on which the respective unions sought to negotiate. The employer parties saw this as an inability to agree on a matter to which they were not obliged to agree, while the unions saw it as a refusal to engage properly in negotiations and a breach of good faith.

The evidence in this case suggested that the union believed the companies were obliged to negotiate a meca by virtue of the outcome of the ballots held under s 45 of the Act, and of having been cited in the notice initiating bargaining. Much of the view that the companies were not bargaining in good faith can be traced to this belief, particularly as the relationship between the parties otherwise appeared to be reasonably cordial. At the time there was nothing of the tension indicated in the **INL** case.

The scheme of the Act in this respect is that, before initiating bargaining for a meca under s 42, a union must conduct separate secret ballots of its members employed by each employer intended to be a party to the bargaining. When the outcome is in favour of a single collective agreement, then the union may initiate bargaining by giving a notice to each employer in respect of whom the ballot favoured a single document, in accordance with s 42.

Section 31, which sets out the objects of the statutory bargaining provisions, provides:

> "31. The object of this part is –
>
> (a) ….
> (e) to ensure that employees confirm proposed collective bargaining for a multi-party collective agreement."

In turn all parties must abide by the code of good faith approved by the Minister of Labour under s 35 of the Act, in the sense that the Authority may have regard to the code when determining whether parties have dealt with each other in good faith. Other than in terms of the responses required by the obligation to bargain in good faith, the Act is silent on the response required of an employer when responding to a notice initiating a meca.

Finally, s 33 of the Act provides:

> "33. The duty of good faith in section 4 does not require a union and an employer bargaining for a collective agreement –
>
> (a) to agree on any matter for inclusion in a collective agreement; or
> (b) to enter into a collective agreement."

I do not understand anything in that scheme to oblige employers, when responding to a notice initiating bargaining for a meca, to negotiate on the basis that any concluded agreement must be a meca. The provisions associated with the balloting process are neutral in respect of the nature of any agreement that might eventually be concluded, and the purpose of the ballots is to obtain the views of union members concerning whether they wish to be bound by a document which is also binding on members employed by other organisations. In short, the effect of a 'yes' vote is to confer a clear authority on their union to negotiate with employers in addition to their own. This is reflected in s 31(e). In the absence of clear wording to that effect, the requirement to conduct a ballot does not go as far as to give members an effective mandate to determine the level of bargaining through the ballot.

Such a scheme is consistent with the position of the Freedom of Association Committee of the Governing Body of the International Labour Organisation. In the **INL** case my colleague cited the

following extract from the Committee's digest of decisions on complaints brought before it (4th edition, 1996):

> "According to the principle of free and voluntary collective bargaining embodies in article 4 of convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority.
>
> The determination of the bargaining level is essentially a matter to be left to the discretion of the parties. Thus, the Committee does not consider the refusal by employers to bargain at a particular level as an infringement of freedom of association."

I therefore do not accept the generalised submission that the companies failed to respect the union members' rights, including their right to freely associate, organise and bargain collectively.

For the same reasons as my colleague in the **INL** case, I conclude that the issue of whether or not particular companies should be parties to a meca or not is a valid issue on which they may bargain in the course of negotiations following a notice initiating bargaining for a meca. However neither party is under an obligation to agree either on the contents of the associated coverage clause, or to enter into a meca at all.

Turning to the approaches the parties took to the negotiations, the union complained that the companies approached the bargaining process with closed minds on whether they would enter into a meca. If that is true, the union was just as closed to the possibility of entering into any type of agreement other than a meca. The companies believed they were not obliged to negotiate for a meca if they did not wish to, while the union believed the facts of its balloting of members and initiating bargaining for a meca meant that the company was obliged to negotiate for a meca. It stood firm on that position and has shown itself to be no more prepared than the companies may be to change its mind on the matter. Both positions were based on the parties' understanding of the meaning of the Act, but on an appropriate application of the good faith provisions all parties must be prepared to discuss and reconsider their stance.

The union also complained that the companies misled it concerning their intentions to bargain for a meca. It says it believed the companies were prepared to bargain for a meca and the companies disabused it of this belief at the 'eleventh hour'. There was no evidence that the companies expressly indicated to the union that they were prepared to negotiate a meca, and no evidence that they misled or deceived the union on the matter. I do not accept that they did so.

Moreover Mr Conway said that he advised Mr Young in February 2001 that he did not believe the companies would be prepared to bargain for a meca. When that proposition was first put to Mr Young it could not have been plainer that he simply had no recollection of such a discussion. Although he has since then repeatedly denied having such a discussion, it is more accurate to say he has no recollection of it. Even if the conversation did not occur, I consider complaints about an 'eleventh hour' notification of the wish to enter into site-based bargaining amount to the pot calling the kettle black given the lateness of the union's forwarding of the detail of its claims.

Overall, I do not believe there was any breach of good faith in the companies' notification of their wish to enter into site-based or individual bargaining rather than to bargain for a meca.

A third complaint was that the companies refused to meet with the union for the purpose of bargaining. That is not an accurate statement of the companies' position. They met with the union for the purposes of bargaining on 27 April. The outcome was that a fundamental area of difference between the parties was identified. This was not just an issue of who the parties to the agreement should be, but was also an issue as to the content of the coverage clause. The union took the view

that this did not amount to negotiation at all, but I disagree. It then suggested a further date of 11 May for 'negotiations proper'. The companies did not respond by refusing to negotiate – they offered to bargain for site agreements. An approach was then made to the mediation service and subsequently these proceedings were issued. The companies have continued to state they are prepared to bargain collectively, although their preference is for site or individual agreements.

In association with this complaint, the union characterised the companies' responses of 27 April and 7 May as an attempt to dictate the way in which bargaining was to be conducted. I do not accept that is an accurate characterisation. All the companies were doing was stating clearly the kind of agreements they wished to negotiate, just as the union had done. The surrounding discussion and correspondence merely highlights that there was a stalemate, and it is unhelpful to describe that sort of exchange as an attempt to dictate the way in which bargaining should be conducted or as an attempt to raise pre-conditions to the bargaining.

The practical problem in the present case is one of 'where to from here'. The answer to that cannot be better stated than it was in the **INL** case, namely:

> "… it is not until the substance of the initiating party's proposals (and any proposals made by the other parties) have all been considered and responded to that the type and structure of collective agreement(s) can be properly determined. For example, it may well be that detailed consideration of the union's proposals … will clarify whether such proposals are workable and in the interests of all parties. If this were to prove to be the case, then the INL companies may change their position on the desirability of a multi-employer collective agreement. If not, then the union may change its position on the desirability of separate agreements with each company." (p 25)

Orders

It will be obvious from the above recitation of the facts that neither party has responded to the proposals of the other, save on the matter of whether any final agreement would be a meca. The respondents have provided me with a document on a confidential basis which persuades me that the companies have at least considered the union's claims although they have responded only in the limited way already indicated. In that sense they have failed to respond to the union's proposals.

I order that the document headed 'Notes regarding Employment Agreement negotiations with NDU' remain confidential and not be copied or disclosed to any person.

For its part, the union has had nothing to respond to other than the companies' statement of their position on bargaining for a meca.

For the above reasons, I consider it appropriate to order all of the parties to comply with ss 4 and 32 of the Act by:

(a) participating in the bargaining process initiated by the notice dated 20 February 2001;
(b) considering and responding to all proposals put forward in the bargaining process;
(c) engaging in a process of attempting to seek solutions to the issues between the parties, although this order should not be construed as requiring the parties to reach agreement;
(d) approaching collective negotiations with an open mind.

I have no reason to expect that any of the parties will be dilatory in acting in accordance with these orders. However leave is reserved for either party to apply for further orders regarding a timetable for compliance if that proves necessary.

Costs

Costs are reserved.

If the parties wish the Authority to determine the matter they shall have 14 days from the date of this agreement in which to file and serve memoranda on the matter. If either wishes to reply to anything in the memorandum of the other there shall be a further three working days from the date of receipt of the relevant memorandum in which to file and serve such reply.

R A Monaghan
Member, Employment Relations Authority