Determination:AA 313/06
File Number: 5041600

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	National Distribution Union. (Applicant)
AND	Spotless Services Limited. (Respondent)
REPRESENTATIVES	David Fleming for Applicant. Richard Harrison for Respondent.
MEMBER OF AUTHORITY	Ken Raureti
DETERMINED ON THE PAPERS	
DATE OF DETERMINATION	5 October 2006.

DETERMINATION OF THE AUTHORITY

Employment relationship problem.

[1] The National Distribution Union (NDU) represents employees in the retail, entertainment, transport, energy, stores, textile clothing, baking and wood sectors. Spotless Services (NZ) Limited (Spotless) is a provider of outsourced commercial services including cleaning services.

[2] The NDU initiated bargaining for a multi-employer collective agreement covering all employees at the Tachikawa Forest Products Limited wood processing plant. Spotless employs two cleaners at the Tachikawa site. The intended coverage for the collective extended to all employees on site, including the two cleaners employed by Spotless.

[3] Spotless is a party to the NZ Cleaning Contractors Multi-Employer Collective Employment Agreement 2006-2007 (NZ Cleaning Contractors Collective). The Union party is the Service & Food Workers Union (SFWU). The coverage of that collective agreement includes the work of the two cleaners employed by Spotless. The two cleaners are members of the NDU, not the SFWU. The term of the NZ Cleaning Contractors Collective expires on 31 December 2007.

[4] Spotless regards the NZ Cleaning Contactors Collective to which it is a party as the *applicable collective agreement* for their cleaner employees throughout the country, and therefore it says the NDU cannot initiate bargaining earlier than 60 days before the 31 December 2007 expiry date.

[5] The dispute between the parties is whether the NZ Cleaning Contractors Collective is an *applicable collective agreement* for the purposes of s41 of the Employment Relations Act 2000.

Summary of NDU submissions.

[6] The NDU says the dispute essentially turns on the meaning of the phrase *"applicable collective agreement"* when used in the context of s41. It says the phrase relates to an agreement between the intended parties to the bargaining, and which covers the work the proposed bargaining relates to.

It refers to s5 of the Act which says;

In this Act, unless the context otherwise requires,—

> ***applicable collective agreement*** *means the collective agreement that is binding on the relevant union and employer, at the relevant point in time in relation to an employee of the employer who is a member of the union*

[7] It says that a collective agreement can only bind the union which is a party to it. The NZ Cleaning Contractors Collective is not binding on the NDU, as it is an agreement between Spotless and the SFWU. There is no privity of contract between Spotless and the NDU, and neither the NDU nor its members are bound by the NZ Cleaning Contractors Collective.

[8] The NDU refers to and summarises the other sections of the Act where the phrase *"applicable collective agreement"* appears. It says that while it is not aware of any case law defining the phrase within the context of ss 41 or 45, the phrase has been used in a number of decisions of the Employment Court relating to the determination of employees' contractual entitlements. *[Pacific Flight Catering Ltd v Fitzpatrick [2003] 1 ERNZ 192; NZ Amalgamated Engineering Printing & Manufacturing Union Inc v The Christchurch Press, A Division of Fairfax New Zealand Ltd [2005] 1 ERNZ 288 etc]*

[9] The NDU also alerts to a case in a collective bargaining situation relating to early initiation of bargaining for a collective agreement to replace a collective contract, pursuant to s246 of the Act. The NDU says there is no suggestion that the *applicable collective agreement* could be anything other than the agreement that binds the employee concerned, the phrase has been used by the Court to refer to the existing agreement in force between the employer and the particular union involved in the bargaining. [See *Australasian Correctional Management Ltd v Corrections Association of New Zealand (Inc) [2002] 1 ERNZ 175, 183 (CA).*

[10] Under the heading of **Purpose of Part 5 of the Act,** the NDU says that ss 41 and 45 sit within this part of the Act with the object of this part being to provide the requirements of good faith and to "promote orderly collective bargaining".

[11] At s41 of the Act **When bargaining may be initiated,** it says;

> *(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) Subsection (1) applies subject to section 40(2).*
> *(3) If there is an applicable collective agreement in force,—*
> *(a) a union must not initiate bargaining earlier than 60 days before the date on which the collective agreement expires:*
> *(b) an employer must not initiate bargaining earlier than 40 days before the date on which the collective agreement expires*
> *(4) However, if there is more than 1 applicable collective agreement if force that binds 1 or more unions or 1 or more employers or both that are intended to be parties to the bargaining, then—*
> *(a) a union must not initiate bargaining before the later of the following dates:*
> *(i) the date that is 120 days before the date on which the last applicable collective employment agreement expires:*
> *(ii) the date that is 60 days before the date on which the first applicable collective agreement expires:*
>
> *(b) an employer must not initiate bargaining before the later of the following dates:*
> *(i) the date that is 100 days before the date on which the last applicable collective agreement expires:*
> *(ii) the date that is 40 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 for.

[12] Section 45 relates to ***One or more unions proposing to initiate bargaining with 2 or more employers for single collective agreement***

(1) This section applies to—

(a) 1 union proposing to initiate bargaining with 2 or more employers for a single collective agreement:

(b) 2 or more unions proposing to initiate bargaining with 1 or more employers for a single collective agreement.

(2) Before bargaining for the single collective agreement is initiated under section 42, the union or each union (as the case may require) must hold, in accordance with its rules, separate secret ballots of its members employed by each employer intended to be a party to the bargaining.

(3) A secret ballot may be held only if the members of the union employed by the employer are—

(a) not covered by an applicable collective agreement that is in force; or

(b) covered by an applicable collective agreement that is in force and the secret ballot is held not earlier than 60 days before the time within which bargaining may be initiated by the union under section 41.

(4) The result of a secret ballot of members of the union employed by an employer is determined by a simple majority of the members who are entitled to vote and who do vote.

[13] The NDU indicates that where two or more unions initiate bargaining with the same employer within 40 days of each other, the employer may require the unions to either agree to consolidate the bargaining or withdraw their initiation of bargaining. It submits there is nothing in Part 5 of the Act, or in ss 41 or 45 specifically that in any way requires a departure from the s5 definition of "applicable collective agreement".

[14] Under the heading of **General statutory purpose**, it submits that s3 (a) of the Act is (inter alia) to*:*

"(a) build productive employment relationships…….

(iii) by promoting collective bargaining; and

(iv)by protecting the integrity of individual choice…."

[15] It says that in *Australasian Correctional Management Limited* the Court emphasised s246 had to be interpreted in light of these statutory purposes, and that any interpretation that curtailed the ability to bargain collectively, or curtailed employees' freedom of choice, should be avoided. It says that preventing the NDU initiating bargaining on the basis of the existence of another collective agreement that it is not a party to and which does not bind its members would unduly inhibit collective bargaining, and would unduly limit employees' freedom of choice.

[16] At s3 (b) a further purpose of the Act is:

"to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively".

[17] The NDU says that Convention 87 guarantees employees the right to join an employees organisation of their own choosing, while Convention 89 guarantees the right to bargain collectively.

[18] In the wider context, the NDU says it is not uncommon for employers, particularly large employers, to be parties to separate agreements with two or more unions, with potentially overlapping coverage. It says that such scenarios are recognised in the Act itself, including ss 50, 57, 58 & 62.

[19] In conclusion, the NDU says that the words of s5 are clear, unless context requires otherwise, an applicable collective agreement is one between the relevant union and employer, and binding the employees. It says there is nothing in the context of initiation of bargaining that requires departure from this meaning, and there is good reason not to depart from the general statutory definition.

Summary of Spotless' submissions.

[20] Spotless regards the NZ Cleaning Contractors Collective as the applicable collective agreement for their cleaner employees involved in the commercial cleaning contracts throughout the country. This means when a cleaner is employed by Spotless at any of its commercial cleaning sites, including the Tachikawa site, it has to advise employees of the existence of the cleaners' collective, that they can join the Union (SFWU) in order to be bound by the collective agreement and during the first thirty days of employment, new cleaners are engaged on the terms and conditions of the cleaners' agreement that would bind the employee if he or she joins the SFWU: s62 (2) ERA. If any employee elects to join the SFWU, then they are bound by the collective. If the employee elects not to join the SFWU, then employment will continue on an individual employment agreement.

[21] The obligations of Spotless under s62 require it to recognise the cleaners' agreement as the applicable agreement, or potentially applicable collective agreement, in respect of new cleaners employed to carry out contract cleaning work by the company at its commercial sites around the country.

[22] Spotless says the issue is wider than just the Tachikawa site. It has many smaller commercial cleaning sites around the country and employees who elect not to join the SFWU and decide to join and authorise another union to commence bargaining will potentially expose the company to numerous additional collective agreement negotiations with various different unions. This runs counter to the objective of building productive employment relationships, undermines the NZ Contractors Cleaning Collective and affects relationships between the parties.

[23] The relevant section **When Bargaining May Be Initiated** is s41(1) of the ERA which states:

> *"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."*

[24] In this case, it is Spotless' position that there is an *"applicable collective agreement in force between a union and an employer"*; the NZ Cleaning Contractors Collective as between SFWU and Spotless (as well as other employer parties). Spotless says this section does not require there to be an applicable collective agreement as between the union wishing to initiate (the NDU in this case) and the employer, but an applicable collective agreement between *"a union"*, not *"the union"* and *"an employer"*.

[25] Spotless says the reason put forward for this interpretation is primarily one of orderly and productive employment relationship, and one of mutual trust and confidence as, where a collective agreement exists between an employer and union, there is an expectation by both

parties that they will not do anything to undermine the collective and the employer will promote it as required by s62 and other relevant provisions of the ERA.

[26] Spotless says it can then plan ahead comfortably in the knowledge that the collective agreement represents its labour costs and commitments for the period of the collective agreement. Individual employees who elect not to join the union will be on an individual employment agreement, in reality little different from and certainly not more favourable than, the collective agreement. Accordingly, there is no undermining of the collective in the interests of good industrial relations. It says it promotes the collective and also advises of the manner in which employees can join the union and be bound by the collective after the first 30 days of employment in accordance with the Act; this benefits the union and its members. In return, the employer has certainty and stability for the duration of the collective agreement both in terms of labour costs, avoiding industrial action and other activities associated with collective bargaining coercion, and can plan ahead with some confidence.

[27] Spotless also relies on an assessment of *"applicable collective agreement in force",* a meaning which is defined in s41 (5) of the ERA which states:

> *"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 for."*

[28] It says there is in force a collective agreement between *"a union"* and *"an employer"*; SFWU and Spotless. The next limb of the section is important:

> *"… if the agreement binds employees whose work is intended to come within the coverage clause in the collective agreement being bargained for."*

Presumably, the coverage clause of the Tachikawa collective (being bargained for) extends to those undertaking cleaning tasks or engaged as cleaners. This is work that binds Spotless employees who are members of the SFWU and covered by the NZ Cleaning Contractors Collective.

[29] In summary, it is submitted that the provision at s41(1) of the ERA envisages a "greenfield situation" - where an employer is not party to a collective agreement which would cover one or more employees by joining the appropriate union. If the cleaners' collective, for example, were to exclude coverage of sites such as Tachikawa then there would be no issue, membership of the SFWU would not bind them to the collective agreement.

[30] Spotless says that s56 of the Act, **Application of Collective Agreement** gives further weight to the proposition that an applicable collective agreement is one which could bind an employee by membership of the union party to the collective, despite the fact that they have not actually taken this step. This section provides:

> *"A collective agreement that is in force binds and is enforceable by –*
>
> *(a) the union and the employer that are parties to the agreement; and*
>
> *(b) employees –*
>
> *(i) who are employed by an employer that is party to the agreement; and*
>
> *(ii) who are or become members of the union that is a party to the agreement; and*
>
> *(iii) whose work comes within the coverage clause in the agreement."*

[31] The reference at s56(1)(b)(ii) means an applicable collective agreement is one which is enforceable by an employee who, while not currently a member, then chooses to become a member of the union and meets the other two criteria in (i) and (iii).

[32] In the current case, for example, the cleaners employed by Spotless at Tachikawa could enforce the cleaners' collective in their favour by deciding to join the SFWU; they do this by becoming a member of this union and meeting the remaining criteria. The reason that they can do this is that the cleaners' collective is a "collective agreement that is in force", becoming binding and enforceable by membership of the union.

[33] Spotless says the NDU relies on the definition of applicable collective agreement in the preliminary provisions at s5 of the ERA, this being a collective agreement binding on *"… the relevant union and employer, at the relevant point in time in relation to an employee of the employer who is a member of the union"*.

[34] It says this definition has little bearing on s41 as it is provided from the point of view of the employee as to identifying the binding collective agreement, however it does not assist with the meaning of the provision in s41(1) of the Act and whether the reference to *"a union"* in s41 could be different from the union who is attempting to initiate bargaining

[35] Spotless says its interpretation does not exclude another union from initiating bargaining at a particular site and offering employees an alternative service to the existing union, allowing for freedom of association. The issue is simply one of time frame, imposing some order and so avoiding an employer such as Spotless being faced with continual notices for bargaining. Spotless says if unions are able to initiate bargaining in the manner presented by the NDU, then in many ways the consolidation of bargaining provision (s50) becomes meaningless, its very purpose undermined.

[36] Spotless also says there are no cases of which counsel is aware that have dealt expressly with the matter at issue, however there is some support for the view that an applicable collective agreement is one which is ready and available to the employee by simply joining the union that is party to the collective. It says that in *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Timaru Herald***,** a division of Fairfax New Zealand Limited (formerly a division of INL Publishing Limited) 2005 1 ERNZ 30, the Employment Court rejected the proposition that a class of membership of a union that is party to a collective agreement may not be bound by it as the class of membership had not authorised the union to represent the collective interest. In keeping with the objectives of the Act it noted at paragraph 35 (in relation to s56 of the ERA):

> *"S56, by contrast, is a mandatory provision which incorporates the underlying principle "join the union, join the collective'."*

[37] Spotless says it is open to the cleaners at the Tachikawa site at any time to *"join the union, join the collective"*. They could maintain joint union membership in the meantime until the appropriate statutory time frame allows the NDU to also initiate bargaining on their behalf.

[38] Spotless indicates the recent decision in *Epic Packaging Ltd v NZ Amalgamated Engineering Printing & Manufacturing Union Inc* AC, Employment Court, AC39/06, 21 July 2006, serves to strengthen the view that there are restraints on the initiation of bargaining and for good reason - *"bargaining includes both compulsory and coercive elements'* allowing for strike or lock-out action as well as assimilated bargaining provisions which are all very regulated as part of the objective to facilitate and build productive employment relationships.

[39] The issue before the Court in *Epic Packaging* was whether it was open to the union to initiate bargaining to coerce the employer to become a subsequent party to the multi-employer plastics industry collective agreement. This involved consideration of s56A of the ERA and whether this enabled the union to initiate bargaining in order to join a subsequent employer party to a collective agreement that had a significant period of time to run. The Court held that s56A did not allow the union to initiate bargaining under s42 of the Act.

[40] The reasoning put forward by the Court includes the following reference to s41 of the Act at paragraph 77 of the decision:

> *"The Act specifically provides in s41 that, once an 'applicable' collective agreement has been settled, the statutory bargaining process cannot be invoked to bargain for it again until a precise time close to its expiry. In our view, this restriction on fresh bargaining for an agreement which has been concluded reflects an important object of Part 5 of the Act set out in s31(d) which is 'to promote orderly collective bargaining'. To allow the statutory bargaining process to be invoked again in respect to a collective agreement which has already been concluded as such would, in our view, be contrary to that object."*

[41] Spotless says there is no doubt that the prohibition in s41 would prevent, in this case, the SFWU initiating bargaining of the cleaners' agreement before the 60 day period. The *Epic Packaging* decision extends the need for order; in this situation the SFWU could not initiate bargaining with another commercial cleaning company in order to have it join the NZ Cleaning Contractors Collective. Similarly, Spotless could not initiate bargaining with the NDU to have it join the collective in respect of the Tachikawa site without meeting the relevant time frames. The rationale for both these outcomes is the promotion of orderly collective bargaining.

[42] It is submitted that the same rationale applied by the Employment Court in the *Epic Packaging* case applies in this situation, just as an employer could not be required to engage in bargaining initiated by the union to join an applicable collective whose coverage would include its employees, neither should it be open for another union to initiate bargaining where there already exists an applicable collective agreement available to its employees but involving another union.

[43] It is submitted that the object of orderly collective bargaining and collective agreements themselves will be undermined if a union that is not party to a collective agreement is able to obtain one or more members at a particular site where there is in existence a collective agreement and then insist on initiating bargaining under s42 of the Act.

[44] In its concluding remarks, Spotless says the issue for it is primarily one of resources and cost, it is already a party to a large number of collective agreements and in the area of commercial cleaning, would prefer to retain consistency across its sites by observing the terms and conditions of the NZ Cleaning Contractors Collective which it negotiates with the SFWU. This desire in no way does not impinge on any of the objects of the Act nor the various principles found in international conventions referred to in the applicant's submissions

[45] It is accepted that there are instances of employees being parties to separate agreement with two or more unions as submitted by the applicant, with potentially overlapping coverage. This could eventuate in this situation as more than one union can initiate bargaining, providing the time frames in s41 are complied with. This then gives the opportunity for the parties to consider consolidation or other options which would exist during this bargaining process.

[46] The respondent's position is one of maintaining an orderly bargaining process and good faith relationships. The wider precedent effect of the applicant's interpretation is not the advent of overlapping collective agreements, this already occurs with the Act's time frames, but the harmful effect of potential for continuous bargaining that undermines existing collective arrangements.

Key points of both submissions.

[47] Both parties to this dispute have indicated that they are not aware of any case law that defines the phrase *applicable collective agreement* within the context of s41, or that deals with the matter expressly at issue. Having said that though, both the NDU and Spotless have made references to various cases as being useful to have regard for in the overall consideration of the matter. Having the benefit of the parties' submissions, and the opportunity to conduct independent research, I too am not aware of any case law that expressly deals with the current dispute. I thank both Mr Fleming and Mr Harrison for their respective submissions.

[48] The NDU relies predominantly on the interpretation in s5 which says an ***applicable collective agreement*** *means the collective agreement that is binding on the relevant union and employer, at the relevant point in time in relation to an employee of the employer who is a member of the union.* It says that a collective agreement can only bind the union which is a party to it. The NZ Cleaning Contractors Collective is not binding on the NDU, as it is a collective agreement between Spotless and the SFWU. There is no privity of contract between Spotless and the NDU, and neither the NDU nor its members are bound by the NZ Cleaning Contractors Collective.

[49] Spotless on the other hand say there is an *applicable collective agreement between a union (SFWU) and an employer (Spotless).* Spotless says that the section does not require there to be an *applicable collective agreement* between the union wishing to initiate bargaining (NDU) and an employer (Spotless). Spotless indicates that it regards the NZ Cleaning Contractors Collective as the *applicable collective agreement* for all of its cleaner employees involved in commercial cleaning contracts throughout the country, which, it says means that whenever it employs a cleaner, it has to advise the employees of the existence of the Collective, that they can join the Union, etc …. [para 20 & 21]. It says its obligations under s62 require it to recognise the NZ Cleaning Contractors Collective as the *applicable collective agreement*, or potentially applicable collective agreement.

Findings.

[50] Whilst it is clear that certain employer obligations arise out of s62 of the Act, those obligations do not arise out of there being an *applicable collective agreement*. The employer's obligations arise out of it being a party to a collective agreement, or more than one collective agreement covering the work to be performed by the employee.

[51] Section 62 of the Act outlines an employer's obligations in respect of *new employees who are not a member of a union that is a party to a collective agreement that covers the work to be done by the employee; and enters into an individual employment agreement with an employer that is a party to a collective agreement that covers the work to be done by the employee.* It goes on at sub-section (3) to specifically outline an employer's obligations if the work to be done by the employee is covered by more than one collective agreement. S62 anticipates, and makes provision for such situations and requires that where there is more than one collective agreement covering the work to be done by the employee, the employer shall inform the employee of the collective that binds more of the employer's employees in relation to that work, and requires the employer to inform the employee of the existence of the other agreement/s.

[52] Under s56 **Application of collective agreement** it is fundamental that a collective agreement that is in force binds only the union and employer that are parties to the agreement, and employees who are (or become) members of the relevant union party. The parties to the NZ Cleaning Contractors Collective are the SFWU and Spotless. The NDU is not a union party to that collective. The cleaners employed by Spotless are not members of the the SFWU, therefore the NZ Cleaning Contractors Collective is not binding on them. There is no collective agreement in force between the NDU and Spotless.

[53] Is there an *applicable collective agreement* between the NDU and Spotless? The interpretation of ***applicable collective agreement*** is covered in s5, and *means the collective agreement that is binding on the relevant union and employer, at the relevant point in time in relation to an employee of the employer who is a member of the union.* The matter in hand in this case is the bargaining notice, which was initiated by the NDU. The relevant union in this matter is the NDU, the employer is Spotless. The relevant point in time in relation to the employees is the time at which the notice initiating bargaining was given to the employer. At that point in time, they were members of the NDU. There is no collective agreement binding on them. Applying the interpretation pursuant to s5 of the Act, and further reinforced by the

previous findings, it is my conclusion that there is no ***applicable collective agreement*** between the NDU and Spotless.

Determination.

[54] The determination of the dispute between the parties is that **the NZ Cleaning Contractors Multi-Employer Collective Employment Agreement is not an "*applicable collective agreement*" for the purposes of s41 of the Employment Relations Act 2000.**

Costs.

[55] The parties requested that the matter be determined on the papers. The matter was important to both parties, and they agreed that if the matter can be determined on the papers, each will bear its own costs. The matter has been determined on the papers, therefore in keeping with the party's agreement; costs will lie where they fall.

Ken Raureti
Member of Employment Relations Authority