

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** New Zealand Public Service Association (Applicant)  
**AND** Southland Regional Council (Respondent)  
**REPRESENTATIVES** Andrew Dallas for the applicant  
Christine French for the respondent  
**MEMBER OF AUTHORITY** James Crichton  
**SUBMISSIONS RECEIVED** 11 February 2005, 23 February 2005, 4 March 2005, 10 March 2005,  
14 March 2005  
**DATE OF DETERMINATION** 9 May 2005

**DETERMINATION OF THE AUTHORITY**

***Employment Relationship Problem***

[1] This is an application by the Public Service Association (PSA) in respect to a dispute that the PSA has with the Southland Regional Council (The Council) concerning the appropriate application of clause 3 of section 2 of the Southland Local Government Officers Agreement, 1 July 2003 – 30 June 2005 (The Collective Agreement).

[2] The essence of the provision is a requirement that the council notify the PSA of the names and other appropriate details of new employees within 1 week of their joining the council.

[3] The PSA's complaint is that the Council failed to do that and the statement of problem says that the reason the Council failed to do that was because of legal advice which encouraged it in the view that there was a conflict between the relevant provision just referred to in the collective agreement and the Privacy Act 1993(particularly principle 11).

[4] Further, the PSA was also told by the Council (again as recited in the statement of problem) that the PSA was unable to enforce its view of clause 3 of section 2 of the collective agreement because that provision was "at variance" with section 62 (2)(c) of the Employment Relations Act 2000.

[5] The Council's statement in reply identifies 2 bases on which the PSA's claim is to be rebuffed namely a contention that the obligation in the collective agreement is subject to an implied condition requiring the consent of the new employee or in the alternative that the relevant clause in the collective agreement is unenforceable and illegal because it is contrary to principle 11 of the Privacy Act 1993.

### ***The Process for Resolution***

[6] Because of the particular nature of the difference between the parties, it was concluded that a reference to mediation assistance might not assist the parties in their efforts to reach some accord on the matter.

[7] In particular, the respondent Council identified that because its behaviour was based on legal advice, it was difficult to see how mediation could assist the parties given that each was dealing with the matter on principle and with the benefit of competent legal advice.

[8] In those circumstances, I accepted that the parties failure to attend mediation before the matter came to the Authority was in all the circumstances appropriate and I declined to order the parties to mediation.

[9] Further, I determined that I would deal with the matter on the papers as essentially this dispute involves matters of legal interpretation. I thought it unlikely that I would be assisted in my investigation by hearing evidence and the parties' counsel agreed with me.

### ***The Relevant Law***

[10] Section 62 of the Employment Relations Act 2000 sets out the employers obligations in respect to new employees who are not members of the relevant union. The appropriate subsection is subsection 2 and it is set out hereunder in full:

*62(2) [Employer's obligation] At the time when the employee enters into the individual employment agreement with an employer, the employer must-*

*(a) Inform the employee-*

*(i) that the collective agreement exists and covers work to be done by the employee; and*

*(ii) that the employee may join the union that is a party to the collective agreement; and*

*(iii) about how to contact the union; and*

*(iv) that, if the employee joins the union, the employee will be bound by the collective agreement; and*

*(v) that, during the first 30 days of the employee's employment, the employee's terms and conditions of employment comprise-*

*(A) the terms and conditions in the collective agreement that would bind the employee if the employee were a member of the union; and*

*(B) any additional terms and conditions mutually agreed to by the employee and employer that are not inconsistent with the terms and conditions in the collective agreement; and*

*(b) give the employee a copy of the collective agreement; and*

*(c) if the employee agrees, inform the union as soon as practicable that the employee has entered into the individual employment agreement with the employer.*

[11] The Privacy Act 1993 provides a statutory code by which the privacy of individuals is protected. The statute enunciates a series of Principles which guide and inform the central tenets of the Act. The relevant Principle for our purposes is Principle 11 and it is now set out in full:

#### *Principle 11*

##### *Limits on disclosure of personal information*

*An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,-*

*(a) That the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or*

*(b) That the source of the information is a publicly available publication; or*

*(c) That the disclosure is to the individual concerned; or*

*(d) That the disclosure is authorised by the individual concerned; or*

*(e) That non-compliance is necessary-*

*(i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or*

*(ii) For the enforcement of a law imposing pecuniary penalty; or*

*(iii) For the protection of the public revenue; or*

*(iv) For the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or*

*(f) That the disclosure of the information is necessary to prevent or lessen a serious and imminent threat to –*

*(i) Public health or public safety; or*

*(ii) The life or health of the individual concerned or another individual; or*

*(g) That the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern; or*

*(h) That the information-*

*(i) Is to be used in a form in which the individual concerned is not identified; or*

*(ii) Is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or*

*(i) That the disclosure of the information is in accordance with an authority granted under section 54 of this Act.*

### **Determination**

[12] I have been assisted by the erudite submissions which have been filed on behalf of the parties by both counsel.

[13] Notwithstanding the significant gulf between the views of the respective parties, I see the matter clearly.

[14] In my view, The Council cannot be held to be in breach of the collective agreement when it is complying with the terms of the relevant clause in so far as the law allows.

[15] I accept that the Council is providing the personal details of new employees at the commencement of their employment to the PSA whenever they consent. That seems to me to be as far as the law allows them to go.

[16] Ms French, counsel for the Council, argues eloquently for the primacy of Principle 11 in the Privacy Act as being the dominant source of law governing the issue between the parties. I accept that argument but I prefer to base my decision more on the clear words of section 62 (2)(c) which commences with the critical words “if the employee agrees...”.

[17] It is difficult to square those words just mentioned with the provision under dispute in the collective agreement. The collective agreement does not contemplate the consent of the individual concerned yet the statute requires it.

[18] In those circumstances, I am clear that the collective employment agreement cannot override the statutory provision and accordingly the relevant clause in the collective employment agreement must be read subject to the applicable statutory enactment.

[19] That interpretation is supported by the Ms French's quite proper insistence on Principle 11 of the Privacy Act, reliance on which would in my judgement produce the same result.

[20] I am not attracted by the PSA's argument that the Privacy Act's Principles are not enforceable in a court of law because it seems to me axiomatic that if I were to issue a compliance order requiring the respondent council to conform to the strict terms of the provision in the collective agreement as negotiated, the Council might then be confronted with a compliance order issued out of the Human Rights Tribunal.

[21] I am also unmoved by the implication from the PSA's argument that simply because the respondents Council has agreed in negotiation to provide this information to the PSA and recorded that in 2 successive collective employment agreements, it should be required to continue to provide such information even where that agreement is plainly in breach of a statutory obligation.

[22] I accept that the situation as it exists is an unsatisfactory one. It is not for the Authority to try discern the motivations of parties to collective employment negotiations. One can only assume that the statutory obligation imposed on parties such as the respondent Council by the Privacy Act, and imposed on both parties by the effect of section 62 (2)(c) of the Employment Relations Act was overlooked when this matter was negotiated.

[23] Accordingly, I decline to find that the respondent is in breach of clause 3 of section 2 of the Southland Local Government Officers Agreement 1 July 2003 to 30 June 2005 and I make no declaration or impose any compliance order as the applicant has requested that I do.

[24] Plainly, the provision in contention cannot be allowed to stand in its present form and ought to be the subject of negotiations between the parties at an early date.

[25] In that regard, I note that the relevant document expires by the passage of time on the 30<sup>th</sup> of June this year.

[26] Costs are reserved.

James Crichton  
Member of Employment Relations Authority