

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 291
5326539

BETWEEN

IAIN THOMPSON
First Applicant

JOHN NEALE
Second Applicant

RANIER LAGOCKI
Third Applicant

AND

NORSKE SKOG TASMAN
LIMITED
Respondent

Member of Authority: Dzintra King

Representatives: Lou Yukich, Advocate for Applicants
Kylie Dunn, Counsel for Respondent

Hearing: 24 February 2010 at Rotorua

Affidavit evidence from Messrs Thompson and Lagocki 3 March 2011

Submissions Received: 7 and 23 March 2011 from Applicants
17 March 2011 from Respondent

Determination: 6 July 2011

DETERMINATION OF THE AUTHORITY

[1] The applicants, Messrs Iain Thompson, John Neale and Ranier Lagocki contend that the respondent, Norske Skog Tasman Limited (“NSTL” or “Norske Skog”) has breached s 4 Wages Protection Act 1983 and unjustifiably disadvantaged them.

[2] The applicants are members of the Eastern Bay Independent Industrial Workers Union 1995 Inc (“EBIIWU” or “the Union”). They were employed as Control System Tradesmen in the Maintenance Response Team (“MRT”).

[3] The most recent collective employment agreement expired on 7 February 2009. The applicants were employed on individual employment agreements based on the expired collective. NSTL and the EBIIWU have been bargaining for a new collective agreement since February 2007.

[4] On August 25 2010 members of the EBIIWU withdrew their labour in support of their bargaining claims. However, the MRT shift personnel remained on alternative duty to provide essential and emergency services. The applicants say this was a longstanding arrangement and that in return for providing essential services the MRT employees received their normal wages.

[5] As of 10 November 2010 the MRT workers received reduced amounts of wages. The respondent says that the work performed by the applicants during the strike was less than 5% of their ordinary work. The applicants do not dispute that they did not carry out full duties but do dispute what percentage of time was spent carrying out essential services work.

[6] Mr Yukich asserted that the MRT staff were not on strike, were not suspended and were not locked out and that the deductions from their wages were contrary to the agreement reached with the employer to provide essential services in such circumstances and contrary to custom and practice.

[7] The applicants say there is no basis for the respondent to reduce their wages.

[8] The applicants seek payment of arrears of wages and compensation humiliation and distress. They also seek a penalty in respect of each employee for breach of s 4 Wages Protection Act 1983.

[9] The issues for determination are:

- Should affidavit evidence filed by Messrs Thompson and Lagocki after the conclusion of the investigation meeting be accepted?
- Were the applicants on strike?

- Was there an agreement that NSTL would pay the applicants full salary during the strike?
- Was NSTL obliged to pay full salary during the strike?
- What remedies should be awarded?

Background

[10] NSTL operates a paper mill in Kawerau. Aside from shutdowns, it operates 24 hours a day, 7 days a week, 365 days of the year.

[11] The primary focus of the Maintenance Response Team was to provide a breakdown service.

[12] The roles of the three applicants were disestablished with effect from 7 January 2011. Mr Neale's last day was 25 December 2010, Mr Thompson's was 5 January and Mr Lagocki's 7 January 2011.

[13] NSTL contends that the applicants have been on partial strike since 25 August 2010 and that following consultation it reduced the applicants' salaries to reflect the actual work they were performing during the partial strike.

[14] On 25 August 2010 EBIIWU members employed by the respondent commenced strike action. Mr Yukich sent an email to Mr Bishop advising the Union members had reluctantly withdrawn their labour and that MRT personnel would remain on site to provide emergency and essential services cover.

[15] On 26 October 2010 Mr Christopher Bishop, the Human Resources Manager, wrote to Mr Yukich saying that the company had in good faith and in anticipation of a short stoppage continued to pay full wages notwithstanding the partial strike. The MRT staff had indicated and confirmed that it was a partial strike by declining to work the majority of their normal tasks remaining on standby for emergency and essential services. Mr Bishop stated that the company had reviewed the appropriateness of the undertaking to pay full wages in light of the prolonged nature of the dispute and would be reducing the wages paid by 80%. He went on to say that the company did not need MRT staff to attend the site when on shift but they were

welcome to do so if they wished. At the beginning of their shifts MRT personnel were to ensure their contact details were lodged with the Norske Skog Safety and Access Team so they could respond to a call to attend the site within 60 minutes. This letter was to enable the EBIIWU to provide feedback prior to the updated arrangement being implemented as from 1 November.

[16] Mr Yukich replied by stating that the company was proposing a variation of contract.

[17] Mr Mark Haslam, the Human Resources Advisor in the Maintenance Area, responded by saying that the company was not proposing a variation of contract but responding to the current partial strike action.

[18] On 1 November Mr Bishop wrote to Mr Yukich saying the salary reduction to \$550 per week would commence on 2 November. That rate would also apply to day workers providing MRT coverage.

[19] On 8 November Mr Bishop emailed Mr Yukich saying the company did not believe it was prevented from ceasing or adjusting wages during a full or partial strike either by contract or any other form of agreement. Mr Yukich replied saying:

It has evidently escaped your attention but MRT personnel are not on strike, we have an agreement with NTSL to a variation of duties for MRT when day workers take strike action.

[20] The respondent says this is the first time Mr Yukich or the EBIIWU had stated that MRT employees were not on strike.

[21] On 28 October in an email to Mr Haslam Mr Yukich asserted that Ms Sharon Scott, the previous Human Resources Manager, had in 2006 insisted that MRT members of the Union were required to remain on duty in the event of a lawful strike and would receive full pay for doing so. Mr Yukich said Ms Scott had said that if MRT withdrew their labour NTSL would have to shut the mill down, which would mean that Carter Holt Harvey would also have to shut the pulp mill and no one wanted that to happen.

[22] Mr Haslam said he was unaware of any agreement regarding a variation to the duties of the applicants during strike action by other EBIIWU workers. The first he had heard of this was the assertion by Mr Yukich on 8 November. Ms Scott had not mentioned such an agreement to him.

[23] Mr Haslam accepted that on at least six occasions when the EBIIWU had taken strike action MRT staff had remained on duty to provide essential services cover and had been paid their full wages. A very small part of MRT work fell within the definition of an essential service. EBIIWU had to give 14 days' notice of strike action but such notice had not been given. Prior to 25 August all the strikes by the EBIIWU had been of short duration – less than 14 days. MRT employees provided essential services cover and the company elected not to reduce their pay, but did not consider it had an obligation to pay full wages.

[24] During the period of the strike EBIIWU day shift staff remained on strike with regard to all their duties. The MRT employees attended the site but were located within NSTL's Workplace Safety and Access Team (security) at the company's front gate. Before they started strike action the applicants had been based at the MRT workshop onsite. They did not carry out their normal work.

[25] Mr Haslam deposed that while the company had been advised that MRT employees would be available for emergency and essential service work that did not prove to be the case. On the few occasions that an emergency had occurred or there had been essential work to be done the applicants had assessed whether it was necessary or not.

[26] In November 2010 NSTL announced a proposal to contract out the work performed by the MRT staff. The EBIIWU and the redundant employees filed an application in the Employment Court seeking an injunction to restrain the redundancies. Each of the applicants was a plaintiff in the Employment Court proceedings. The documents filed in the Employment Court indicated that the applicants were on strike and had been since 25 August. The Statement of Claim states that the second plaintiffs have been on strike since 25 August 2010 in support of their claims. Mr Shakes' affidavit states that Union members determined to withdraw

their labour on 25 August in support of their claims in bargaining. Mr Shakes referred to himself as a “*striking worker*”.

[27] When I asked Mr Yukich whether he maintained that the MRT workers had not been on strike, he replied that that was correct. I then asked how he could reconcile that view with the Statement of Claim and Mr Shakes’ affidavit in the Employment Court proceedings. He responded that there were different circumstances.

[28] Clearly, the applicants could not be on strike for the Employment Relations Authority proceedings yet be on strike for the Employment Court proceedings.

[29] I noted that if the workers were not on strike then the issue of whether there was an agreement regarding variation whilst a partial strike existed was irrelevant.

Late evidence

[30] The applicants were to file evidence by 27 January 2011. Evidence from Messrs Neale and Shakes was filed in accordance with the timetable as was Norske Skog’s evidence. Mr Thompson attended the investigation meeting but Mr Lagocki did not. The applicants seek to file affidavits from Messrs Thompson and Lagocki. I have not been given any reason why this evidence could not have been filed prior to the investigation meeting. It appears Mr Lagocki was intending to attend but was called away to a job interview in the day.

[31] The respondent asks that the late affidavits are not accepted.

[32] Insofar as Mr Thompson’s affidavit evidence is concerned, apart from the evidence regarding lost wages I will not accept it.

[33] Mr Lagocki is very fortunate that I have decided not to dismiss the matter. However, I do not intend to accept evidence from him on any matter other than that regarding wages, which is readily verifiable.

Were the applicants on strike?

[34] Section 81 (1) Employment Relations Act 2000 sets out the definition of a strike. The notice given by the EBIIWU on 25 August set out that its members were on strike and that MRT personnel would remain on site to provide emergency and essential services cover. The applicants did not perform the entirety of their normal duties. They were present on the site for part of the time but they did not work.

[35] In *NZ Labourers etc IUOW & Ors v Fletcher Challenge Ltd & Ors* [1988] 1 NZLR 520 the Court of Appeal held that a partial discontinuance of employment by employees meant that the definition of a strike was met.

[36] The second element of the definition of a strike is the intention of the applicants. The applicants were acting in concert with a common understanding

[37] The applicants were not ready and willing to carry out their normal work in its entirety.

[38] The applicants were participating in a partial strike from 25 August 2010 till 7 January 2011.

Agreement that applicants would be paid full salary

[39] Para 8 of the amended Statement of Problem asserts that the applicants were not on strike but that there was an agreement between Norske Skog and The EBIIWU that the applicants' duties were varied. The agreement was ostensibly to the effect that the applicants would perform only essential services and emergency work during a strike by other EBIIWU members and that they would not be on strike but would receive their full salaries.

[40] Both Ms Scott and Mr Haslam deposed that they had no knowledge of such an agreement. Mr Shakes confirmed that payment of full salaries was not discussed during any discussions he had participated in with Ms Scott or Mr Haslam.

[41] I accept the respondent's submission that there was no evidence of any such agreement.

[42] Mr Shakes and Mr Neale gave evidence that MRT employees had been paid while performing essential services or emergency work in the past but this was not evidence regarding an agreement per se.

[43] None of the applicants had any first hand knowledge of an agreement regarding full payment of wages for carrying out partial work.

[44] Even if there had been a past agreement, the applicants would need to show that it formed part of their terms and conditions.

[45] The EBIIWU was incorporated on 4 May 2000. There was no evidence regarding when the parties started dealing with each other but it would appear that it must have been at some stage between Norske Skog's incorporation and the commencement of the expired collective agreement – 1 July 2002. Norske Skog is a separate legal entity from the applicants' previous employers.

[46] Furthermore, if there had been a custom and practice regarding payment of full salaries that would not have been binding on Norske Skog as clause 1.2 of the expired collective provides that that agreement "*supersedes all prior negotiations, representations, understandings, customs, practice and other agreements or arrangements*".

[47] The expired collective was agreed on 20 November 2008. I heard no evidence of a strike after 20 November in relation to which the applicants were paid their full salaries for carrying out part of their jobs.

[48] The applicants cannot rely on custom and practice. Any custom and practice existing prior to the expired collective is not binding on the parties.

Was Norske Skog obliged to pay full salary during the partial strike?

[49] The applicants claim that if they were on strike there was no basis upon which to reduce their salaries and that the reduction was a breach of s 4 Wages Protection Act 1983.

[50] They assert that employees are paid for work performed unless they are on approved leave. The applicants were not approved leave.

[51] I accept the respondent's submission that when *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd (No 3)* 2007 was appealed to the Court of Appeal the Court of Appeal did not overturn the Employment Court's assertion that employees who are on strike are not entitled to wages.

[52] Section 4 Wages Protection Act 1983 provides that, subject to s 5(1) and 6(2) wages are to be paid when they become payable. If employees are on strike, that is, a total strike, and are not working at all, then wages are not payable.

[53] Section 87 (3) provides that an employee who is suspended is not entitled to any remuneration. Section 96 provides that an employer is not liable for wages during a lockout.

[54] The applicants say that during a partial strike an employer has a choice between accepting partial performance and suspending striking employees.

[55] In *Postal Workers Association v NZ Post Ltd* (2007) 8 NZELC 98,918 the Authority considered whether NZ Post Ltd was able to deduct money from striking postal workers without having suspended the workers. The postal workers delivered only some of the mail assigned to them and reposted the rest of their allocated mail by placing it in public post boxes along the delivery routes. Once the employer became aware that mail had been reposted it took steps to suspend the workers.

[56] The postal workers only partially performed their duties. Their part performance broke a term of their employment agreement to a strike.

[57] In that determination the Authority discussed the issue of abatement, found in common law, and concluded that this doctrine could not be applied because it was inconsistent with the statutory scheme in New Zealand.

[58] At para [41] the Authority stated that to apply abatement would seem to be inconsistent with the principle underlying s 85(1)(c)(i) Employment Relations Act 2000 whereby a worker cannot be sued for damages for breach of an employment agreement; and that to apply the abatement doctrine would mean that apart of the benefit of what was otherwise an immunity from civil suit for striking workers would be lost.

[59] To apply the abatement doctrine would be inconsistent with the provision for suspension of striking workers.

[60] The respondent was not entitled to deduct wages from the applicants.

[61] Even if this conclusion is incorrect, the respondent was still unable to deduct wages in the manner it did. It deducted wages according to an arbitrary assessment of the work carried out. No records were kept and the employer cannot show that the deductions accorded with the work not being carried out.

Remedies

[62] Pursuant to s 11 Wages Protection Act 1983 the applicants are entitled to recover the deductions made from their wages.

[63] Mr Neale is to be paid \$12,674.05.

[64] Mr Thompson is to be paid \$11,504.70.

[65] Mr Lagocki is to be paid \$10,711.00.

[66] Clause 11 Schedule 2 provides that payment of interest may be ordered at the rate prescribed in s 87 (3) Judicature Act 1908. As of 1 July 2011 that rate is 5%. The interest to run from 2 November 2010 until the date of this determination.

[67] Penalties have been sought. I decline to award penalties as the particular circumstances of this case do not warrant an award of penalties.

[68] I accept that the applicants were disadvantaged by the failure to pay them their full wages. However, the evidence given by the applicants about the effect of the disadvantage was the same; and Mr Lagocki's was contained in his late affidavit and forms part of the evidence which I do not accept. I decline to make an award of compensation.

Costs

[69] If the parties are unable to agree the issue of costs the applicants should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicants' memorandum.

Dzintra King

Member of the Employment Relations Authority