

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 131/08
5104344

BETWEEN UNITE! UNION
 Applicant

AND MPA INVESTMENTS
 LIMITED t/a McDONALDS
 KAIAPOI
 Respondent

Member of Authority: Philip Cheyne

Representatives: Peter Cranney, Counsel for Applicant
 Eska Hartdegen, Counsel for Respondent

Investigation Meeting: 12 and 13 June 2008 at Christchurch

Further information: Email dated 29 August 2008 from Respondent

Determination: 29 August 2008

DETERMINATION OF THE AUTHORITY

Introduction

[1] Two different but related problems were lodged with the Authority in October 2007. In both statements of problem the respondent was initially identified as *Pat Cornish McDonalds Kaiapoi*.

[2] As well as responding to each problem the respondent raised its own claim against Unite, one of the applicants. By consent the identity of the respondent was amended to reflect the employer's legal identity, MPA Investments Limited. The company operates the business McDonalds Kaiapoi. Its directors are Patrick and Ann Cornish and they own nearly all the company's shares. As well as being the company's principals Mr and Mrs Cornish manage the company's business. For convenience, I will refer to the employer as McDonalds Kaiapoi.

[3] By agreement there was one consolidated investigation meeting during which we canvassed the evidence and submissions for Chantelle Coup's claims against McDonalds Kaiapoi, Unite's claims against McDonalds Kaiapoi and McDonalds Kaiapoi's claims against Unite.

[4] To assist me to focus on the issues relevant to the separate problems, I have decided to issue two determinations. To some extent it is artificial to separate the problems in this way and a fuller understanding of the context of this determination can be had by referring also to the other determination.

The statement of problem and statement in reply

[5] In June 2007 Unite recruited a number of members who worked at McDonalds Kaiapoi. Union fee deduction forms were sent to McDonalds Kaiapoi but the company did not commence deductions promptly.

[6] In July 2007 most of the new Union members resigned. Unite says that McDonalds Kaiapoi intimidated Union members. Further, Unite says that McDonalds Kaiapoi breached ss.7 and 11 of the Employment Relations Act 2000. These provisions make it unlawful for a person to exert undue influence intended to induce any person to resign from a Union. Initially McDonalds Kaiapoi simply denied the claims of intimidation and undue influence and set out its view of the relevant facts. The reply also referred to the involvement of McDonalds Restaurant (New Zealand) Limited managers in the dispute.

[7] Counsel for McDonalds Kaiapoi sought a direction to mediation on a specific date and supported that with a letter that canvassed information about earlier attempts to resolve Ms Coup's and Unite's problems, including mediation. During a telephone conference the parties agreed to return to mediation. The matters did not settle.

Counter-claim

[8] During a second telephone conference arrangements were made for an investigation meeting. Counsel foreshadowed McDonalds Kaiapoi's intention to lodge a counterclaim against Unite. I was told that the claim was based on events outside and/or after the mediation. However, when the counterclaim was lodged with the Authority, much of it referenced apparently without prejudice settlement discussions and mediation events. Unite sought to have the counterclaim struck out.

[9] After hearing from both counsel I directed that Unite need not respond to most of the facts alleged in the counterclaim. They clearly reference events during and related to mediation and/or of a without prejudice nature. What remains on foot is McDonalds Kaiapoi's assertion that the Union acted in bad faith over its handling of both employment relationship problems against McDonalds Kaiapoi's essentially by involving McDonald's head office.

[10] To resolve these claims I must set out fully the relevant events and resolve various evidential conflicts.

Union recruitment

[11] Unite employed Caroline Hearst to recruit Union members at various work sites. Ms Hearst visited McDonalds Kaiapoi on 15 and 16 June 2007. She spoke to individual employees who were released from their duties for a short time and she managed to get about 20 staff to complete Union membership forms which included a Union fees deduction authorisation. Ms Hearst had a well rehearsed spiel about the benefits of Union membership which included giving each person a pamphlet and a business card or relevant contact details for the area Union organiser. Part of this spiel included information about better rates of pay available at competitor fast food outlets and promotion of the idea that joining the Union would help achieve similar rates of pay at McDonalds Kaiapoi.

[12] There are several criticisms of Ms Hearst in the evidence of McDonalds Kaiapoi. The first is that Ms Hearst did not give the new members any detail about how to contact the Union. However, three staff members who joined the Union (Garth Squires, Chantelle Coup and Zara Anderson) say in evidence that they did receive a pamphlet and/or a business card. Ms Hearst's evidence is that she gave out pamphlets and cards or wrote down contact details if she ran out of cards. There is no reason to doubt that this was done by her as part of her routine when recruiting the Union members at McDonalds Kaiapoi.

[13] The second criticism is that Ms Hearst offered prospective members a free computer if they joined the Union. The Unite pamphlet refers to a strategic partnership with Te Wananga O Aotearoa which offers courses, including one where the student gets free use of a computer at home. Ms Hearst's evidence is that she had lost some faith about whether the course would proceed so she did not sign up

anyone, instead offering to take names for later contact. Again, there is no reason to doubt Ms Hearst's evidence about this.

[14] Mr Cornish gave evidence about his *feeling that staff were pushed into signing up* to the Union. His evidence is also that staff thought that they would get a free computer by joining the Union. He says in evidence that it *doesn't seem right ... free stuff is like a bribe*. Mr Cornish also says in his evidence that he was sticking up for *people being bullied into joining*. Mr Cornish's evidence about Ms Hearst's discussions with staff is hearsay. I do not accept that Ms Hearst *bribed, pushed, or bullied* anyone into joining the Union.

[15] The final point about Ms Hearst's recruitment drive concerns her evidence that she formed the view that the new franchisees (Mr and Mrs Cornish) were not as good employers as the previous owners of the business. That evidence is by way of explaining the surprising success from the recruitment visits. Mr and Mrs Cornish naturally take exception to that evidence. Mrs Cornish told me of Ms Hearst's comment to her at the time about how happy the staff seemed while Mr Cornish provided information after the investigation meeting to establish that only two of the Union members recruited by Ms Hearst worked for the previous owners. This is not a case about whether Mr and Mrs Cornish are good employers in some general sense or should be regarded as better or worse than the previous owners of the business. Even if it was, Ms Hearst's opinion is of little value to the Authority. I will proceed on the basis that her opinion, while no doubt genuinely held, is mistaken.

[16] Ms Hearst forwarded her recruitment forms to the Union's head office in Auckland who in turn faxed the Union fee deduction authorisations to McDonalds Kaiapoi's manager (Matt Hall) on 29 June 2007. It seems that there were several attempts at faxing the information but it is not disputed that the forms were received by McDonalds Kaiapoi on or about 29 June 2007.

[17] Evelyn Gates is the Human Resources Director for McDonalds Restaurants (New Zealand) Limited. Thonia Brooks is McDonalds Restaurants (New Zealand) Limited's Human Resources Manager and reports to Ms Gates. Theirs is an information and advisory role to support franchisees such as Mr and Mrs Cornish. Ms Brooks' evidence is that she advises franchisees to commence Union fee deductions in the pay period immediately following receipt of an authorisation form. That is part

of a wider understanding between McDonalds head office and Unite about the management of their relationship.

[18] Matt Hall was McDonalds Kaiapoi's trainee restaurant manager at the time. He was effectively second-in-charge after Mr and Mrs Cornish. When Mr Hall received the faxed authorisation forms on or about 29 June 2007 he put them in a basket for Mr Cornish to deal with. Mr Cornish was away at the time but returned in early July 2007. Even after his return Mr Cornish apparently did nothing with these forms for some weeks. No satisfactory explanation has been given for this state of affairs.

The first notice

[19] The evidence of McDonalds Kaiapoi about the sequence of events following the receipt of the faxed authorisations is muddled. Mrs Cornish gave evidence that she and Mr Cornish were in Australia between 23 June and 5 July 2007. That included attendance at a McDonalds' conference on the Gold Coast. Mr and Mrs Cornish and Mr Hall all say that Mr Cornish spoke to Mr Hall by phone during that conference and told him to put up a notice giving the Union's address for staff who wanted to resign from Unite. Mr Hall and Mr Cornish say this resulted from staff members' earlier approaches to them both about how to resign.

[20] Mr Hall was emphatic that he created and posted the notice within an hour or so of Mr Cornish's instruction. There is no reason to doubt Mr Hall's evidence about that timeframe. He says that the first notice was displayed for about four days before it was replaced by a second notice. It is certain that Ms Coup saw the notice on 24 and 25 July 2007 and that the first notice was replaced by a second notice by 27 July 2007. Since the first notice was originally displayed in late July, it could not have been the direct result of any instruction from Mr Cornish to Mr Hall during the time of the Gold Coast conference. Accepting that there probably was some phone discussion between Mr Hall and Mr Cornish during the time of the Gold Coast conference, that must have been about the receipt of the authorisation forms. It therefore remains unclear why nothing happened to implement the Union fee deduction forms.

[21] It is helpful to set out the text of the first notice:

To all Unite members

Can all of you please see me about resigning from the Union as I need you to fill out a piece of paper saying you wish for no payment to come out of your wages.

You are also required to send a letter informing the Union that you wish to resign from Unite Union.

Their address is as follows:

*Unite House
300 Queen Street
PO Box 7175
Wellesley Street
Auckland 1141*

This needs to be done before the wages are completed this week or your deduction will start.

*Thanks,
Matt*

[22] Joe Davies is a Unite union organiser based in Christchurch. On or about 24 July 2007 Mr Davies spoke to Mr Cornish by phone. By that time Mr Davies was aware of the first notice. During their discussion, Mr Cornish told Mr Davies that since the 29 June faxes staff had been approaching him wanting to resign from the Union; that on advice from McDonalds head office he had told staff they needed to give notice in writing not to start Union fee deductions; and that Mr Hall has spoken with staff to ascertain whether they wanted to join the Union or not.

Mr Hall speaks with staff

[23] There is considerable controversy in the evidence about Mr Hall's exchanges with staff about their union membership. The reasons for my findings in respect of the exchange between Mr Hall and Ms Coup on 25 July 2007 are set out in the other determination. To summarise, Mr Hall told Ms Coup he needed her to write a letter resigning from the Union but she told him that she did not want to resign. Mr Hall asked why she had joined and Ms Coup said that her partner thought it was a good idea. Mr Hall then said that the lady recruiting union members was lying and they were just trying to get money from Ms Coup. Ms Coup then put to Mr Hall what Ms Bishop had reported Mr Cornish as saying about pay rises and promotions. Mr Hall

denied that but Ms Coup was not convinced by his denial. Mr Hall went on to say *well if you're in the union it's just proving to both me and Pat that you don't trust us.*

[24] Garth Squires worked at McDonalds Kaiapoi at the relevant time. He joined Unite after speaking to Ms Hearst. His evidence is that Mr Hall asked him if he had joined the Union and why. He says that Mr Hall called him into the office alone. There, Mr Squires told Mr Hall that he joined to get higher wages. Mr Squires' evidence is that Mr Hall told him that he did not need to join the Union, that McDonalds would increase his pay anyway and that signing up to the Union showed a lack of loyalty to Mr Cornish and McDonalds. In response, Mr Squires said that was not his intention and he could resign if Mr Hall wanted. Mr Hall said *good* or something similar. Mr Squires impressed as a reliable witness and I accept his evidence about his exchanges with Mr Hall.

[25] Previously undisclosed documents held by McDonalds Kaiapoi included handwritten letters from staff asking that Union fees not be deducted. There is one written by Mr Squires. His evidence is that he wrote this a couple of days after the exchange with Mr Hall. However, Mr Squires also says that he did not resign from the Union. After Mr Davies learnt of the first notice he endeavoured to contact the Union recruits by phone and sent an email. Mr Davies approached Mr Squires and must have secured his continued membership.

[26] Several current employees of McDonalds Kaiapoi also gave evidence about joining the Union and then resigning. Ms Bishop joined on 16 June 2007. She says she resigned about a month later after having spoken to her mother. Her evidence is that she did not see the first notice as exerting any pressure on her to resign. She says that she spoke to Mr Hall to get the Union's address and later had a discussion with Mr Cornish who confirmed it would not be a problem if she stayed as a Union member. Her evidence is that she wrote to the Union but got no response. There are two handwritten notes by her amongst the previously undisclosed documents, one dated 9 October 2007 asking McDonalds Kaiapoi to cease deductions. The undated letter was rewritten by her at Mr Cornish's request. As noted elsewhere, Ms Bishop is fiercely loyal to Mr and Mrs Cornish and her evidence supporting the notion that McDonalds Kaiapoi did not exert undue influence needs to be treated with some caution. However, there is no reason to doubt her evidence that her mother questioned whether there was any purpose in her belonging to the Union.

[27] Zara Anderton still works at McDonalds Kaiapoi. In her statement Ms Anderton said that she understood the notice to simply convey the Union address for those who wanted to resign, that she did not and she remained a member for a few months. When questioned Ms Anderton said that she asked Mr Hall for the Union address, Mr Hall said he would put up a notice and the notice went up *pretty much the same day*. She also said that she wrote a resignation letter *a week or two* after the notice went up. Her handwritten resignation letter is one of the previously undisclosed documents.

[28] Carrie-Ann Gardner is now a trainee manager having worked in other capacities at McDonalds Kaiapoi. She is a mature woman. Her evidence is that she has never liked Unions. She told Ms Hearst that she was not interested in joining the Union. Her direct evidence about Ms Hearst did not support McDonalds Kaiapoi's criticism of the recruitment campaign. In evidence, Ms Gardner proffered an opinion about the effect of the notice and her view that others felt pressured by Ms Hearst to join the Union. I place little weight on this opinion and hearsay evidence.

[29] Janie Kirk still works for McDonalds Kaiapoi. She joined the Union on 15 June 2007. Mr Davies records her as saying to him on or before 27 July 2007 that she had heard nothing about resigning from Mr Cornish or Mr Hall and was definitely staying with the Union. Ms Kirk's evidence is that *as attitudes changed people started saying they were going to resign. Then rumours started to come that you wouldn't get bonuses or pay rises*. Ms Kirk's evidence is that she spoke to her parents and then Mrs Cornish about resigning from the Union. She got the Union's address from the notice and wrote a letter of resignation a day or two after speaking with Mrs Cornish. Mrs Cornish agreed that she and Ms Kirk spoke about her resigning from the Union but neither of them could recall any detail of their discussion except for Ms Kirk asking what Unions do. Ms Kirk is a similar age to Ms Coup.

[30] Mr Hall's evidence is that he can specifically recall Larissa Becks, Savannah Irvine and Janie Kirk telling him they wanted to resign from the Union. They had joined in mid June 2007. Mr Davies records Ms Irvine telling him or about 27 July 2007 that she would probably leave the Union but was thinking about it. Amongst the previously undisclosed documents are undated notes apparently written by Ms Becks and Ms Irvine indicating their intention to resign from the Union and asking that money (Union fees) not be deducted from their pay.

[31] Something more needs to be said about the previously undisclosed resignation letters. There are 14 similarly worded handwritten notes. One is dated 20 July 2007, two are dated 21 July 2007 and the remainder are not dated. There is no reason to doubt the accuracy of those that are dated. There are four other notes written by some of those who wrote the original 14. These four notes are dated September or October 2007.

[32] The 14 similar worded notes reflect the words used by Mr Hall in his first notice. The dates on some of these 14 notes, the similar wording contained in them and the connection between that wording and the first notice leads me to conclude that the 14 resignation notes resulted from Mr Hall's first notice and/or the discussions he had with at least some of these staff members. This indicates that the first notice was posted by 20 July 2007. As noted, its existence came to Unite's attention via Ms Coup on or about 24 July 2007.

Unite's response to the first notice

[33] As noted Mr Davies spoke to or left messages for and sent an email to as many of the union members as he could within a few days of learning of the existence of the notice. Mr Davies also reported events to Unite's National Director (Mike Treen) who in turn contacted David Munro.

[34] Mr Munro is an experienced HR practitioner who works for Teesdale Associates Limited. Teesdale Associates is engaged by McDonalds Restaurants (New Zealand) Limited to manage McDonalds' relationship with Unite and conduct wage negotiations. Mr Munro is the Union's principal point of contact concerning relationship issues. Mr Treen sent an email to Mr Munro at 9.30am on Wednesday 25 July 2007 setting out Mr Davies' concerns following his first phone call with Mr Cornish about the Union membership issue. Mr Munro relayed this information to Ms Gates and Ms Brooks.

[35] Mr and Mrs Cornish are now scathing about the role of Mr Munro, Ms Gates and Ms Brooks in events. Their evidence is that they feel betrayed by their role. Those feelings seem to be part of the motivation for the counterclaim against Unite, thinking that would give an opportunity for the facts to be canvassed.

[36] There is an email dated 30 July 2007 from Mr Munro to Mr Treen that reads (in part):

Hi Mike,

I have left a message for you to call me, but in the meanwhile, for the record, I can advise that I have rarely heard Evelyn Gates as angry as she was in my telephone conversation with her earlier today. We are very supportive of your position; Evelyn is unaware of anything particularly problematic about the Joe Davies approach, and to say that she is 'profoundly' disappointed about Pat's behaviour and approach, would be an understatement.

From time-to-time we have to deal with renegade tendencies amongst the odd franchisee and this is one of those occasions. Pat has not been following the Head Office advice and guidance and we are working to ensure that he begins to.

[37] The communications from Mr Munro such as that just quoted were designed to mollify Unite so care needs to be taken not to read some of the statements too literally. It is clear that there was an element of spin to the text of Mr Munro's emails.

[38] The head office involvement was in the context of limiting the potential harm to the wider relationship between Unite and McDonalds generally, especially in light of earlier industrial action. Whether or not this contributed to Mr and Mrs Cornish's feelings of betrayal is immaterial for present purposes.

[39] As noted, Mr Davies attempted to phone and email as many of the Unite members as possible in the first few days after learning about the notice. Mr Davies then personally visited the workplace on Sunday 29 July 2007. Ms Gardner was present in a supervisory role. Mr Davies explained the purpose of his visit but Ms Gardner initially declined to let him talk to staff. Mr Davies insisted. Ms Gardner then rang Mr Cornish and there followed a phone exchange between the two men. There is some conflict in the evidence about this.

[40] I should mention Ms Gardner's evidence that Mr Davies was *sleazy*. Mr Cornish's evidence is that she told him that Mr Davies *is just hanging around and he seems really creepy*. The gist of Ms Gardner's view is clear despite the slight differences in the description. The evidence says more about Ms Gardner's attitude to Mr Davies as a Union official than it does about Mr Davies' conduct at the workplace. There was nothing improper about his behaviour at McDonalds Kaiapoi on 29 July 2007.

[41] Mrs Cornish apparently listened to the call on speaker phone. Mr Davies was not aware of this at the time. Mr and Mrs Cornish say that Mr Davies became aggressive without provocation. Mr Davies says that Mr Cornish became angry and hostile. There is a specific dispute about whether Mr Cornish threatened legal action, whether he said *see how many members you've got by the end of the week*, and whether he accused Mr Davies of acting unlawfully by promising pay rises if people joined the Union.

[42] The most reliable evidence about this exchange is to be found in a report written by Mr Davies soon afterwards. It reads (in part):

I went out there this afternoon. When I arrived, the staff were very nervous. The duty manager promptly phoned the franchisee while I was talking to an employee about the Union. (She was very nervous about talking to me and seemed on edge during the entire conversation.) The franchisee asked to speak to me over the telephone and after the usual pleasantries began to become abusive. He told me I had to ring him before I came to the restaurant and said that I wasn't allowed to take anyone away from their duties (the restaurant was practically empty). I told him he wasn't allowed to encourage our members to leave the Union and that he had broken the law when he did that. He said I had broken the law by promising his employees a pay rise. (I have only ever promised to try and get them a pay rise.)

He said that he would be taking the matter further, threatened legal action against the Union and finished with 'See how many members you've got by the end of the week'. There is no doubt in my mind that this was a threat made against our members.

Anyway, I tried several times to pull the thing out of the fire and get back on some kind of professional footing with the guy, but he insisted on a fight, and that's how it was left in the end.

[43] I find that this note is an accurate summary of the phone call between Mr Davies and Mr Cornish. By the time of this exchange, Mr Cornish had most, if not all, of the handwritten resignation letters in his possession. He also knew something of Mr Davies' attempts to contact the Union members but had a measure of confidence that Mr Davies was meeting limited success. This finding is based on Mr Cornish's record of a text exchange between himself and Ms Becks on 26 July 2007. Mr Cornish's note of this text exchange is one of the documents that was disclosed by McDonalds Kaiapoi during the course of the investigation meeting. Because by the time of this second phone call with Mr Davies, Mr Cornish knew that a substantial majority of the Union members were resigning and because of the escalating disagreement between them during the call, it is likely that Mr Cornish made the

comment recorded by Mr Davies in his report *see how many members you've got by the end of the week*. I take the note *abusive* to mean that Mr Cornish attempted to stipulate the conditions under which Mr Davies could visit the work place rather than Mr Cornish using abusive language.

[44] There was a third phone call between Mr Davies and Mr Cornish, probably on 29 July 2007. Mr Davies' purpose was an attempt to reopen some dialogue after the earlier difficult exchange and Mr Cornish reciprocated in that approach. During this third phone discussion, Mr Cornish asked about Unite's objection to the notice. Mr Cornish read out the wording of the second notice. It reads:

To all Unite members

If you are wishing to resign from the Union

Their address is as follows:

*Unite House
300 Queen Street
PO Box 7175
Wellesley Street
Auckland 1141*

This needs to be done before the wages are completed this week or the deductions will start.

You are not required to leave the Union.

*Thanks,
Matt*

[45] Mr Davies said that this was not the objectionable notice. On Mr Cornish's evidence, this was the first he knew of the existence of an earlier notice with different wording. He says that he then spoke to Mr Hall and learnt that Mr Hall had amended and replaced the first notice in response to a query from a staff member asking if she had to resign. At that point Mr Hall realised the first notice could be read to have an unintended meaning and he changed it on the computer, thereby over writing the computer file containing the wording of the first notice. Mr Hall then posted the second notice on or about 27 July 2007.

[46] There is significant difficulty with the notion that Mr Cornish knew nothing of the wording or existence of the first notice until his third phone conversation with Mr Davies on or about Sunday 29 July 2007. First, there is the general point that it seems unlikely that Mr Cornish was so remote from what was happening in his business in

respect of an important issue. Secondly, there is the indication in Mr Treen's 25 July 2007 email to Mr Munro that Mr Cornish knew by then that a resigning member had to give written notice about leaving the Union and not wanting Union fee deductions to start. This reflects the text of Mr Hall's first notice and the 14 written similarly worded resignation notes. The evidence of Ms Gates and Ms Brooks points to there having been a conversation between Ms Brooks and Mr Cornish about Union fee deductions and the like in the week prior to 30 July 2007. Indeed, Ms Brooks believes that her advice contributed to the redrafting of the notice and it is certain that the second notice was posted by 27 July 2007. Mr Hall's evidence is that he was not aware of McDonalds' policy about Union fee deductions and that he told those employees who first approached him that he did not know what needed to be done for them to resign. However, Mr Hall's first notice gives specific detailed instructions. That information that must have come from somewhere, but Mr Hall could not explain where. The most likely source is Mr Cornish who got it either from Ms Brooks, or from discussions Mr Cornish says he had with other McDonalds' operators while on the Gold Coast. I do not mean to imply that Ms Brooks had any say in the drafting of the first notice to which objection is taken by Unite. Ms Brooks also says that she told Mr Cornish that he had to commence Union fee deductions in accordance with McDonalds' policy. That explains why the first notice says *This needs to be done before the wages are completed this week or your deduction will start*. Mr Cornish knew that he had to cover the problem potentially caused by his inaction.

[47] From all this I find that Mr Cornish probably was aware of the text of the first notice when he spoke to Mr Davies on 24 July 2007 and certainly knew of it prior to their exchange on Sunday 29 July 2007. What Mr Cornish did not know when he spoke to Mr Davies was that Ms Coup had photographed the notice.

[48] The emails involving Mr Munro, Ms Brooks, Ms Gates and Mr Treen showed that arrangements were eventually made for an offsite meeting without loss of pay for interested staff to hear from Mr Cornish first and then have an opportunity to speak with the Union. This meeting on 13 August 2007 was attended by only four staff members. There is some disagreement in the evidence about whether Mr Cornish willingly or reluctantly agreed to the meeting. The point is not important.

[49] There continued to be disagreement between Unite and McDonalds Kaiapoi about the validity of the original hand written resignations. There is some evidence to

the effect that several of those who gave the handwritten notes to McDonalds Kaiapoi also sent resignation letters to Unite which were ignored. However, these issues about who was in and who was out of the Union were eventually resolved. Most of the originally recruited members resigned from the Union in late July 2007 or soon after.

Legal issues

[50] The statement of problem asks for declarations that McDonalds Kaiapoi has breached ss.7 and 11 of the Employment Relations Act 2000 and seeks awards of compensation, punitive and/or exemplary damages and other orders deemed just. However, at the beginning of the investigation meeting, counsel for Unite summarised the nature of the remedies sought in respect of each application. For this matter he affirmed the claim for declarations about breaches of ss.7 and 11, withdrew the claims for compensation and damages and other relief and continued the claim for costs.

[51] The object of the Employment Relations Act 2000 is to build productive employment relationships through the promotion of good faith in the employment relationship by (inter alia) acknowledging and addressing the inherent inequality of power in employment relationships and promoting the integrity of individual choice. Section 4 requires those in an employment relationship to deal with one another in good faith. Sections 3 and 4 just mentioned are key provisions of the Act. Part 3 of the Act deals with freedom of association. The object of Part 3 is to establish that employees have the freedom to choose whether or not to be members of a Union and to establish that no person may apply undue influence on another over Union membership or non membership. Section 11 prohibits persons from exerting undue influence with the intention of inducing another person to cease to be a member of a Union. The significance of this provision in the scheme of the Act as a whole is marked by liability to a penalty for any person who contravenes it.

[52] In *Eketone v. Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783, the Court of Appeal said the following:

Undue influence is a concept well known in the law, somewhat flexible of meaning according to the context. It aptly focuses upon improper exploitation of inequality between people in their dealings which equity and conscience will not condone. I see no reason to give it any different meaning in the Employment Contracts Act.

It cannot be doubted that certain employees are vulnerable to influence from strong employers and might readily submit to

influence exerted directly or in subtle ways. It is important to ensure that in such cases their freedom to choose is assured and is not interfered with by undue influence. That is best done by dealing with particular circumstances as they arise when the true nature of the relationship can be assessed in conjunction with particular conduct said to deny the freedom to choose. That is a more sensitive instrument for achieving a proper balance between the competing rights in the imposition of a legal presumption of undue influence in all cases.

[53] There is no reason to doubt the relevance of this passage under the present Act. In that context I note *NZ Dairy Workers Union Inc v NZ Milk Products Ltd* [2004] 1 ERNZ 376 where the Court of Appeal said referring to the present Act:

For s.11 to apply, there must be undue influence exerted and with the intention of inducing a person to become or remain a member of a union. It follows that there is nothing wrong with exerting influence, unless it is undue and has the requisite intent.

[54] In *New Zealand Educational Institute v State Services Commissioner* [1997] ERNZ 381 a full bench of the Employment Court said:

...it cannot be said that undue influence has been exerted unless it has resulted in any persons to whom it has been applied (assuming that it has been) acting under the goad of that influence against their will.

[55] From this I must look to whether undue influence was exerted on anyone by McDonalds Kaiapoi, whether that was done with the requisite intent and the subjects acted *under the goad of that influence*. It is convenient to start with the nature of the influence that was exerted by McDonalds Kaiapoi.

[56] In part, the position for McDonalds Kaiapoi is that they simply provided information to employees in response to approaches from employees asking about how they could resign from the Union. I reject this position as a complete explanation of what happened although it may be true or partly true in respect of some employees. On 26 July 2007 Mr Cornish said in a text message to Ms Becks *That's why I stuck up for everyone by asking them again.* (my emphasis). Mr Cornish was more guarded when he told Mr Davies on 24 July about Mr Hall speaking with staff to ascertain whether they wanted to join the Union. The evidence of Ms Coup and Mr Squires is unequivocal about Mr Hall's approach. Finally the first notice conveys much more than information about how to resign. What happened was the Mr Cornish had Mr Hall go around the staff and Mr Hall attempted to talk them into resigning. Mr Cornish also spoke to some staff but there is no reliable evidence about those exchanges.

[57] Most if not all of the McDonalds Kaiapoi staff spoken to by Mr Hall were *employees [who] are vulnerable to influence from strong employers and might readily submit to influence*. They had no guaranteed days or hours of work. They were young and inexperienced. Against that, Mr Hall was in a position of significant influence over their work, Mr Cornish was a father figure and McDonalds Kaiapoi part of a large and powerful organisation. In the context of such relationships it would not take much to cross the line from lawful to unlawful influence amounting to interference with freedom of choice. The first notice itself comprised an unlawful interference with these employees' freedom of choice. Mr Hall's approaches as evidenced by Ms Coup and Mr Squires also comprised an unlawful interference with their freedom of choice. Mr Hall and Mr Cornish went beyond any permitted influence.

[58] I find that these things were done with the intention of inducing staff to resign from the Union. To some extent McDonalds Kaiapoi attempts to explain the first notice and Mr Hall's approaches to staff by distancing Mr Cornish from these actions and saying that they simply wanted to find out who wanted to remain as a union member. For the reasons explained above I do not accept that as an accurate account of what happened. The truth is apparent from the first part of Mr Cornish's text message to Ms Becks as follows: *I think they talked everyone into joining and maybe even pushed some into joining. That's why I stuck up for everyone* It also emerges from the text of the first notice which directs Union members to resign. There is Mr Cornish's evidence that Ms Hearst *bribed, pushed, or bullied* staff into joining the Union. Finally, there is Ms Gates' evidence that Mr Cornish was *very upset given so many of his team joined the union. He was upset about it as he sees them as his family and he did not understand why they had done so*. In his evidence Mr Cornish's downplays his upset but I prefer Ms Gates' evidence. From all this I find that Mr Cornish through Mr Hall's actions intended to induce resignations from the Union.

[59] There is some difficulty with the *NZEI* requirement of establishing that subjects acted *under the goad of that influence*. There are obvious difficulties for Unite tracking down former Union members who may have been subjected to undue influence but no longer work for McDonalds Kaiapoi. Former Union members still employed at McDonalds Kaiapoi who gave evidence tended to disavow any influence from their employer as a reason for their resignations. I recognise the uneasy position they may be in but the wording in their resignation notes suggests a causative link with the first notice. I do not have a resignation note by Ms Kirk, but there is her

evidence about the change in attitude and the concerns of other staff (not herself) that pay rises might be adversely affected by union membership. For present purposes I need go no further than Ms Coup and Mr Squires. The undue influence contributed to Ms Coup's resignation from her employment and therefore from the Union and Mr Squires wrote one of the 14 resignation notes. At least to that extent the *NZEI* requirement is satisfied on the evidence available.

[60] It follows from the above analysis that McDonalds Kaiapoi breached s7 and s11 of the Employment Relations Act 2000.

Breach of good faith

[61] Counsel for Unite argued that McDonalds Kaiapoi's actions constituted a breach of good faith. A breach of the freedom of association provisions such as the present one will inevitably constitute a breach of good faith. The obligation on McDonalds Kaiapoi under s.4(1A)(1)(b) was to be active and constructive in establishing and maintaining a productive employment relationship between it and Unite. McDonalds Kaiapoi was active but destructive of their employment relationship.

[62] I was not asked to order any remedy against McDonalds Kaiapoi for the breach of good faith.

[63] It is convenient under this heading to deal with McDonalds Kaiapoi's counter claim against Unite. A penalty is claimed for breach of good faith. For the most part the factual basis for the complaint relies on events connected to mediation and without prejudice communications. The claim cannot succeed without admissible evidence.

[64] There is complaint about Ms Hearst's recruitment methods but none of Mr Cornish's views are sustained on the facts. There are complaints about Unite's apparent failure to process resignations but those are issues (if at all) between the individual members and Unite. Finally, any issues between McDonalds Kaiapoi and McDonalds Restaurants (New Zealand) Limited are not justiciable in the present proceedings if at all before the Authority.

[65] One more point raised by McDonalds Kaiapoi should be mentioned. There are submissions to the effect that the Wages Protection Act 1983 operated here to support or even require the employer's actions. I am referred to *NZ Dairy Workers Union Inc.*

That case concerned the lawfulness of an arrangement between a union and an employer to deduct a bargaining fee from the wages of non union members wanting the same terms and conditions as were enjoyed by union members under a collective agreement. The Court of Appeal accepted that written consent for deductions under the Wages Protection Act meant consent that was freely given and not the result of improper exploitation of inequality of bargaining power. The Union fee deduction authorisations given in the present case were not the result of any improper exploitation of bargaining power on the part of the Union and Mr Cornish had no reasonable basis for doubting the legitimacy of the faxed authorisations. The Wages Protection Act was not material to Mr Cornish's thinking at the time and does not assist now.

Future relationship

[66] I was asked by counsel for Unite to give some guidelines for the future should similar problems arise, regardless of the outcome of the instant case.

[67] I am confident that McDonalds Restaurants (New Zealand) Limited has more than sufficient capacity to give guidance to any of its franchisees but there is no evidence that the present dispute extends beyond McDonalds Kaiapoi and perhaps is limited to the events in 2007. Nothing more of a general nature should be said by the Authority.

Summary

[68] McDonalds Kaiapoi breached s.7 and s.11 of the Employment Relations Act 2000.

[69] McDonalds Kaiapoi's counter-claims against Unite are dismissed.

[70] Costs are reserved. Any claim for costs should be lodged and served within 14 days and the other party may have 14 days to lodge and serve a reply before the Authority fixes what if any costs award should follow.

Postscript

[71] Because my conclusions from the evidence overall caused me to reject the notion that Mr Cornish was absent from New Zealand when the first notice was posted I sought more information through counsel about timing issues. Counsel for

McDonalds now tells me that computer records show the first notice was created on 20 July 2007 and modified on 26 July 2007. Counsel also confirms the dates of Mr and Mrs Cornish's absence from New Zealand as 23 June 2007 to 5 July 2007.

Philip Cheyne
Member of the Employment Relations Authority