

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 192
5347408

BETWEEN

UNITE UNION
INCORPORATED
Applicant

AND

FIRST SECURITY GUARD
SERVICES LIMITED
Respondent

Member of Authority: Dzintra King

Representatives: Mike Treen, Advocate for Applicant
Stephen Langton, Counsel for Respondent

Hearing: 15 February 2012

Submissions received: 22 and 29 February 2012 from Applicant
27 February 2012 from Respondent

Determination: 5 June 2012

DETERMINATION OF THE AUTHORITY

[1] The applicant, Unite Union Incorporated (“Unite” or “the union”) alleges that there has been a breach of good faith by the respondent, First Security Guard Services Limited (“FSGS” or “the company”). The Union says the Company passed on union-negotiated terms of settlement to employees who are not union members without the agreement of the Union.

[2] The Union has a collective employment agreement with the company for staff employed in its Prison Escort and Court Custodial Services (“PECCS”). On 1 February 2010 the parties entered into a collective employment agreement (“CEA”) which expired on 31 January 2011. Negotiations for a new CEA commenced on 29 April 2011.

[3] Mr David Seadon, the Manager of PECCS, said the company had wanted to start bargaining earlier so it could conclude its review of pay rates for all employees. The previous increase for individual employment agreement (“IEA”) employees had taken effect on 1 February 2010 and those employees were expecting an increase in February of 2011. The company decided to put the pay review for IEA staff on hold until after the collective bargaining had been concluded. They did this because they wanted to be able to ensure IEA staff could be offered the same pay increase that would be offered to CEA employees. Mr Seadon said that with a small staff it was important to ensure that staff were paid ‘like pay for like work’, or friction would be generated.

[4] At the first meeting the parties signed a Bargaining Process Agreement (“BPA”). Mr Seadon said that he and Mr Mulholland (then involved in the negotiations) made it clear the company wanted to offer any negotiated pay increase to non-union staff in order to maintain a pay equity approach whereby all employees with the same length of service would receive the same pay rate.

[5] Agreement was not reached on 29 April. On 4 May Mr Minto emailed saying the members had rejected the company’s offer. He proposed a counter offer of a 4% pay increase backdated to 1 February 2011, a \$2 an hour allowance for guards escorting maximum security prisoners (“the Maxi allowance”) and no pass on of those terms to non-union members.

[6] On 17 May the company made a counter offer and signalled its intention to make a comparable pay offer to IEA staff. At that stage no back pay was included.

[7] On 18 May an offer of 4% with backdating to 1 February 2011 was made.

[8] When the parties met again on 19 May the company made it clear that it would make a comparable pay increase offer to IEA staff but agreed that would not include the same offer in terms of back pay.

[9] On 19 May Mr Minto and the delegates reported back to members. The offer was rejected and the union was instructed to obtain a resolution that day before the union members would start work.

[10] The company agreed to a 4% pay increase backdated to 1 February, an increase and extension of the Maxi allowance and provision of long service leave. It was agreed in the terms of settlement that they would “*not be automatically passed on to non-union members.*” The terms of settlement also included a provision that “*First Security signals its intention to make a comparable pay offer to non-union staff with effect from 1 June 2011.*”

[11] On 1 June Mr Seadon wrote to all IEA staff advising them of the 4% increase along with the \$450 compensation payment, which was said to be a payment made as compensation (“the compensation for lateness payment”) for the delay in having an offer made to them. That was a greater sum than many union members received as back pay, which ranged from \$253.40 to \$529.32, depending on the member’s pay rate and the number of hours they had worked for the back pay period.

[12] IEA staff were not offered the back pay, the maxi allowance or long service leave. Some staff contacted Mr Seadon regarding the offer.

[13] Some members did resign from the union. The evidence was that there was dissatisfaction with the manner in which negotiations had been handled, particularly the fact that staff did not start work as normal on 19 May and were docked pay as a result.

[14] The issue for the union is not the fact that IEA staff were given a pay increase; it is that the union sees the compensation payment as being the same as or substantially similar to the back pay and the payment of money to the IEA staff is seen as passing on, which was not agreed and as a breach of good faith,

Section 59B

[15] Section 59B (1) provides that it is not a breach of the duty of good faith in s 4 for an employer to agree that a term or condition of employment of an employee not bound by a collective agreement should be the same or substantially the same as a term or condition in a collective agreement that binds the employer.

[16] Section 59B (2) deals with passing on once a collective employment agreement has been concluded. Subsection (2) requires both that the passing on took place with the intention of undermining the collective agreement and that the effect of the passing on was to undermine the collective agreement.

[17] A major issue is whether the \$450 compensation for lateness payment was substantially the same as the agreed backdating to 1 February 2011 of 4% for union members.

[18] The compensation for lateness payment was a form of back pay. The back pay payments averaged \$418.46. The closest payments to the amount of \$450 were \$454.05, \$445.84, and \$454.39.

[19] In *National Distribution Union Inc v General Distributors Ltd* [2007] ERNZ 120 the Employment Court discussed the meaning of substantial sameness. In that case the Court found that the wage increase given to non union employees was not the same or substantially the same as a term or condition in the collective employment agreement.

[20] The offer made by General Distributors Limited offer was an overall 5.2 percent increase for Countdown staff and an overall increase of 5 percent for all other supermarket staff. That increase equated to an average of between 54 and 57 cents per hour. This was less than the flat rate of 60 cents per hour negotiated by the Northern Distribution Union. The 60 cents per hour was the equivalent of a 5 percent increase only for those employees who had previously been paid \$12 per hour. There were only a few staff who fell into that category. Employees who earned less than \$12 per hour gained a lesser increase than did those employees who earned more than \$12 per hour.

[21] The applicant submitted that the facts in *NDU* were complex and that case should be distinguished from the relatively simple and different facts in this case.

[22] Following the reasoning in *NDU* I conclude that the compensation payment and the back pay are not substantially the same. The purpose of the payment is, if not the same, then certainly substantially the same. However, the amounts paid are not.

[23] Even if the payment had been the same or substantially the same there would be no breach unless the passing on was done both with the intention of undermining the collective and the collective was in fact undermined.

Undermining

[24] In *NDU* the Court discussed the concept of intention at length. It concluded that intention to harm need not be the primary purpose but had to be a concurrent or activating purpose; that if the undermining was an incidental, even if a known or foreseen consequence of an employer's act of omission or commission done for some other purpose, that would be insufficient to establish the necessary intention to undermine. Additionally, recklessness concerning the consequences of an act or omission that might have the effect of undermining might not be sufficient to establish the employer's intention to undermine.

[25] At para [110] the Court accepted the submission that s 59B (2) was not concerned with undermining the union, its ability to attract members or to bargain or conduct bargaining for a future collective agreement but was concerned solely with the undermining of an extant collective agreement.

[26] The company did not make an offer to IEA staff with the intention of undermining the union but with the intention of trying to ensure that all workers were remunerated in a similar fashion and to compensate for the delay in receiving the wage review. That evidence was not contested.

[27] In reaching the conclusion undermining had not taken place in *NDU* the Court considered the provisions of s 59B (6).

[28] At para [144] the Court held that "bargaining" by unilateral offer intended to be accepted or rejected was a well-established and recognised feature of the creation and variation of individual employment agreements and was not unlawful. In the current case the minimum legal requirements of bargaining for an individual employment agreement were met by FSGS. FSGS invited individuals to approach their managers regarding specific concerns and that is sufficient to meet the expectation of "bargaining".

[29] The second criterion to be considered is whether the employer consulted the union in good faith before agreeing to the term or condition of employment. At para [146] in *NDU* the Court said there had been no evidence of attempts at concealment or evidence of anti union sentiment. FSGS bargained with the union and signalled its intention to provide non union staff with a comparable pay increase. Mr Seadon said that at the meeting with the union on 18 May he had made it clear that the company intended to make a comparable pay offer to IEA staff but that would not include the same offer in respect of back pay. In an email to Mr Mulholland dated May 19 Mr Minto wrote *'however it is important to say we'd expect the company to hold the line on the back pay issue for non-union members at least to the extent we discussed this morning.'*

[30] The proposed terms of settlement included a no pass-on provision: *The parties agree that without attempting to influence the outcome of individual bargaining the terms of settlement will not be automatically passed on to non union members.'*

[31] There was also a provision headed **Matters covered by letter of intent** which provided: *"First Security signals its intention to make a comparable pay offer to non union staff with effect from 1 June 2011."*

[32] FSGS signalled its intention clearly and cannot be said to have failed to consult.

[33] A further consideration is the number of employees bound or covered by the CEA as opposed to those not bound or covered. In *NDU* at para [156] the Court concluded that undermining the collective could not consist solely of reducing the potential number of employees covered by the collective. On the evidence, any reduction was minimal.

[34] There was no intention to undermine the collective and the collective was not in fact undermined.

[35] While the union's concern regarding the compensation payment is understandable the making of the payment cannot be said to constitute a breach of good faith.

[36] Clause 35A of the CEA was not breached.

[37] There was no breach of s 9 (1) (b) Employment Relations Act 2000.

Costs

[38] The respondent is to file a costs' memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority