**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2011] NZEmpC 33**
**ARC 18/11**

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| | IN THE MATTER OF | proceedings removed from the Employment Relations Authority |
| | BETWEEN | TERTIARY EDUCATION UNION<br>Plaintiff |
| | AND | CHIEF EXECUTIVE, WESTERN INSTITUTE OF TECHNOLOGY<br>First Defendant |
| | AND | CHIEF EXECUTIVE, UNITEC NEW ZEALAND<br>Second Defendant |
| | AND | CHIEF EXECUTIVE, WHITIREIA COMMUNITY POLYTECHNIC<br>Third Defendant |
| | AND | CHIEF EXECUTIVE, NORTHLAND POLYTECHNIC<br>Fourth Defendant |
| | AND | CHIEF EXECUTIVE, BAY OF PLENTY POLYTECHNIC<br>Fifth Defendant |
| | AND | CHIEF EXECUTIVE, WAIKATO INSTITUTE OF TECHNOLOGY<br>Sixth Defendant |
| Hearing: | 28 March 2011<br>(Heard at Auckland) | |
| Court: | Chief Judge G L Colgan<br>Judge B S Travis<br>Judge A A Couch | |
| Counsel: | Peter Cranney, counsel for plaintiff<br>Sherridan Cook and Aaron Harlowe, counsel for defendant | |
| Judgment: | 14 April 2011 | |

## JUDGMENT OF THE FULL COURT

[1] This judgment interprets and applies for the first time in this Court the law relating to collective bargaining where affected employees do not wish to bargain for a single collective agreement with a group of employers. The proceeding, which needs to be decided urgently because collective bargaining is stalled, was removed for hearing in this Court by the Employment Relations Authority under s 178 of the Employment Relations Act 2000 (the Act) on 9 March 2011.[1]

[2] The relevant uncontroversial facts can be stated quite shortly. The Tertiary Education Union (the Union) represents employees of six defendant polytechnics and institutes of technology (ITPs) in the North Island. Since 18 March 2004 the Union or its predecessors and the six defendants have been parties to a series of multi-employer collective agreements (mecas), the last of which came into force on 1 June 2010 and expired on 30 November 2010.

[3] On 7 December 2010 the six ITPs collectively initiated bargaining for a single meca by giving notice to this effect under s 42 of the Act. As bargaining was initiated by the defendants after the expiry of the former meca, their initiation notice did not have the effect of extending the term of the expired meca under s 53 of the Act.

[4] The Union believed that its members at the six ITPs would not wish to be covered by a single collective agreement and accordingly conducted secret ballots of its members at those institutions under s 46(b) of the Act to determine whether the members favoured bargaining for a single collective agreement with the named employers. The question voted on was that referred to in s 46(b), "whether the [union] member is in favour of bargaining for a single collective agreement with [the six ITPs]" although not in those precise words. No issue is taken with the adequacy of the ballot's question under s 46(b).

[1] [2011] NZERA Auckland 89.

[5] A majority of members at all six ITPs voted against a single multi employer agreement and, on 11 February 2011, the Union both advised the individual ITPs of that outcome and purported to initiate bargaining for single collective agreements (secas) between itself and each of the individual ITPs. The Union did so on the basis that the bargaining initiated by the ITPs collectively on 7 December 2011 had come to an end as a result of the outcome of those secret ballots and that the Union was then free in law to initiate bargaining with each of the ITPs individually.

[6] The ITPs collectively disagreed, claimed that the Union was obliged to continue to bargain with them and asserted that the purported initiation of bargaining by the Union with each of them individually was an unlawful cross initiation of bargaining. All collective bargaining has ceased pending a resolution of the legal position in these proceedings.

## Section 47(6) of the Act

[7] The section of the Act at the heart of this case is s 47 and, in particular, subs (6) of that section. The material parts of s 47(6) (with our underlined emphases) are:

> **47 When secret ballots required after employer initiates bargaining for single collective agreement**
>
> (1) This section applies to—
>
> ...
>
> (b) 1 or more unions in relation to which 2 or more employers have initiated bargaining for a single collective agreement.
>
> ...
>
> (6) At the conclusion of the secret ballots, <u>bargaining for a single collective agreement may continue</u>,—
>
> …
>
> (b) <u>where subsection (1)(b) applies, if the members of the union</u> …
>
> (i) <u>have voted in favour of bargaining for a single collective agreement with the 2 or more employers;</u> or
>
> (ii) are considered by the union or each union, as the case may be, to be in favour of bargaining for a single collective agreement with the 2 or more employers; or
>
> (iii) both.

[8] While it is immediately clear from s 47(6) what the consequence of a ballot in favour of bargaining for a single meca is to be, the subsection does not provide explicitly for the consequence of a negative ballot. We must therefore ascertain the meaning and effect of s 47(6) in that context.

[9] The starting point must be section 5 of the Interpretation Act 1999 which provides:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[10] In applying that provision, we also have regard to what the Supreme Court (Tipping J) said in *Commerce Commission v Fonterra Co-operative Group Ltd*:[2]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.
>
> ...
>
> [24] Where, as here, the meaning is not clear on the face of the legislation, the court will regard context and purpose as essential guides to meaning. ...

## Collective bargaining initiation – the scheme of the legislation

[11] As with other provisions of the Act relating to the process of collective bargaining, those parts of the statute governing its initiation do not apply equally to unions (and their members) and employers. Unions and their members are deliberately advantaged in some respects and employers restricted in others.

[2] [2007] 3 NZLR 767 (SC).

Although employers are entitled to initiate bargaining for a collective agreement with a union or unions, there are two important statutory constraints upon their doing so.

[12] First, and not in issue in this case, employers can only initiate for 'replacement' collective agreements, not new ones: s 40(2) of the Act. Second, in the case of 'replacement' collective agreements, unions are given a 20-day head start to initiate bargaining under ss 41(3) and 41(4) of the Act. An employer or employers can only initiate if a union or unions do not do so in that period. These advantages give unions the ability to set the initial agenda for bargaining and to define the consequential and sometimes onerous obligations which arise from it. Employers can only take the initiative in that way if unions have not taken their statutory opportunity to initiate bargaining first.

[13] Similarly, union members have unique rights to control bargaining for a multi-party collective agreement. Again, not immediately in issue in this case, s 45 of the Act provides that before multi-party collective bargaining is initiated by a union or unions, their members must be balloted. Similarly, s 47 provides for the views of union members to influence employer initiated bargaining for a multi party collective agreement.

[14] These provisions are consistent with s 31(e) which declares that one of the objects of Part 5 of the Act is to:

> "ensure that employees confirm proposed collective bargaining for a multi-party collective agreement".

[15] It is significant that s 31(e) does not distinguish between union initiated bargaining and employer initiated bargaining. The objective is that any proposed multi-party collective bargaining must be acceptable to a majority of affected employees.

[16] Section 48 removes the balloting requirements for both union initiated and employer initiated multi party collective bargaining if the collective agreement proposed is, among other things, intended to replace a collective agreement that is

"in force". The parties are agreed that is not the situation in this case because the employers initiated bargaining after the previous collective agreement expired.

[17] The one arguably pro-employer provision relating to the initiation of collective bargaining is s 50 which enables an employer who receives more than one notice initiating bargaining in respect of the same work, to require bargaining to be consolidated. That provision has no application to this case.

## Case for the plaintiff

[18] The plaintiff's case is that, in this legislative context, the purpose of s 47(6) is to give a majority of affected union members power to prevent any multi-party collective bargaining taking place where this has been initiated by an employer or employers. Focussing on the words of s 47(6), Mr Cranney, counsel for the plaintiff, submitted that the corollary of a positive ballot enabling such bargaining to continue is that a negative ballot must bring bargaining to an end. In its simplest terms, his argument was that, as the statute provides that bargaining "may continue" if there is a positive ballot, the fact that there is a negative ballot must mean that bargaining may not continue.

[19] On the assumption that this primary argument about the meaning and effect of s 47(6) is correct, Mr Cranney submitted that the Union was entitled to initiate bargaining with each individual ITP as it purported to do. Although the Act does not expressly prohibit further initiation of bargaining between parties already engaged in bargaining (cross initiation), the full Court in *Service & Food Workers Union Nga Ringa Tota Inc v Auckland District Health Board*[3] found that such a prohibition was necessarily implicit in the Act. That decision turned on the application of another of the objects of Part 5 of the Act set out in s 31(d) which is "to promote orderly collective bargaining"

[20] The logic of Mr Cranney's submission was that a construction of s 47(6) which brought the bargaining initiated by the defendants to an end meant that the bargaining subsequently initiated by the plaintiff did not amount to cross-initiation

[3] [2007] ERNZ 553.

and therefore avoided the effect of the decision in the *Service & Food Workers Union* case.

## Case for the defendants

[21] The defendants' case is that the Union is required to continue to bargain with them notwithstanding the negative ballot and that the plaintiff's notices initiating bargaining with the defendants individually are an unlawful cross-initiation of bargaining. This case rests on the proposition that the purpose of s 47 is only to place a "check" on unions to ensure that they bargain for a particular type of collective agreement according to the majority will of their members. The defendants say that it goes no further and, in particular, it does not allow a union or its members to determine either the parties to bargaining or the type of collective agreement for which they may bargain. The defendants say that to find otherwise would contradict relevant and settled principles of collective bargaining and this cannot be justified in the absence of a clear and express direction to this effect in the legislation.

[22] In support of this case, Mr Cook's submissions were founded on the proposition that s 47 and s 45 are directed at the relationship between a union and its members and not at the bargaining between that union and employers. These sections specifically state that they are to "apply to" unions and, in Mr Cook's submission, their provisions must therefore be seen as directed solely at the actions of unions and their members. He suggested that is confirmed by the Union's discretion to choose which of three questions in s 46 is to be asked of its members.

[23] Mr Cook submitted that s 31(e), which declares that one of the objects of Part 5 of the Act is "to ensure that employees confirm proposed collective bargaining for a multi-party collective agreement", means confirmation to the employees' union of their preference, not confirmation of the type of agreement which may be bargained for.

[24] Mr Cook submitted that if, as the plaintiff contends, the effect of a negative ballot under s 45 or s 47 would be to prevent a meca being agreed in any subsequent

bargaining, this would be a significant in-road into what is otherwise a matter to be negotiated freely between the parties to the bargaining. He suggested this would be wholly inconsistent with both the statutory scheme as interpreted by this Court and the Court of Appeal. In the *Service & Food Workers Union* case, this Court found at para 96 that the Act "contemplates one set of negotiations for the same parties initiated either by a union or unions or by an employer or employers." Mr Cook also relied on *NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Witney Investments Ltd (formerly Epic Packaging Ltd)*[4] in support of the proposition that, in bargaining for a collective agreement, all aspects of the agreement, including the identity of the parties, are up for negotiation. Counsel submitted that a construction of s 47(6) following a negative ballot which brought bargaining to an end or limited the outcome in any way, would offend these well established principles and ought not to be adopted in the absence of express statutory language.

[25] We were then referred to s 33 of the Act which requires the parties to collective bargaining to conclude a collective agreement unless there is a genuine reason based on reasonable grounds not to do so. Mr Cook submitted that this does not prefer one type of collective agreement, for example a meca or a seca, over another: *Service & Food Workers Union* at paras [60] and [66] confirming similar findings in *Toll NZ Consolidated Ltd v Rail & Maritime Union Inc*[5] *and Association of University Staff Inc v Vice-Chancellor of the University of Auckland*.[6] Mr Cook noted that a principle which can be derived from those cases is that the statute encourages collectivism per se and not particular types of collectivism.

[26] Finally, Mr Cook advanced a submission based on the New Zealand Bill of Rights Act 1990 and, in particular, to ss 6 and 17. He sought to rely on the principle in s 6 of that Act that the meaning of a statute to be preferred is that which is consistent with the rights guaranteed by it. Mr Cook submitted that if s 47(6) was interpreted in accordance with the plaintiff's argument, this would infringe the defendants' right to freedom of association guaranteed by s 17 of the New Zealand Bill of Rights Act. This principle was applied by the full Court in the *Service & Food Workers Union* case but, as Mr Cook properly conceded, the Court of Appeal

[4] [2007] ERNZ 862, [2008] 2NZLR 228 (CA)
[5] [2004] 1 ERNZ 392.
[6] [2005] ERNZ 224.

in the *Witney Investments* case said it was to yield to the statutory bargaining provisions of the Employment Relations Act.

[27] In summary, the defendants say that their interpretation of s 47 allows it to readily coexist with, and indeed complement, the other provisions of Part 5 of the Act and the principles of bargaining as these have been established by the courts.

## Discussion and Decision

[28] As counsel agreed, the difficulty in this case is that there is no express statutory provision about the consequences of a negative employee vote. Section 47(6) only provides expressly what may occur after a positive vote, that is a continuation of the collective bargaining as initiated. The court's task is to attempt to ascertain the parliamentary intention in the event of a negative vote consistently with the statutory object of requiring employee approval for multi-employer collective bargaining.

[29] We accept Mr Cranney's submission that the only sensible meaning to be given to the words used in s 47(6) is that, just as a positive ballot means that bargaining "may continue", a negative ballot must mean that bargaining may not continue. Where Mr Cranney's argument encounters greater difficulty with the text, however, is that s 47(6) is quite specific about the type of bargaining which may continue and, by implication, may not continue. That is, "bargaining for a single collective agreement". Applying that plain meaning of the text would mean that, following a negative ballot, bargaining for any type of collective agreement other then a single collective agreement could continue. This was the "fall back" position adopted by Mr Cook in the course of argument. One effect of this construction would be that bargaining could continue for any other type of multi-party collective agreement.

[30] That result would be inconsistent with the object of this Part of the Act set out in s 31(e) which is to ensure that employees confirm "proposed collective bargaining for a multi party collective agreement". In this case, the members of the union have not confirmed any bargaining for a multi-party collective agreement. The effect of the ballot was to disapprove bargaining for a collective agreement with all six defendants. Such a negative result cannot be construed as approval for anything

else. In particular it cannot be seen as confirmation of bargaining for any other type of collective agreement.

[31] It might be suggested that employees could "confirm" bargaining for a multi party collective agreement, and thereby the object set out in s 31(e), by ratifying such an agreement once it had been negotiated by their union. We would not accept that suggestion. The use of the word "proposed" in s 31(e) makes it clear that confirmation by employees is required before the bargaining takes place. In any event, ratifying an agreement which has been reached is a very different thing to confirming the scope of bargaining for an agreement at the outset.

[32] We think the absence of an express provision dealing with the consequences of a negative employee vote about multi-employer collective bargaining is explicable by the legislative history of this Part of the Act. As introduced to the House, the Employment Relations Bill 2000 contained an objects clause which, materially for the purposes of this case, was enacted unchanged as s 31. It also included two clauses giving effect to the object set out in what is now s 31(e). One of those clauses was recommended very largely (and for the purposes of this case, immaterially) unchanged, and became s 45, which deals with union initiated bargaining for a multi- party collective agreement. That section is consistent with s 31(e) in that it requires an affirmative ballot by union members confirming the type of agreement to be bargained for before bargaining commences.

[33] The other clause, dealing with employer initiated bargaining for a multi-party collective agreement was cl 58:

> **58 Two or more employers proposing to initiate bargaining with 1 or more unions**
>
> (1) The employers may initiate bargaining by notice under section 49 only if, and to the extent that, the requirements of this section are complied with.
>
> (2) One of the employers must give the notice, on behalf of itself and the other employers concerned.
>
> (3) A union that receives a notice must as soon as possible advise the employer giving the notice that either—
>
> (a) it considers that its members employed by an employer concerned would, if a secret ballot were held, agree to

bargaining being initiated for a single collective agreement; or

(b) it considers that its members employed by an employer concerned would, if a secret ballot were held, not agree to bargaining being initiated for a single collective agreement.

(4) If a union gives to an employer advice under subsection (3)(a) the employer may continue bargaining with the union, but not before all unions give their advice under subsection (3) and, if subsection (3)(b) applies to any of those unions, that subsections (5) and (6) have been complied with.

(5) If a union gives to an employer advice under subsection (3)(b), the union must as soon as is possible proceed to hold a secret ballot of its members employed by the employer.

(6) The secret ballot must be held in accordance with sections 54 and 55, and those sections apply with all necessary modifications.

[34] It is apparent that this clause also required positive confirmation by union members of the nature of multi-party collective bargaining before it could proceed. This flows from the direction in subcl (1) that employers may initiate such bargaining "only if, and to the extent that, the requirements of this section are complied with". That provision was therefore also consistent with the object set out in s 31(e).

[35] During the select committee process, cl 58 was substantially changed to become what is now s 47. In omitting to deal expressly with the consequences of a negative vote, the select committee may have overlooked the consequential incongruity with the objects in s 31.

[36] In such circumstances, we think s 47(6) ought to be construed in a manner consistent with the objects of this Part of the legislation and with the related provisions in s 45 which are consistent with those objects. On this basis, we find that, where bargaining is initiated by one or more employers for a multi-party collective agreement, the effect of s 47(6) is that bargaining may only continue to the extent that the union or each union considers its members to be in favour of the bargaining or there has been a ballot of union members confirming bargaining of that type. Where, as in this case, there has been no positive confirmation of any bargaining for a multi-party collective agreement, no bargaining can continue unless and until re-initiated.

[37] We think this construction also gives effect to the object of orderly bargaining in s 31(d). If the parties were permitted to continue bargaining for an outcome other than a single collective agreement with all of the defendants, any permissible agreement would involve fewer than all of the parties. As Mr Cranney pointed out, that would mean there were parties at the bargaining table engaged in bargaining for collective agreements to which they could not become a party. In our view, that would constitute disorderly bargaining.

[38] The consequence of our conclusion that the parties were precluded from any further bargaining at the initiation of the defendants, is that the subsequent initiation of bargaining by the plaintiff with each of the defendants promoted orderly bargaining and was not an unlawful counter-initiation of bargaining.

## Result

[39] In summary, our conclusions are:

(a) Following the negative ballot of union members communicated to the defendants on 11 February 2011, the parties were not permitted to continue bargaining pursuant to the defendants' initiation of 7 December 2010.

(b) The plaintiff's initiation of bargaining with each of the defendants individually on 11 February 2011 was proper.

## Costs

[40] Although the plaintiff has been successful, this is undoubtedly a test case. For this reason we consider that the parties should bear their own costs of representation in both the Employment Relations Authority and this Court.

GL Colgan
Chief Judge
for the full Court

Signed at 9.30 am on Thursday 14 April 2011