IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 42
ARC 18/11

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for stay of proceedings
BETWEEN	TERTIARY EDUCATION UNION Plaintiff
AND	CHIEF EXECUTIVE, WESTERN INSTITUTE OF TECHNOLOGY First Defendant
AND	CHIEF EXECUTIVE, UNITEC NEW ZEALAND Second Defendant
AND	CHIEF EXECUTIVE, WHITIREIA COMMUNITY POLYTECHNIC Third Defendant
AND	CHIEF EXECUTIVE, NORTHLAND POLYTECHNIC Fourth Defendant
AND	CHIEF EXECUTIVE, BAY OF PLENTY POLYTECHNIC Fifth Defendant
AND	CHIEF EXECUTIVE, WAIKATO INSTITUTE OF TECHNOLOGY Sixth Defendant

Hearing: 11 May 2011 (in Chambers)
(Heard at Auckland)

Appearances: Peter Cranney, counsel for plaintiff
Sherridan Cook and Aaron Harlowe, counsel for defendants

Judgment: 11 May 2011

ORAL SUPPLEMENTARY JUDGMENT OF THE FULL COURT

[1] This application is decided by a full Court pursuant to s 210(1) of the Employment Relations Act 2000 (the Act).

[2] The defendants apply for a stay of these proceedings. Because the case before us has been concluded with a substantive judgment,[1] we assume that the defendants really seek an order prohibiting collective bargaining between the Tertiary Education Union (the Union) and the individual defendants until the Court of Appeal determines the defendants' application for leave to appeal. That application has been filed with the Court of Appeal and a priority hearing has been sought. Counsel also advises that the Union has now consented to leave to appeal being granted and supports the application for a priority hearing of the appeal. No information is yet available as to when the Court of Appeal may consider the matter.

[3] The defendants say that, in the meantime, if they must continue to bargain collectively but as individuals, their rights of appeal (if leave is granted by the Court of Appeal) will be compromised, if not negated, by such single employer (seca) bargaining. They say that if they are successful on appeal, time, effort and money will have been wasted on seca bargaining as this Court's judgment now permits.

[4] The Union opposes the cessation of seca collective bargaining that it is now entitled to pursue with the individual defendants as a result of our judgment. The Union points out that one of the original defendants, the first defendant, the Chief Executive of the Western Institute of Technology, has now settled a seca with the Union and so is no longer a party to the appeal.

[5] The Union says that the application for leave to appeal has no bona fides because the employer's notice initiating bargaining has been rendered ineffective by the decision of the first defendant to abandon his intention to bargain with the five other defendants after the previous hearing and to settle a seca with the Union. Mr

[1] [2011] NZEmpC 33.

Cranney submits that in these circumstances, the original collective notice given by the employers is no longer valid. Counsel submits that the remaining defendants would have to give a new notice initiating bargaining for a multi-employer collective agreement (meca) and they cannot now do so because the Union has commenced seca collective bargaining.

[6] Although counsel began to develop the interesting and difficult argument about that point before us today, it is not appropriate for us to determine it at this stage. As a result of the rehearsal of the arguments, we accept that there is a serious question for decision potentially on the effect of the original notice now that one of the employers will not be a party to meca collective bargaining, but that was not before us originally and is not for decision now.

[7] Alternatively, the Union says that there could be a partial stay allowing bargaining with each of the (now) five defendants to commence or continue without prejudice to the entitlements in law of the employers if they are successful on appeal.

[8] We accept that the principles for determining whether a stay should be granted in a case such as this, have been set out by the Court of Appeal in *Keung v GBR Investment Limited*[2] which principles have been adopted by this Court in other cases.

[9] As in our principal judgment, we come back to the statutory objective of orderly and progressive collective bargaining. As previous judgments of this Court about collective bargaining have pointed out, while the statute encourages collective bargaining and the settlement of collective agreements, it does not promote one form of collective bargaining over another and, in particular, multi-employer collective bargaining over single employer collective bargaining. The result of our judgment is that there will be collective bargaining, and subsequently collective agreements, as the statute contemplates. The legislation requires parties to settle collective agreements following collective bargaining unless specified statutory criteria (not at issue in this case, at least not yet) can be established. To now stop the collective bargaining that the judgment permits, based on the Union's bargaining initiations,

[2] [2010] NZCA 396.

would be to delay, perhaps significantly, the settlement of collective agreements. This would not accord with the statutory objectives of orderly collective bargaining and the prompt settlement of collective agreements.

[10] Addressing briefly the *Keung* criteria and first as to whether a stay should be granted, there is some merit in Mr Cook's submission that, absent a stay or other prohibition on the current seca collective bargaining, the defendants may be disadvantaged if they are ultimately successful. But, counter-balancing that, if a stay is granted and the defendants are not successful on appeal, there will be disadvantage to the plaintiff and its members. That factor is, therefore, largely neutral between the parties.

[11] Next, we accept that the defendants are prosecuting bona fide their intention to appeal the Court's judgment. As to whether the Union and its members will be injuriously affected, we have already weighed that in the balance and accept that there is a real potential for injury. As to the effect on third parties, we accept Mr Cranney's submission that Union members may be affected adversely and, in particular, frustrated or at least delayed in their wishes to seek changes to remuneration in collective bargaining. Also affected may be non-union employees of the defendants whose terms and conditions of employment may be affected by the outcomes of delayed collective bargaining.

[12] Next, we accept that the issues involved are both novel and important, not only for these parties but for unions and employers generally. In that sense, there is a public interest in the proceedings, at least among the public engaged in employment relations and collective bargaining.

[13] The overall balance of convenience is a factor that we will turn to shortly. Finally, as *Keung* identifies, the apparent strength of an appeal is now treated as an additional factor. It is difficult to assess independently the strength of the defendants' appeal given the novelty of the question and what we have already identified as less than clear legislative guidance.

[14] What has influenced us most is the undertaking that the plaintiff has offered to the Court. It says that for the period of the next month or so, which will in fact be the period until 13 June 2011 when the case can next come back before the Court, it will not seek any application for a compliance order in relation to the seca bargaining that it has commenced with the defendants individually, with two exceptions.

[15] The first exception is that it reserves to itself the right to seek compliance in respect of the process of settling bargaining process arrangements under the Act. We note here that the defendants have no objection to that in the sense that they accept in the circumstances that there may be limited seca collective bargaining including the development and settlement of bargaining process arrangements.

[16] The second exception to the plaintiff's undertaking not to seek compliance is more controversial. The plaintiff seeks to reserve to itself the opportunity to seek compliance with s 43 of the Act. This is the section which requires an employer that has initiated bargaining or received a notice initiating bargaining to bring that to the attention of all employees, whether or not they are members of the Union.

[17] The defendants say that their compliance with s 43 in respect of their original bargaining initiation notice is sufficient and that they should not be required to issue a further s 43 notice in respect of the Union's bargaining initiation that we have found to have been undertaken lawfully. Further, the defendants say that the issue of a second and potentially a third s 43 notice, if they are successful on appeal, might confuse employees.

[18] The plaintiff says that the statute requires the defendants to give s 43 notices after receiving what we have determined was the Union's lawful initiation for seca collective bargaining. Although the time limit for doing so under s 43 was no later than 10 days after the initiation of bargaining, we accept that there was controversy about that, at least until the date of our judgment. In any event, the Union says that s 43 ought to have been complied with by the defendants after our judgment was issued, but it has not been.

[19] For two reasons, we consider that the Union's position is probably correct. First, s 43 notices depend upon whether an employer has either initiated bargaining or received a notice initiating bargaining. The defendants' initial s 43 notice was based on its initiation of bargaining. That position has now been set aside so that the alternative under s 43, that is the employers' receipt of a notice initiating bargaining by the Union, applies.

[20] The second significant difference between the first s 43 notice, in reliance on the employers' initiation of bargaining, and the current position, relates to a requirement that a s 43 notice specify, among other things, the intended parties to the bargaining. The employers' initial notice specified the six defendant employers as being the intended employer parties to the bargaining. That position has now changed with the departure from meca collective bargaining of the Western Institute of Technology. The intended parties to any agreement or agreements (whether mecas or secas) are now different than the intended parties originally nominated in the employers' s 43 notice.

[21] Given that position, we accept that the Union's undertaking, which is solemnly given and is enforceable as an injunction would be, satisfies the justice of the position for the next month or so until the important matter of when the Court of Appeal may be able to deal with an appeal can be known more certainly.

[22] We note that the Union submits that a new s 43 notice should be given to employees, including non-Union employees, but says that this should be accompanied by an explanation about the litigation and its effect. The Union proposes that it should have an input into the advice to be given to employees and is prepared to do so.

[23] Although we are not prepared to require the employers to give a s 43 notice at this point, we do find the Union's exemption of a compliance application in respect of s 43 to be significant. We strongly recommend to the defendants that they co-operate with the Union in providing appropriate s 43 notices including explanations about the litigation and its effect. The recipients of such notices will be staff of tertiary institutions. The preparedness of the Union to engage with the employers as

a matter of good faith in the drafting of that advice will also help to ensure that the position is clarified rather than confused for affected employees.

[24] For those reasons we decline to make an order staying the proceedings, or otherwise preventing completely the seca collective bargaining that the Union has now initiated. In that regard, we note the comments of the full Court in *Australasian Correctional Management v CANZ*[3] at para [35] as to the statutory scheme of bargaining and the encouragement of it as opposed to its prohibition or restriction.

> … The legislation's emphasis is upon negotiation in good faith for terms and conditions of employment rather than prescriptive and interventionist prohibitions upon bargaining.

[25] The question of leave to appeal and when the Court of Appeal may be able to deal with that application and any appeal are of course entirely matters for the Court of Appeal. It is, in our view, likely that this important consideration will be clearer within the next month and it may be that no further assistance from this Court will be required. If it is, the application for stay may be renewed by the defendants when the matter is next before us at 10 am on 13 June 2011. We otherwise reserve leave to any party to apply for any further orders or directions on reasonable notice. We also reserve questions of costs.

GL Colgan
Chief Judge
for the full Court

Judgment delivered orally at 3pm on Wednesday 11 May 2011

[3] [2001] ERNZ 575, 583.