IN THE EMPLOYMENT COURT
AUCKLAND

AC 22/09
ARC 9/09

IN THE MATTER OF	Proceedings removed from the Employment Relations Authority
BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS UNION INC First Plaintiff
AND	JIM MOENGAROA AND OTHERS Second Plaintiffs
AND	CARTER HOLT HARVEY LIMITED Defendant

Hearing: 18 May 2009

Appearances: LJ Yukich, Advocate for Plaintiffs
Peter Kiely & Daniel Erickson, Counsel for Defendant
Greg Lloyd, Counsel for NZ Amalgamated Engineering, Printing and Manufacturing Union Inc as Intervener by leave

Judgment: 27 May 2009

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This judgment determines a preliminary issue of fact and law about the terms and conditions of employment agreements. Depending on the decision of this preliminary issue, the Court may have to determine subsequently whether the employer is entitled to restructure its operations in a way that may affect adversely those employees where there is no, or no sufficient, applicable employment protection provision under s69OJ of the Employment Relations Act 2000 ("the Act").

[2] In opening the case for the plaintiffs, Mr Yukich raised for the first time a new cause of action alleging that even if the second plaintiffs' terms and conditions

of employment are based on the expired collective agreement, it does not comply with the minimum requirements of s69OJ. The plaintiffs say that for this reason, also, the defendant is not entitled to restructure its operations making some or all of the second plaintiffs redundant unless and until there is an employee protection provision compliant with s69OJ. Counsel for the defendant were unprepared to address this belated and new cause of action and I refused Mr Yukich leave to amend the plaintiffs' statement of claim at trial for that reason. I did, however, permit the point to be argued in the event that the plaintiffs are unsuccessful on their first cause of action that no employee protection provision was ratified as required by law.

[3] The second plaintiffs are five saw doctors at Carter Holt Harvey Limited's (CHH's) sawmill in Kawerau. They are members of the first plaintiff, the Eastern Bay Independent Industrial Workers Union Inc (EBIIWU). The first plaintiff is negotiating for a collective agreement with CHH covering these employees. No such collective agreement currently exists between these parties.

[4] One of the issues in the proceeding is the nature of the employment relationship between the saw doctors and CHH. Before joining the first plaintiff, the five saw doctors were members of another union, the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc (EPMU). They were members of that union when it entered into a collective agreement with CHH that was current between 2005 and 2008 but has now expired. The collective agreement contained an employment protection provision (EPP) pursuant to s69OJ.

[5] The EBIIWU asserts that although the terms of settlement for the 2005-2008 collective agreement eventually contained an EPP clause, this was not settled in bargaining and was not ratified by EPMU members covered by the bargaining including the five saw doctors. The EBIIWU says that the EPP clause was inserted in the collective agreement after settlement and purported ratification of its terms, but before signing. The plaintiffs say that because the EPP clause was not ratified by EPMU members, it is therefore not in law a part of the collective agreement. Indeed, the logic of the plaintiffs' argument is that there was no effective collective agreement at all.

[6] The plaintiffs say that the five saw doctors cannot now be employed on individual employment agreements with CHH based on an expired collective agreement including the EPP. The plaintiffs' case is that the five saw doctors are engaged on individual employment agreements that are not compliant with s69OJ. It follows, therefore in the plaintiffs' contention, that CHH is not entitled to restructure its operations potentially affecting adversely these five saw doctors unless and until an EPP is negotiated and settled, whether as a variation to their current individual employment agreements or as part of a new collective agreement to cover them.

Relevant background

[7] The Fletcher Challenge Forests Kawerau Mill Site Collective Agreement 2003-2005 (Trades) was a collective agreement between the EPMU and Fletcher Challenge Forests Industries Limited. Saw doctors, including the second plaintiffs, were covered by this collective agreement as members of the EPMU. The agreement contained no provision that complied with s69 of the Act as amended in late 2004. During the currency of the 2003-2005 collective agreement, the operations of the Kawerau Mill were taken over by Carter Holt Harvey Limited which assumed the employer's obligations under the collective agreement. The 2003-2005 collective agreement expired on 17 July 2005. Because bargaining for a replacement collective agreement had not been initiated by the EPMU until after the expiry of the collective agreement, it was not extended under s53 and affected employees were thereafter on individual employment agreements based on the expired collective. Nothing turns on this employment status in this case.

[8] Notice of initiation of bargaining for a replacement collective agreement was given by the EPMU to the defendant in mid-August 2005, approximately one month after the expiry of the 2003-2005 collective agreement. A bargaining process arrangement pursuant to s32 of the Act was settled on 7 November 2005. Relevant provisions of the arrangement under s32 of the Act included:

> *Where possible there will be one ratification meeting and all members will be paid to attend at ordinary rates of pay. The date, time and duration of the meeting is to be as agreed between the parties, including whether members are required to ensure the continuation of business operations.*
> …

> *The Employer and Union advocates will record any settlement in writing and sign it as soon as settlement is reached. That signed settlement will be the terms put to ratification by union members.*
>
> *Once the settlement is ratified, the employer will prepare the employment agreement for signature which the parties will sign as soon as practicable.*

[9] Collective bargaining was prolonged but agreed terms of settlement of a single union collective agreement for trades employees (including the five saw doctors who were then still members of the EPMU) were reduced to writing and signed by the representatives of the employer and the union on 19 July 2006.

[10] A ratification meeting was held on 21 July 2006. Of the 32 union members covered by the agreement, 25 attended. Of the five saw doctors, two attended, James Moengaroa and Teuamairangi Chapman. Mr Moengaroa was the delegate for the saw doctors and had been involved closely in the negotiations for the collective agreement. After the meeting the EPMU advised CHH that the collective agreement had been ratified. It was subsequently signed by the union and the employer.

[11] The ratification meeting consisted of a description to assembled union members of the terms of settlement contained in the written and signed memorandum of these dated 19 July, the substance of which ran to five pages.

[12] The "all up" ratification meeting for the relevant collective agreement was held on 21 July 2006. No specific mention was made at the ratification meeting of an EPP clause. Mr Moengaroa was opposed to the ratification of the collective agreement because he disagreed with the union negotiators having settled for less than the saw doctors wanted.

[13] Twenty-four of the 25 union members present at the ratification meeting voted in favour of ratification. Mr Moengaroa abstained. Following the union's ratification arrangement, the overwhelming vote in favour purported to ratify the collective agreement summarised in the terms of settlement that had been reduced to writing and that were discussed at the ratification meeting.

[14] The union's practice at that time was to discuss terms of settlement at ratification meetings and to have these voted on. No copy of the written terms of

settlement or of the collective agreement was made available to union members at the ratification meeting.

[15] Some time later the five saw doctors, who are the second plaintiffs, resigned from their membership of the EPMU. This caused the cessation of their coverage by the 2005-2008 collective agreement. The second plaintiffs subsequently joined the first plaintiff union which has been and remains in deadlocked bargaining with the defendant.

The *Waikato DHB* case

[16] The plaintiffs rely substantially on the judgment of the full Court in *Waikato District Health Board & Ors v NZ Public Service Association Inc* [2008] ERNZ 80 to establish non-ratification of the collective agreement. That judgment addressed what is required to ratify a collective agreement in law. Whether the collective agreement in that case had or had not been ratified was not determined. That was left to a subsequent trial before a single Judge and the litigation was apparently settled without a finding of the facts in that particular case and whether these met the test for ratification. It is necessary to define the principles for which the *Waikato DHB* case stands before considering the particular facts in this case about ratification.

[17] The relevant facts in the *Waikato DHB* case were as follows. Collective bargaining was begun by a number of district health boards for a number of collective agreements between them and relevant unions. In the course of bargaining, a parallel negotiation took place between the unions and the Ministry of Health, being the funding provider of the district health boards. This parallel negotiation process resulted in an offer by the Ministry of increased funding to the district health boards that would, in turn, allow these employers to settle for identifiable increased wages for employees in the bargaining. The settlement terms of this parallel negotiation with the Ministry (that was not collective bargaining as defined in the Act) was taken to union members for approval. The union members *"ratified"* the agreement with the Ministry. Bargaining on other terms and conditions of the collective agreements (including with Waikato DHB) then

resumed. Collective agreements were subsequently signed by the unions and employers. There remained an open question whether these collective agreements had been ratified by union members. For the purpose of determining the legal question, it was assumed that there had not been such a ratification.

[18] The Court determined that a *"ratification"* of terms, settled in a parallel negotiation process that was not collective bargaining, would not have met the statutory requirement for the ratification of a collective agreement if that was what had happened.

[19] The case may be said to stand for the following principles:

- Pursuant to s54(1) a collective agreement is of no effect unless it is signed by the parties.

- Pursuant so s51(1) a union must not sign a collective agreement unless the collective agreement has been ratified in accordance with the union's ratification procedure which must comply with the Act.

- If a union's ratification procedure provides for ratification of terms of settlement in bargaining and not for ratification of a collective agreement, this will not meet the statutory test of what is required to be ratified.

- Despite a non-compliant ratification procedure in a bargaining process arrangement, the essential question is whether a collective agreement between the employer and the union has been ratified.

- If a collective agreement is not ratified, or if something other than a collective agreement is ratified, such collective agreement can, derivatively, have no effect.

[20] The facts in this case are, of course, not the same. Here, the dispute turns on the state of play in the bargaining at the date on which it is contended that there was ratification and what happened at the ratification meeting.

[21] The plaintiffs say that what was *"ratified"* on 21 July 2006 was a summary of the written terms of settlement that had concluded the bargaining 2 days previously and was reduced to writing by the negotiators in accordance with their bargaining process arrangement.

[22] I have reached the following conclusions about these relevant events. In general, where there are conflicts between the evidence called for the plaintiffs on the one hand, and the evidence called for the defendant and the intervener on the other, I prefer the latter. That is not because the plaintiffs' witnesses tried to mislead the Court. Rather, their recollections of events, now almost 3 years ago, was more vague and their understanding of what is at least a quasi-legal process for the formation of effective collective agreements, is less acute and informed than that of the other witnesses.

[23] I accept the plaintiffs' evidence that what was discussed at the ratification meeting on 21 July 2006 was the content of the document created for that purpose and following the bargaining process arrangement, the terms of settlement in negotiations. These consisted of changed or new terms and conditions of employment when compared to the previous expired collective agreement between the parties.

[24] If all that had existed and been ratified at that meeting had been those terms of settlement, there would not have been, as the statute requires, ratification of a collective agreement. But the written terms of settlement were not the whole picture. As negotiations had progressed, a member of the company's negotiation team had created electronically and updated progressively a form of collective agreement that recorded the state of the bargaining. After each negotiating session, this was updated electronically by the company's human resources manager, using the Microsoft "tracked changes" tool and sent by email to the negotiators including those for the union. This enabled the parties to the negotiations to see and verify changes made in the collective agreement creation process and in the form of a draft collective agreement.

[25] I find that it is more probable than not that by 19 July 2006 the draft collective agreement then sent to the union was in the form of a collective agreement that was ratifiable. In particular, it included the EPP that was uncontroversial in the bargaining and as appeared subsequently in the form of the collective agreement that was signed by the employer and union parties giving effect in law to that agreement.

[26] Further, I find that union negotiators had, from time to time, discussed with the union's members at the numerous report back meetings, the content of the proposed EPP. This was known to the union members when they ratified the collective agreement on 21 July 2006.

[27] In these circumstances I find that it was not simply the terms of settlement document that were ratified by the union members on 21 July but a collective agreement that was in ratifiable form in the sense that it met the statutory minimal requirements for a collective agreement. The fact that the electronic document or a hard copy may not have been made available to the union members by the negotiators fell short of best practice but was not fatal to the ratification process. The important point is that there was in existence a settled collective agreement capable of ratification that was known to, and had been agreed by, the union negotiators and on which they had reported to their members. It was that collective agreement that was ratified by the union members.

[28] It follows, therefore, that the terms and conditions of employment of the second plaintiffs were contained in the 2005-2008 collective agreement by virtue of their membership of the union when that collective agreement took effect. The second plaintiffs' subsequent resignation from the EPMU and their joining the first plaintiff meant, in law, that they were then on individual employment agreements based on the collective agreement to which they had previously been bound by their union membership.

[29] I deal now with several other ingenious but fundamentally flawed arguments advanced by Mr Yukich in a bid to invalidate the 2005-2008 collective agreement. That bargaining may have been initiated for a single employer multi union collective agreement does not of itself invalidate a single employer single union collective

agreement that was the product of that bargaining. No statutory analysis of the basis for this bald assertion or reference to case law was advanced by Mr Yukich. There is nothing in the legislative scheme that requires a re-initiation of bargaining if the party nature of the collective agreement alters during the bargaining process.

[30] Next, any error in a *"Personal to holder"* letter issued to Mr Moengaroa on 21 August 2006 as to the date on which collective bargaining was concluded does not invalidate or affect adversely the ratification process of that bargaining. At best, the error was of 1 day (19 July 2006 being described erroneously as 18 July 2006) .

[31] It is immaterial that the affected employees may, on the date of ratification, have been employed on individual employment agreements. What is important is that the second plaintiffs were then members of the EPMU which had settled a ratifiable collective agreement with CHH. It is immaterial that the EPMU may have previously disengaged from bargaining with another union in the same negotiations. Bargaining continued between CHH and the EPMU until terms of settlement were agreed to on 19 July 2006 and were then in the form of a ratifiable collective agreement.

[32] There was no requirement in law for CHH to provide copies of the collective agreement to the affected employees before or at the time of ratification. That was a legal process whereby the employees ratified the settlement of a collective agreement negotiated on their behalf by the union. In any event, I am satisfied that the employer did provide to the employees, through their union negotiators, a form of collective agreement capable of ratification in law.

[33] On the basis of the factual findings made, there was no post-ratification addition to or variation of the terms of settlement that Mr Yukich submitted would have required a reopening of the initiation of bargaining or application of the variation procedures in the saw doctors' individual agreements. The EPP and indeed all terms of the collective agreement signed subsequently by the union and the employer were in the form of a ratifiable agreement by 21 July 2006 and were ratified by an overwhelming vote of affected employees present at a ratification meeting.

[34] In these circumstances the EPP provisions in that expired collective agreement continued to apply to the second plaintiffs. They will do so unless and until there is a settlement of the collective bargaining between the plaintiffs and the defendant and the creation of a effective collective agreement between these parties that will bind the defendant and the second plaintiffs in their employment relationship.

[35] In these circumstances the plaintiffs' first ground of challenge to the lawfulness of the defendant's restructuring affecting adversely the second plaintiffs' employment must fail.

[36] As noted at the outset of this judgment, however, there now still remains the question whether the EPP, that I have found governs the terms and conditions of employment of the second plaintiffs, is compliant with the statute and, if not, what may be the consequences of that non-compliance. This impresses me as a question of law determinable by comparing the relevant provisions of the collective agreement with the statutory requirements. It seems unlikely that any evidence, or at least further evidence, will be needed for this purpose. If the terms of the now expired collective agreement upon which the terms and conditions of employment of the second plaintiffs meet the statutory requirements, then the defendant is free to pursue its restructuring proposals in compliance with the EPP. If, however, the Court concludes that the EPP is not in accordance with s69OJ, a decision will have to be made about the consequence of that non-compliance.

[37] The latter question is to be heard by a full Court in other proceedings on Thursday 28 May 2009 and, if it arises again in this case before me, I would wish to have the benefit of the full Court's views before deciding it in these proceedings.

[38] Unless, therefore, any party wishes to be heard on the procedure to be adopted, I will allow the plaintiffs the period of 4 weeks from the date of this judgment to make written submissions on the question of the compliance of the EPP with the statute, the defendant a further 4 weeks to respond, with the plaintiffs having a further week thereafter for any submissions in reply. I will then determine that subsequent question.

[39] I reserve costs at this stage of the proceeding.

GL Colgan
Chief Judge

Judgment signed at 4.10 pm on Wednesday 27 May 2009