

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2011] NZEmpC 83
WRC 21/11**

IN THE MATTER OF proceedings for injunction orders removed
from the Employment Relations Authority
and for compliance orders

BETWEEN NEW ZEALAND PROFESSIONAL
FIREFIGHTERS UNION
Plaintiff

AND NEW ZEALAND FIRE SERVICE
COMMISSION
Defendant

Hearing: 11 July 2011 (in Chambers by telephone conference call)

Counsel: Peter Cranney, counsel for plaintiff
Geoff Davenport, counsel for defendant

Judgment: 11 July 2011

SUPPLEMENTARY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] Less than two hours after the delivery of the Court’s judgment¹ last Friday afternoon, 8 July 2011, the Union applied to exercise the leave reserved at para [34] to determine the identity of a mediation service and/or of a mediator and/or of the particular issues to be the subject of mediation. Although I had said that this leave could be sought “on short notice”, it seems inherently unlikely that these questions could have been the subject of consideration and discussion between the parties, let alone for such discussions (which ought to have been conducted in good faith) to have broken down to such an extent that the Court’s further intervention was required within that short time.

¹ [2011] NZEmpC 80.

[2] Nevertheless, the Union sought an order that Mike Feeley of the Department of Labour be the mediator, that the subject matter of the mediation be “outstanding matters in the bargaining”, and that the mediation commence at 4 pm today, Monday 11 July 2011. I note that neither the Bargaining Process Agreement nor the leave that I reserved allows such a direction to be given about when mediation is to commence.

[3] The Commission was almost as quick out of the blocks in response. On Saturday 9 July 2011 it filed, by counsel, a comprehensive memorandum in response opposing the Union’s applications and confirming that there had been no liaison, at least between counsel, about the matters for which leave was reserved in the judgment.

[4] As to the application by the Union for directions identifying the mediator and the subject matter of the mediation, the Commission says simply that whilst the Department of Labour’s Mediation Service has a number of experienced mediators who would be suitable for the task of mediation, that matter has not yet been discussed between the parties. Equally succinctly, the Commission says that the issues for mediation are, self-evidently, the outstanding disagreements in the collective bargaining.

[5] Addressing in more detail the Union’s request for orders that mediation commence at 4 pm today, the Commission makes a number of points. First, it says it intends to engage in the mediation in good faith to see if a collective agreement can be settled and that, in these circumstances, its commencement should not be unduly rushed. Next, it says its collective bargaining team of seven is otherwise engaged in Fire Service business including two who are out of the country this week. The Commission says its principal negotiator, Ms Hearn, is unavailable this week. It says it is essential that the employer’s key bargaining team members be able to attend the mediation. The Commission says its bargaining team is able to attend mediation next week (that is beginning 18 July 2011) and, in particular, on any of 19, 21 or 22 July 2011.

[6] Penultimately, the Commission says that the orders sought by the plaintiff are contrary to the Bargaining Process Agreement which envisages mediation occurring within a reasonable period of up to 14 days and not on the next working day after the Court's decision. Finally, the Commission assures the Court that it will engage in mediated bargaining in good faith in accordance with para [34] of last Friday's judgment.

[7] I refuse the orders now sought by the Union for the following reasons.

[8] The Bargaining Process Agreement requires the parties to discuss and attempt to settle between themselves the identities of the mediation service and the mediator to be used. That has not happened, or at least not sufficiently, and it is not open to either party to attempt to bypass that requirement by coming directly to the Court to determine these issues. Indeed, from the defendant's response, it seems clear that there is likely to be agreement between the parties and the Department of Labour's Mediation Service can be the mediation service referred to in cl 10(b) of the BPA. Whether Mr Feeley is or is not to be the mediator will depend upon discussions between the parties and with the Mediation Service but I am not prepared to make an order or direction in that regard at the moment. Finally, on the question of the subject matter of the mediation, it appears that the parties are in fact in agreement that it will be their outstanding differences in bargaining that will be on the agenda at mediation. That illustrates the desirability of parties finding common ground as well areas of disagreement before coming to the Court as they could have done.

[9] On the question of when mediation takes place, that is not only not a matter for the Court to determine (at least at this time) but has indeed been agreed to by the parties themselves in cl 10(b). It contemplates that the mediation will take place within "a reasonable timeframe" which will normally be considered to be up to 14 days. I am not persuaded that the present circumstances are abnormal.

[10] Because of the subject matter of the mediation (the collective bargaining) and because it is to be hoped that mediation will assist the parties to reach a ratifiable collective agreement, I accept that it is reasonable for the Commission to have its bargaining team present at mediation as it would be also for the Union. The

Commission's suggestion that mediation should commence and take place next week is within the 14-day timeframe agreed to by the parties themselves and although I will not make a direction about when this is to happen for reasons already given, I do consider the Commission's suggested timeframe to be reasonable.

[11] Those are the reasons for which I have refused the Union's application. It will, of course, be open to either party to seek to use the reserved leave but they must comply first with their BPA obligations.

[12] I reserve costs on this application.

GL Colgan
Chief Judge

Judgment signed at 3.15 pm on Monday 11 July 2011