IN THE COURT OF APPEAL OF NEW ZEALAND

CA305/2011
[2011] NZCA 286

BETWEEN	CHIEF EXECUTIVE, UNITEC INSTITUTE OF TECHNOLOGY First Appellant
AND	CHIEF EXECUTIVE, WHITIREIA COMMUNITY POLYTECHNIC Second Appellant
AND	CHIEF EXECUTIVE, NORTHLAND POLYTECHNIC Third Appellant
AND	CHIEF EXECUTIVE, BAY OF PLENTY POLYTECHNIC Fourth Appellant
AND	CHIEF EXECUTIVE, WAIKATO INSTITUTE OF TECHNOLOGY Fifth Appellant
AND	TERTIARY EDUCATION UNION Respondent

Hearing: 8 June 2011

Court: Ellen France, Stevens and Wild JJ

Counsel: S S Cook and A L Harlowe for Appellants
P J Cranney for Respondent

Judgment: 22 June 2011 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B No order as to costs.

REASONS OF THE COURT

(Given by Ellen France J)

Introduction

[1] The Tertiary Education Union (the Union) represents employees of six polytechnics and institutes of technology (ITPs) in the North Island. Since early 2004, the Union or its predecessors and the appellant ITPs have been parties to a series of multi-employer collective agreements (MECAs), the last of which expired on 30 November 2010.

[2] In December 2010, the six ITPs collectively initiated bargaining for a single MECA. The Union believed that its members would not again want to be covered by a single collective agreement. That view triggered the requirement in s 47 of the Employment Relations Act 2000 that the Union conduct a secret ballot of its members to determine whether members favoured bargaining for a single MECA. Section 47 relevantly provides that bargaining for a single MECA may continue if the members have voted in favour of bargaining for such an agreement.

[3] A majority of the members at each ITP voted against a single MECA and, in February 2011, the Union advised the individual ITPs of the outcome and initiated bargaining for single employer collective agreements (SECAs) between itself and each of the individual ITPs.

[4] The ITPs took the view the Union was obliged to continue bargaining with them for a single MECA and that the Union's approach was an unlawful cross initiation of bargaining. Collective bargaining ceased pending legal resolution. In the interim period, one of the six ITPs, the Western Institute of Technology at Taranaki, has concluded a SECA with the respondent and so is not party to the appeal.

[5] The parties' respective positions turn on the effect of s 47 and, in particular, on the effect of the negative ballot of the Union members. The Full Court of the Employment Court concluded that the negative ballot precluded the parties from any further bargaining pursuant to the ITPs' initiation notice.[1] The ITPs sought leave to appeal.

[6] On 20 May 2011, this Court granted leave to appeal on the following question of law:[2]

> Did the Employment Court err in its interpretation of s 47 of the Employment Relations Act and in its application of s 47 to the agreed facts? In particular, did the Employment Court err in concluding that:
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> (1) The negative ballot of the respondent's union's members meant that the parties were not permitted to continue bargaining pursuant to the [ITPs'] initiation notice of 7 December 2010;
>
> (2) The respondent union's initiation of bargaining with each of the [ITPs] individually on 9-11 February 2011 was proper?

[7] We add that the Court has dealt with the case on an urgent basis to enable the parties to conclude the bargaining process promptly.

Factual background

[8] The facts are uncontroversial and are reflected in an agreed statement of facts.[3] In addition to the material in the introduction, above, we need only note that as the bargaining was initiated by the ITPs after the expiry of the previous MECA, the ITPs' initiation notice did not have the effect of extending the term of the MECA under s 53 of the Act. That meant the requirement for secret ballots imposed by s 47 was not negated by s 48 and so the Union was required to consider whether a majority of its members would disagree with bargaining for a MECA under s 47(3).

[9] We note also that the question voted on by the Union's members in the s 47 ballot was that referred to in s 46(b), namely, "whether the [Union] member is in favour of bargaining for a single collective agreement with [the six ITPs]", although

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1 *Tertiary Education Union v Chief Executive, Western Institute of Technology* [2011] NZEmpc 33.

2 *Chief Executive, Unitec Institute of Technology v Tertiary Education Union* [2011] NZCA 207.

3 See also the discussion in the Employment Court's decision at [2]–[6].

not phrased in those exact words. No issue is taken with the adequacy of the ballot question.

The statutory scheme

[10] Section 3 sets out the two objects of the Act, namely:

> (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship – ...
>
> (iii) by promoting collective bargaining; and ...
>
> (b) to promote observance in New Zealand of the principles underlying the International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

[11] The obligation on parties to an employment relationship to deal with each other in good faith is set out in s 4.

[12] Collective bargaining is dealt with in Part 5 of the Act.[4] The object of this Part is described in s 31 and includes promoting "orderly collective bargaining"[5] and ensuring that "employees confirm proposed collective bargaining for a multi-party collective agreement".[6]

[13] Sections 32 to 34 set out what the duty of good faith in s 4 requires where a union and an employer are bargaining for a collective agreement.[7] Section 33 makes it clear that the duty of good faith requires the union and the employer who are bargaining to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to do so.

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4 See the discussion of the relevant provisions by this Court in *NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Witney Investments Ltd (formerly Epic Packaging Ltd)* [2007] NZCA 599, [2007] ERNZ 862 at [88]–[99].

5 Section 31(d). According to s 5, a "collective agreement" means an agreement that is binding on – (a) 1 or more unions; and (b) 1 or more employers; and (c) 2 or more employers: s 5. "Bargaining" in relation to bargaining for a collective agreement, (a) means all the interactions between the parties to the bargaining that relate to the bargaining; and (b) includes– (i) negotiations that relate to the bargaining; and (ii) communications or correspondence (between or on behalf of the parties before, during, or after negotiations) that relate to the bargaining.

6 Section 31(e).

7 A code of good faith was promulgated under s 35(1) on 9 August 2005 by the then Minister of Labour.

[14] The initiation of collective bargaining is dealt with in ss 40 to 42.

[15] In terms of s 40(1), bargaining for a collective agreement may be initiated by one or more unions with one or more employers or one or more employers with one or more unions. If there is no applicable collective agreement in force, the union or employer may initiate bargaining at any time. If there is an applicable agreement in force, the union has what is termed a statutory "head-start" in that the union must not initiate bargaining earlier than 60 days before the expiry of the existing collective agreement while for the employer the period is 40 days.[8] Bargaining is initiated by a notice.[9]

[16] Section 45 deals with the situation where one or more unions propose to initiate bargaining with two or more employers for a single collective agreement. In that case, s 45(2) provides that before bargaining for the single collective agreement is initiated, the union (or each union) must hold separate secret ballots of its members employed by each employer intended to be party to the bargaining. In terms of s 45(4), the result of the secret ballot is determined by a simple majority of the members who are entitled to vote and who do vote. Section 45(5) provides:

> If, at the conclusion of the secret ballots, 2 or more secret ballots have resulted in a decision in favour of bargaining for a single collective agreement, then the union proposing to initiate bargaining for a single collective agreement may initiate bargaining by giving a notice in accordance with section 42 to each employer in respect of which a secret ballot has resulted in a decision in favour of bargaining for a single collective agreement.

[17] The questions to be voted on in a secret ballot for the purposes of s 45 are set out in s 46 as follows:

> (a) whether the member is in favour of bargaining for a single collective agreement, irrespective of the employers or unions concerned; or
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> (b) whether the member is in favour of bargaining for a single collective agreement with named employers or unions; or
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> (c) whether the member is in favour of bargaining for a single collective agreement except with 1 or more named employers or unions.

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8 Section 41(3).

9 Section 42 and see also s 43.

[18] Section 47 relevantly provides as follows:

> **47 When secret ballots required after employer initiates bargaining for single collective agreement**
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> (1) This section applies to—
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> ...
>
> (b) 1 or more unions in relation to which 2 or more employers have initiated bargaining for a single collective agreement.
>
> ...
>
> (3) A union to which subsection (1)(b) applies must hold a secret ballot of its members employed by an employer to which subsection (1)(b) applies if it considers that a majority of its members employed by the employer would disagree with bargaining for a single collective agreement.
>
> (4) A secret ballot held under ... subsection (3) must be held in accordance with sections 45 and 46, and those sections apply with all necessary modifications.
>
> (5) At the conclusion of a secret ballot, the union must inform the ... employers of the result of the secret ballot: …
>
> (6) At the conclusion of the secret ballots, bargaining for a single collective agreement may continue,—
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> ...
>
> (b) where subsection (1)(b) applies, if the members of the union or of each union, if there are 2, or of a majority of the unions, if more than 2,—
>
> (i) have voted in favour of bargaining for a single collective agreement with the 2 or more employers; or
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> (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.

[19] Section 48 sets out the situations in which the requirement for a secret ballot is inapplicable, for example, where the collective agreement is intended to replace a single collective agreement that is in force.[10]

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[10] Section 48(a).

[20] Provision is made in the Act for a process of facilitated bargaining where the parties are having serious difficulties in concluding a collective agreement.[11] In particular, the parties may seek the assistance of the Employment Relations Authority.

[21] Finally, s 51 deals with the ratification of agreements by union members. A union must not sign a collective agreement or a variation of it without ratification by its members.[12]

The decision of the Employment Court

[22] The Employment Court concluded that the only sensible meaning to be given to the words in s 47(6) is that the effect of a negative ballot was the converse of a positive ballot. In other words, bargaining could continue with a positive ballot but a negative ballot meant the Union could not continue with collective bargaining. The Court considered that this construction did face difficulties with the text, in that s 47(6) was quite specific about the type of bargaining which may continue (and by implication, may not), that is, bargaining for a single collective agreement. However, the Court continued:

> [29] ... Applying that plain meaning of the text would mean that, following a negative ballot, bargaining for any type of collective agreement other [than] a single collective agreement could continue. This was the "fall back" position adopted by Mr Cook [for the ITPs] 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.
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> [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.

[23] The Employment Court rejected the argument that employees could "confirm" bargaining for a multi-party collective agreement, and thereby the object

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11 Sections 50A–50J.
12 Section 51(1).

in s 31(e), by ratifying the agreement once it had been negotiated by the Union, despite a negative ballot. The Court said the use of the word "proposed" in s 31(e) makes it plain confirmation by employees is necessary prior to bargaining.

Discussion

[24] We address the matters raised in submissions in the course of the discussion which follows. But, in summary, the appellants submit that the Employment Court's approach gives the union a veto over employer-initiated bargaining for a single multi-party collective agreement, the effect of which cuts short an otherwise valid process of collective bargaining. The appellants say the words of the statute do not provide for that outcome and it is inconsistent with the object of promoting collective bargaining and with the good faith obligation. The Union supports the approach taken by the Employment Court.

[25] Essentially for the reasons given by the Employment Court, we consider that the effect of the negative ballot is that the employer-initiated collective bargaining cannot continue. We emphasise three factors as we now discuss.

[26] First, the wording used in s 47(6), "may continue … if", on its face imposes a precondition to the continuation of the bargaining that has been initiated. There may have been other drafting techniques available to achieve this result, but the language used fits with the fact that the bargaining has "started" because it has been initiated by the employer. The drafter has therefore focused on whether, having started, it may continue. The appellants say clear wording is needed to achieve the result favoured by the Employment Court. We consider the wording is sufficiently clear.

[27] The requirement for a formal ballot and the prescription of specific questions support that conclusion. These requirements and indeed the use of the word "ballot" do not fit well with the appellants' submission that the s 47(6) procedure simply provides for a straw poll which imposes a check on the union and/or assists the employer by providing information about union members' views. It would be odd to impose a requirement for a ballot, with its associated costs to the union and in such specific terms as are indicated by the statute, if all that was intended was information

gathering largely for the employer. Where the requirement is that of information exchange between the parties, as in s 34, the Act refers expressly to the provision of "information".

[28] The legislative history is not particularly helpful but we agree with the Employment Court that, to the extent that it assists, the history is consistent with the establishment of a precondition to the continuation of the employer-initiated bargaining. In the explanatory note to the Employment Relations Bill the ballot requirements in the clauses which became s 45 and s 47 are described as imposing a "precondition".[13] As the Employment Court explains:

> [32] … 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.
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> [33] The other clause, dealing with employer initiated bargaining for a multi-party collective agreement was cl 58:
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> > **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, ...
> >
> > (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 would, if a secret ballot were held, not agree to bargaining being initiated for a single collective agreement.

[13] Employment Relations Bill 2000 (8-1) (explanatory note) at 13.

> (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).
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> [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.[14]

[29] The second factor we emphasise is the symmetry between s 45 and s 47. It is plain that the Union cannot initiate bargaining in terms of s 45 without an affirmative ballot. We see no reason in terms of the drafting for taking a different approach to s 47 which, like s 45, uses the "may continue if" formulation, albeit varied to reflect the fact that, under s 47, bargaining has already been initiated. As Mr Cranney for the Union put it, under s 45 bargaining may not be initiated by the union if members disapprove. Under s 47, it is the employer act of initiation that gives rise to the requirement for member approval. Further, the fact the same procedures and ballot questions apply to both s 47 and s 45 suggests these two sections simply deal with different sides of the same coin.

[30] We do not see this approach as inconsistent with the object of the promotion of collective bargaining or the notion of good faith, As to the former, commentators

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[14] The majority report of the select committee did not discuss cl 57–58 other than to say that amendments had been recommended to "simplify" clauses 53–58: Employment Relations Bill 2000 (8-2) (select committee report) at 14.

suggest that the Act achieves the object of promoting collective bargaining through the provisions relating to unions and those provisions setting out good faith requirements for collective bargaining.[15] Further, as Mr Cranney submits, the Act establishes rules about how bargaining is initiated and conducted. The rules require the initiator to identify the intended parties to the collective agreement and the intended coverage of any collective agreement. There is no inconsistency between these provisions and the approach we take to s 47.

[31] Mr Cook on behalf of the appellants also relies on the authorities which discuss the principles of collective bargaining. For example, Mr Cook refers to *Service and Food Workers Union Nga Ringa Tota v Auckland District Health Board*.[16] In that case, the Employment Court observed 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".[17] If the negative ballot under s 47 can stop the employer-initiated process, Mr Cook says that will mean the initiation of a new set of negotiations on the Union's terms. The Court in the *Service and Food Workers* case was, however, dealing with the situation where negotiations had been underway for some time and the union sought to counter-initiate within that process. Section 47 deals with a different situation, namely, whether a precondition for continuing the employer-initiated bargaining has been met.

[32] A similar point can be made in response to Mr Cook's reliance on the decision of this Court in *New Zealand Amalgamated Engineering, Printing &*

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15 See NZLS Seminar "Employment Relations Act 2000" 2000 at 6 and T Waldegrave "Employment relationship management under the Employment Relations Act 2000" in E Rasmussen (ed) *Employment Relationships New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004) 119. The Act was amended to further promote these goals by the Employment Relations Amendment Act (No 2) 2004. Addressing the proposed changes, the Department of Labour in its report to the Transport and Industrial Relations Select Committee noted that practical incentives for the parties to bargain and settle collectively can vary. The report continued: "Unions face administrative barriers in organising employees collectively, particularly in multi-party bargaining". The report then listed various ways in which the Bill addressed these factors, including: what is now s 33 (duty to conclude collective agreement unless there is a genuine reason not to do so), the various sections aimed at improving unions' ability to represent members, and ss 50A-50J relating to the facilitation of a collective bargaining process *(Employment Relations Law Reform Bill: Department of Labour Presentation to Select Committee* at [8]-[9]).

16 *Service and Food Workers Union Nga Ringa Tota v Auckland District Health Board* [2007] ERNZ 553.

17 At [96].

Manufacturing Union Inc v Witney Investments Ltd (formerly Epic Packaging Ltd).[18] Mr Cook refers in particular to the reference in that decision to the fact that "all aspects of the potential agreement, including ... the identities of the parties ... are up for negotiation".[19] The point being made has, however, to be seen in its factual context. That case concerned the ability to use the Part 5 process to persuade an employer to join an existing MECA. No question arose about the satisfaction of a precondition constraining the union's ability to continue collective bargaining.

[33] As to consistency with good faith it is the case that on our analysis the Union, not having taken advantage of the statutory head-start, may nonetheless be able to wrest the initiation of the process away from the employer by exercising what is, effectively, a veto. In this case, Mr Cranney says there is an explanation for the Union's approach but that raises disputed factual issues which are not for us to resolve. There are, however, two responses we can make. First, that is what the legislature has provided for. That approach does ensure that there is a coincidence of views between the members and the union leadership. Secondly, we consider that the Union in deciding whether to proceed with the ballot will be subject to the s 4 good faith obligations. In other words, the Union in proceeding down a path that might bring bargaining to an end must act in good faith. That reduces the potential for any abuse of the process.

[34] We add that we do not consider our approach to s 47 gives rise to any problem in terms of the right to freedom of association in s 17 of the New Zealand Bill of Rights Act 1990. Mr Cranney pointed us to the commentary in an ILO publication that:[20]

> According to the Committee on Freedom of Association, "the best procedure for safeguarding the independence of the parties involved in collective bargaining is to allow them to decide by mutual agreement the level at which bargaining should take place. In this respect, it would appear that, in many countries, this question is determined by a body that is independent of the parties themselves. The Committee considers that in such cases the body concerned should be truly independent."

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18 *New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Witney Investments Ltd (formerly Epic Packaging Ltd)* [2007] NZCA 599, [2007] ERNZ 862.

19 At [51].

20 B Gernigan, A Odero and H Guido *Collective bargaining: ILO standards and the principles of the supervisory bodies*, (International Labour Office, Geneva, 2000) at 31.

The approach taken in s 47 is consistent with that.

[35] The final feature we emphasise is that the approach taken by the Employment Court is consistent with the object of Part 5 as set out in s 31(e) that is, to ensure employees confirm "proposed" collective bargaining for a multi-party collective agreement. Mr Cook submits that, while there is a link between s 45 and s 31(e), s 47 does not coincide with s 31(e). We do not agree. Rather, the reference to a "proposed" collective agreement in s 31(e) supports the view that the two are inter-connected. Our interpretation of s 47 accordingly does assist in achieving this object of the Act.

[36] The remaining matter we need to address is the "fall-back" position advanced by Mr Cook. The proposed "fall-back" is to conclude that even if the parties cannot continue with bargaining for a MECA, they can proceed to bargain for other options. While this argument may appear to offer an attractive compromise, we agree with the Employment Court that the negative answer to the question voted upon cannot be viewed as approval for any other course not voted upon. That view effectively side-steps the ballot process. Further, at a practical level, the fall-back position suffers from the fact that this is not what the parties sought.

Disposition

[37] For these reasons, we consider that the Employment Court was correct in concluding that the negative ballot meant the parties were not permitted to continue bargaining pursuant to the ITPs' initiation notice and that the Union's initiation of bargaining was proper. The appeal is therefore dismissed.

[38] The parties advise that no issue as to costs arises and accordingly we make no order for costs.

Solicitors:
Buddle Findlay, Auckland for Appellants
Oakley Moran, Wellington for Respondent