IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2016] NZEmpC 154
EMPC 178/2016

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER	of an application for an interim compliance order
BETWEEN	AFFCO NEW ZEALAND LIMITED Plaintiff
AND	NEW ZEALAND MEAT WORKERS & RELATED TRADES UNION INC Defendant

Hearing:	11 October 2016 (Heard at Wellington)
Appearances:	P Wicks QC, counsel for plaintiff P Cranney and S Mitchell, counsel for defendant
Judgment:	23 November 2016

INTERLOCUTORY JUDGMENT (NO 1) OF JUDGE B A CORKILL

An interim compliance order?

[1] AFFCO New Zealand Ltd (AFFCO) applied for an interim compliance order in two parts; the first seeks to restrain officers of the New Zealand Meat Workers and Related Trades Union (the Union) from publishing statements that are derogatory and critical of AFFCO and its related entities and officers; the second seeks an order prohibiting the Union from appointing a particular Union officer, who has allegedly published such statements from acting as its representative at meetings or mediations with AFFCO.

[2] AFFCO says that such orders must be made on an interim basis because the particular Union officer has conducted a media or publicity campaign against AFFCO itself, its parent company and officers, which has involved the use of "denigrating, unbalanced, misleading or untruthful posts on the internet"; and that there are recent instances where this has occurred. It also says that this conduct should disqualify that person to act as a representative for the purposes of interactions with it.

[3] For its part, the Union strongly denies that there is any possible justification for such orders; indeed it asserts the Court has no jurisdiction to grant these remedies.

Procedural background

[4] The present proceeding was removed to the Court by the Employment Relations Authority (the Authority).[1]

[5] The background to the removal originates from a statement of problem which AFFCO lodged on 2 April 2016. At that stage, the company applied for urgency, and for interim orders. In the course of its consideration of the relationship problem, the Authority was required to consider an application by the Union to strike out AFFCO's proceeding, and to consider whether the matter should be removed to this Court.[2] The Authority was not satisfied that there was no sustainable cause of action and so dismissed the application to strike out;[3] and it was satisfied that there were important questions of law involving the scope of the duty of good faith, particularly in the context of collective bargaining. As the Authority saw it, the duty of good faith during bargaining could be relevant when considering "the actions that unions and employers might take in making publications, particularly on social media and other internet forums that enable widespread communication and comment". The matter was accordingly removed to this Court on 20 July 2016.

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1 *AFFCO New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2016] NZERA Christchurch 117.
2 At [19].
3 At [45] - [46].

[6] Initially it was unclear whether AFFCO sought urgency with regard to the removed proceeding. Accordingly, I issued a minute on 21 July 2016 indicating I would discuss this and related issues with counsel on 29 July 2016 at a telephone directions conference. During the course of that conference, Mr Wicks QC, counsel for AFFCO, advised that urgency was not now sought. It was appropriate, therefore, to confirm that the normal time limits would apply for the filing of pleadings before the matter was timetabled for a hearing in the usual way.

[7] In due course, AFFCO filed its statement of claim on 29 August 2016. Briefly, it alleges that since May 2015, numerous items have been published and posted on a Twitter account, a website, in a newspaper and on a Facebook page that were unbalanced, untruthful or derogatory of AFFCO and its parent company and officers. It alleges that these actions breach the duty of good faith as described in s 4(1)(a) of the Employment Relations Act 2000 (the Act).

[8] The pleading includes reference to posts which were published shortly before the filing of the statement of claim. In light of what was asserted to be "the very recent conduct" of the defendant over the period between 20 August and 23 August 2016, AFFCO applied for interim relief on an urgent basis.

[9] On 30 August 2016 I convened a telephone directions conference so as to consider the application for urgency. The result was that an early hearing was arranged for AFFCO's interlocutory application which duly proceeded on 11 October 2016.

The application for interim relief

[10] AFFCO's application, as removed, sought interim compliance orders:

(a) requiring the Union, its officers, employees and agents to comply with the duty of good faith by ceasing and desisting from publishing on any website, Twitter account or other site viewable on the internet, items referring to AFFCO or its parent company or officers that are unbalanced, misleading, untruthful and/or derogatory until further order of the Authority; and

(b) prohibiting the Union from appointing a particular officer to act as its representative to attend any meetings or mediations with AFFCO until further order of the Authority.

[11] The notice of application, after referring to the publications in question, alleged that these were the antithesis of the duty of good faith in that they did not assist in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative and instead act to destroy any such relationship. The application went on to plead that conventional requirements for interlocutory relief all favoured the making of the order for an interim compliance order. The evidence filed in support of the application exhibited the 39 publications which were relied on. The majority of those occurred in 2015; a number referred expressly to issues arising from bargaining between the parties.

[12] In its notice of opposition to the application for interim relief, the primary assertion for the Union was that the Court did not have jurisdiction to grant the order sought; but that even if it did, the claim was very weak, that the balance of convenience strongly favoured the Union as did overall justice, that AFFCO's hands were "unclean", that the company had breached the law in multiple respects which deserve public criticism; and finally it was contended that an interim order would be unjust and would infringe the rights of the Union and its members.

[13] Evidence which was filed for the Union referred to the context within which it said the disputed publications arose. In particular it described the fact that in late 2010, AFFCO had offered workers a choice at the beginning of the season. They could either enter into individual employment agreements or they could continue to be covered by a collective agreement. It was stated that if they accepted the former, they would be engaged for longer seasons. It was also asserted that non-members had been engaged out of seniority order. Workers had been informed that if they left the Union and accepted the individual employment agreement, they would not be laid off. These events had resulted in a sharp decline of Union membership.

[14] The evidence went on to describe a range of subsequent issues, many of which had resulted in decisions being made by the Authority, by this Court or by the

Court of Appeal. Reference was made to a lockout which occurred in early 2012, to various issues as to bargaining then and later, including the issues which came before the full Court in November 2015[4] and more recently in the Court of Appeal.[5] Multiple other decisions of the Authority and the Court were referred to where AFFCO had been criticised. As well, reference was made to diverse newspaper articles and a submission made by one of AFFCO's directors to a Parliamentary Select Committee in which the Union was described as being "dishonest" and "positively misleading".

[15] It was contended that whether the statements posted by or on behalf of the Union amounted to a breach of the duty of good faith required an assessment which had to be undertaken in the context of all the circumstances, particularly those disclosed in the materials produced for the Union.

[16] Evidence in reply was given for AFFCO. The bargaining history was described from the company's perspective. It was contended that AFFCO's claims were designed to provide for increased earnings, more work and more secure work for its employees; its claims had not been intended to weaken the Union or to hurt workers. It was asserted that the Union had continually misrepresented the company's position to its members and at the same time had subjected AFFCO and its parent company and officers to emotive public abuse.

Jurisdiction

[17] The essence of the plaintiff's case is that there have been serious breaches of the good faith provisions of s 4A of the Act, and that to prevent a continuation of such breaches interim relief should be granted.

[18] But the preliminary issue is whether the Authority, and by derivation the Court when a proceeding is removed to it, has jurisdiction to make an interim compliance order.

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4 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204, (2015) 10 NZELC 79-057.

5 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 482.

The legislative provisions

[19] The statutory context for an analysis of this issue is provided by these provisions of the Employment Relations Act 2000 (the Act):

> **137 Power of Authority to order compliance**
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> (1) This section applies where any person has not observed or complied with–
>
> (a) any provision of–
>
> …
>
> (ii) [Part] 1…
>
> (2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.
>
> (3) The Authority must specify a time within which the order is to be obeyed.
>
> (4) The following persons may take action against another person by applying to the Authority for an order of the kind described in subsection (2):
>
> (a) any person (being an employee, employer, union, or employer organisation) who alleges that that person has been affected by non-observance or non-compliance of the kind described in subsection (1).
>
> (b) [Repealed]
>
> **138 Further provisions relating to compliance order by Authority**
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> (1) The power given to the Authority by section 137(2) may be exercised by the Authority—
>
> (a) of its own motion; or
>
> (b) on the application of—
>
> (i) any party to the matter; or
>
> (ii) [Repealed]
>
> (iii) in the case of sections 223C, 223D(6), and 225(4)(c), a Labour Inspector.
>
> (2) Before exercising its power under section 137(2) in relation to a person who is not a party to the matter, the Authority must give that person an opportunity to appear or be represented before the Authority.
>
> (3) Any time specified by the Authority under section 137 may from time to time be extended by the Authority on the application of the person who is required to obey the order.
>
> (4) A compliance order of the kind described in section 137(2)—

(a) may be made subject to such terms and conditions as the Authority thinks fit (including conditions as to the actions of the applicant); and

(b) may be expressed to continue in force until a specified time or the happening of a specified event.

(4A) If the compliance order relates in whole or in part to the payment to an employee of a sum of money, the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it.

(5) Where the Authority makes a compliance order of the kind described in section 137(2), it may then adjourn the matter, without imposing any penalty or making a final determination, to enable the compliance order to be complied with while the matter is adjourned.

(6) Where any person fails to comply with a compliance order made under section 137, the person affected by the failure may apply to the court for the exercise of its powers under section 140(6).

[20] A failure to comply with a compliance order may result in the Court being asked to exercise its powers under s 140(6)[6] which provides:

(6) Where any person fails to comply with a compliance order made under section 139, or where the court, on an application under section 138(6), is satisfied that any person has failed to comply with a compliance order made under section 137, the court may do 1 or more of the following things:

(a) if the person in default is a plaintiff, order that the proceedings be stayed or dismissed as to the whole or any part of the relief claimed by the plaintiff in the proceedings:

(b) if the person in default is a defendant, order that the defendant's defence be struck out and that judgment be sealed accordingly:

(c) order that the person in default be sentenced to imprisonment for a term not exceeding 3 months:

(d) order that the person in default be fined a sum not exceeding $40,000:

(e) order that the property of the person in default be sequestered.

Previous cases

[21] Mr Wicks first submitted that the Court does have jurisdiction to grant interim compliance orders, and that this was the effect of a trio of early cases delivered by the Labour Court which had so held: *New Zealand Harbours IUW v*

[6] Employment Relations Act, s 138(6).

Auckland Harbour Board;[7] *Japan Line (NZ) Ltd v NZ Harbours IUOW*;[8] and *New Zealand Stevedoring and Wharfingering Co Ltd v New Zealand Waterfront Workers IUOW*.[9]

[22] I comment briefly on each. In the first of these, the *New Zealand Harbours* judgment, the Court was required to consider several procedural questions, two of which should be referred to. The first question related to whether the then recently enacted Labour Relations Act 1987 conferred a jurisdiction on the Labour Court to grant ex parte interim injunctions, in respect of a strike or lockout; the second question was whether in that context the Court had jurisdiction to issue an ex parte compliance order.

[23] Each member of the Court considered there was jurisdiction to grant an ex parte order of injunction. Horn CJ, for instance, explained that the statute had bestowed a jurisdiction to grant injunctions in respect of strikes and lockouts which had formerly been possessed by the High Court; and that otherwise the rules of procedure of the latter Court were to apply which included the ability to grant ex parte injunctions.[10]

[24] The second issue related to the ability of the Court to grant an order for compliance without giving notice to the party against whom the order was sought or proposed to be made. On this point each member of the Court held a different view. Horn CJ concluded that the Court had no jurisdiction to do so in the absence of express statutory provisions authorising such a possibility; moreover such a procedural option was inherently unlikely given that the statute required proof of a breach before a compliance order could be made.[11] Williamson J, given the recent enactment of the subject statute, declined to answer the question but commented that he could not think of any circumstances in which a compliance order should be made

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7 *New Zealand Harbours IUW v Auckland Harbour Board* [1988] NZILR 154 (LC).
8 *Japan Line (NZ) Ltd v NZ Harbours IUOW* [1988] NZILR 879 (LC).
9 *New Zealand Stevedoring and Wharfingering Co Ltd v New Zealand Waterfront Workers IUOW* [1989] 1 NZILR 656 (LC).
10 *New Zealand Harbours IUW v Auckland Harbour Board*, above n 7, at 155 – 156 per Horn CJ; see also at 160 – 161 per Williamson J, and at 169 – 171 per Finnigan J.
11 At 158.

ex parte.[12] Finnigan J held that the Labour Court did not have jurisdiction to make an order for compliance without giving notice to the party against whom it was sought or proposed to be made, subject to a qualification that the Court could, of its own motion, and without further notice in other proceedings which had proceeded on notice, make such an order in the absence of a party concerned.[13] He also stated, in obiter dicta, that a Court could make an interim compliance order.

[25] The conclusions reached in *New Zealand Harbours* are of limited assistance in the present context, since the Court was focused on a sub-species of interim orders, those which are granted on an ex parte basis. That possibility does not arise here.

[26] The second and third cases relied on by Mr Wicks also considered interlocutory applications made with regard to strike-related activity. In *Japan Line,* the Court was satisfied that there was an illegal strike, and it made a compliance order which was limited in time; it was to continue until two particular proceedings had been resolved.[14] The Court was not required to consider the legal question as to whether there was jurisdiction to grant an interim compliance order. It is apparent that the facts of the case might well have justified the granting of an interim injunction.

[27] The third case, *New Zealand Stevedoring,* also involved a strike. The Court dealt with an interlocutory application for relief described as an interim compliance order. Again, the Court was not specifically required to determine whether there was a jurisdiction to do so.[15] It considered the application by applying principles relating to interim injunctions. In my view, this judgment cannot be regarded as providing an analysis of the issue of jurisdiction which arises in the present instance.

[28] Mr Cranney, counsel for the Union, pointed out that they were not the only relevant cases which were decided under the Labour Relations Act 1987. Judge Colgan, as he then was, dealt with this issue in two decisions: *Waikato Asphalts Ltd v*

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12 At 166.
13 At 175.
14 *Japan Line (NZ) Ltd v NZ Harbours IUOW*, above n 8, at 886.
15 *New Zealand Stevedoring and Wharfingering Co Ltd v New Zealand Waterfront Workers IUOW,* above n 9, at 660.

Northern Industrial District Distribution Workers IUOW[16] and *New Zealand Labourers IUOW v Fletcher Development and Construction Ltd*.[17] In both instances he made the point that there was no distinct species of interim compliance order, unlike an interim or interlocutory injunction. He held that the statutory provisions contained sufficient flexibility to make a compliance order of limited duration, if necessary subject to conditions. Such an order might have similar effect to an interim order. But there was a significant difference which lay in the burden of proof which had to be satisfied before a compliance order could be made. It was not sufficient for an applicant to establish an arguable case, and then contend that the balance of convenience favoured the grant of such an order. Rather, as the language of the statute stipulated, the Court had to be satisfied that the subject person had not observed or complied with the relevant statutory provision, or the terms of the relevant award or agreement.[18] Only then could a compliance order be issued.

[29] It was thereby concluded that the Court could not make an interim or interlocutory compliance order.

[30] Another important point which emerges from the early cases is to the effect that the compliance procedure is not appropriate for settling disputes about the nature of a person's obligations. So, for example, it is not to be seen as a fast track method for resolving disputed contentions as to the correct interpretation of a contract, or of statutes, rules or decisions. It is a procedure for enforcing "settled or clear obligations".[19]

[31] Coming to more contemporary statements on this topic, there are a number of judgments where the issue has been considered under the current Act.[20] The first of these was made in *Axiom Rolle PRP Valuations Services Ltd v Kapadia*.[21] There, a

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16 *Waikato Asphalt Ltd v Northern Industrial Distribution Workers IUW* [1990] 2 NZILR 780 (LC).

17 *New Zealand Labourers IUOW v Fletcher Development and Construction Ltd* [1990] 2 NZILR 1016 (LC).

18 Labour Relations Act 1987, s 207(1); see *New Zealand Labourers IUOW v Fletcher Development and Construction Ltd*, above n 17, at 1021; *New Zealand Harbours IUW v Auckland Harbour Board*, above n 7, at 157.

19 *New Zealand Harbours IUW v Auckland Harbour Board*, above n 7 at 166 per Williamson J; and to similar effect at 158 – 159 per Horn CJ.

20 I refer to two of them. A third is *Greenlea Premier Meats Ltd v New Zealand Meat & Related Trades Union Inc* [2006] ERNZ 312 at [5].

21 *Axiom Rolle PRP Valuations Services Ltd v Kapadia* [2006] ERNZ 639 (EmpC).

full Court considered whether there was jurisdiction either in the Authority or the Court to make Anton Pillar orders. In that context, there was a brief discussion of the Authority's ability to make a compliance order. It was emphasised that the jurisdiction to do so derives solely from the statute. The Court stated that the Authority was required to investigate an employment relationship problem and determine whether there was a breach before it could issue a compliance order. It was observed that in circumstances of greater urgency, such an investigative process may not be swift enough to restrain what would otherwise be irreparable harm. It was finally noted that it is a principle of long standing that there was no such remedy as an interim compliance order.[22]

[32] Soon after, in *Credit Consultants Debt Services NZ Ltd v Wilson (No 2),*[23] the same full Court returned to this issue. Whilst the focus of the judgment in this instance was on the ability of the Authority or the Court to grant interlocutory and permanent injunctive relief, the following statement was made as to compliance orders:

> [10] Section 137(1)(a) allows the Employment Relations Authority or the Court on removal of proceedings to make an order requiring Mr Wilson to comply with his employment agreement. The Authority must be satisfied that he has not observed or complied with any provision of the agreement. There is no power for the Authority to make an interlocutory compliance order in the same way that interlocutory injunctive relief may be granted by Courts having the jurisdiction to do so to preserve a position pending a substantive hearing. The Authority may investigate the complaint of a breach and if it finds a breach, must specify a time within which a compliance order is to be obeyed: s 137(3). Compliance orders by the Employment Relations Authority are enforceable in the Employment Court under s 138(6).

[33] From the foregoing survey, it is clear that it has long been the position that there is no jurisdiction to make an interim compliance order.

Submission made for AFFCO

[34] After referring to the early decisions on which he relied, Mr Wicks submitted that were the Court to conclude there was no jurisdiction to grant an interim

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22 At [70].

23 *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205 (EmpC).

compliance order, there would be a lacuna in circumstances of urgency where it was appropriate to grant prompt relief. He argued that the Court should strive to avoid such a conclusion.

[35] He invited the Court to have regard to the following provisions of the Act:

- Section 186, which provides that the Court is a court of record, having inherent powers; it was in effect submitted that on a removed matter, the Court could utilise such powers.

- Section 157(2)(b), which emphasises that the Authority must, in carrying out its role, "aim to promote good faith behaviour", an object which this Court should apply on a derivative basis; this would apply to the Court where a matter is removed.

- Section 187(1)(m), which provides that the Court has exclusive jurisdiction to exercise such functions and powers as may be conferred on it by the Employment Relations Act or any other Act; since an order of compliance could be made under the Act utilising the provisions of s 137, this should be understood as including the making of interim compliance orders.

[36] Next, Mr Wicks argued the Court should adopt reasoning of the kind which was applied with regard to the question of whether an interim reinstatement order could be made under the Employment Contracts Act 1991, in the two leading cases on this topic of *X v Y Ltd v NZ Stock Exchange*[24] and *Board of Trustees of Timaru Girls High School v Hobday*.[25] Relying on the rationale adopted in those cases, he said that the scope of the relevant statutory provisions just referred to should be construed in a manner which allowed the Court to conclude that it possessed all the tools of compliance, including if need be, the power to make interim orders.

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[24] *X v Y Ltd v NZ Stock Exchange* [1992] 1 ERNZ 863 (EmpC).

[25] *Board of Trustees of Timaru Girls High School v Hobday* (reported as *Hobday v Timaru Girls' High Trustees)* [1993] 2 ERNZ 146 (CA).

Discussion as to interim compliance orders

[37] For a range of reasons I am not satisfied that the Authority, and now the Court, has the ability to make an interim compliance order.

[38] The first and compelling point is the issue referred to in 1990 by Judge Colgan, as he then was, relating to the onus of proof. The statute puts this issue beyond doubt. Before making a compliance order, the Authority must be persuaded that a person "has not observed or complied with" the relevant obligation.[26]

[39] This is to be contrasted with the position as to interim injunctions. Under s 100 of the Act, the Court has "full and exclusive jurisdiction" to hear and determine injunction proceedings. Obviously that includes the ability to grant interim injunctions, where there must be a threshold assessment as to whether there is an arguable case. That is appropriate for an interlocutory application which is required to be determined on untested evidence.

[40] Parliament could have chosen to allow for such a possibility in respect of compliance orders, but it has not done so.[27] Rather, it has provided for the possibility of time limited orders, and orders which are subject to conditions which has been observed previously, might have the same effect as an order made on an interim basis. However, the starting point must be that Parliament has not seen fit to provide for the possibility of granting a compliance order on an interlocutory basis, where the Court proceeds by considering affidavit evidence only.

[41] A related issue is that the relevant obligation must be regarded as having been established. As the dicta of the cases I have reviewed demonstrates, the compliance procedure is not a fast track method of avoiding the normal procedures by which obligations are clarified. Rather the procedure is a means of enforcing settled or clear liabilities.

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[26] Employment Relations Act 2000, s 137(1).

[27] An example where it has done so is found in the Food Act 2014, at s 335; that said, the context is different and I do not attach significant weight on this comparison.

[42] That all said, it is possible to apply for urgency. If granted the Court will endeavour to resolve the issues very promptly. But that involves a substantive procedure; it is not one which it is appropriate to conduct on an interlocutory basis.

[43] The reference by Mr Wicks to s 186 of the Act which provides that the Employment Court is a Court of record with inherent powers does not assist with regard to the present issue. That is because what is at issue is the jurisdiction of the Authority; it is not a Court.[28] It follows that on a removed matter, the Court can only exercise the powers which the Authority itself could have exercised.

[44] Section 187(1)(m) was referred to. It is not a relevant provision since it relates to the functions and powers of the Court; but nothing turns on this since s 161(1)(s), relating to the jurisdiction of the Authority, is in similar terms. The question which is raised is whether the power to grant an interim compliance order is a power or function conferred by the Employment Relations Act or any other Act. As I have found, such a power is not conferred expressly. Nor in my view is it one which the Court should conclude is a necessary adjunct of the general power possessed by the Authority to make orders of compliance under ss 137 or 138. These provisions spell out the scope of this power in considerable detail, and do not refer to the ability to make interim orders. It would in those circumstances be inappropriate to conclude that although there is no difference to the making of interim orders, Parliament nonetheless intended that such orders could be granted.

[45] Next, I deal with the issue as to whether there is a lacuna which might favour a conclusion that the relevant provisions should be construed as bestowing such a jurisdiction on the Authority. It is significant that despite the early cases which indicated that an interim compliance order could be granted, a persuasive contrary view was expressed in *Waikato Asphalts* and in *New Zealand Labourers*. The conclusions reached in these later judgments have not been challenged since; and indeed were confirmed in *Axiom Rolle* and in *Wilson.*[29] Parliament has not seen fit to alter the long held understanding as to jurisdiction which has pertained since

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[28] *Claydon v Attorney-General* [2002] 1 NZLR 130 (HC); *Claydon v Attorney-General* [2002] 1 ERNZ 281 (CA); *BDM Grange Ltd v Parker* [2006] 1 NZLR 353, [2005] ERNZ 343 (HC) and *Axiom Rolle v Kapadia*, above n 21, at [79].

[29] *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)*, above n 23, at [10].

1990. Nor is there any evidence that the Employment Tribunal, the Authority or the Court has been hampered by the absence of such a jurisdiction. I do not consider that there is in fact a lacuna of the kind described by Mr Wicks.

[46] Furthermore, in my view this is a concern which is more apparent than real. As already mentioned, where a settled obligation requires consideration of a compliance order, the Court can deal with the relevant application on properly tested evidence heard as promptly as can reasonably occur. A contrary approach where claims lie untested by cross-examination or other evidential methodologies used in full hearings, is undesirable, inappropriate and in my view unintended.

[47] There was some discussion with counsel as to whether any inference could be drawn from the fact that the consequences of the breach of a compliance order are severe.[30] These consequences are described in s 140(6) of the Act; they include the imposition of a fine, sequestration of property or imprisonment. The issue is whether the existence of such a potential outcome might provide a reason for concluding that compliance orders should not be made on an interim basis.

[48] There is no doubt that enforcement of a compliance order potentially gives rise to significant sanctions if non-compliance continues. However, the same could be said of a failure to comply with the terms of an interlocutory order such as an interim injunction, since such a breach is a contempt of Court which is also punishable by committal to prison, the imposition of a fine or the sequestration of property.[31] These serious outcomes may occur whether or not the breach is of an interlocutory order. I do not regard this factor as being persuasive either way in construing whether there is a jurisdiction to make interim compliance orders.

[49] Having regard to all the foregoing factors, I conclude that Parliament did not intend to provide for interim compliance orders. I respectfully concur with the obiter dicta statements of the full Court in *Axiom Rolle* and *Wilson* to that effect.

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30 A point which was touched on by CJ Horn in *New Zealand Harbours IUW v Auckland Harbour* Board, above n 7, at 158.

31 *Laws of New Zealand* Injunctions (online ed) at [2] and Contempt of Court (online ed) at [87].

Interim injunction jurisdiction?

[50] In the course of his submissions, Mr Wicks argued in the alternative that AFFCO's application could be considered on the basis of principles relating to interim or interlocutory injunctions. It was submitted that if arguably there had been breaches by or on behalf of the Union of good faith obligations by the publication of the various statements referred to in AFFCO's application, interim relief by way of injunction should be granted to restrain a continuation of such conduct.

[51] Such an argument was not pleaded, although most of it was forecast in Mr Wicks' written submissions which were filed prior to the hearing; and both parties addressed the conventional elements of such an application – arguable case, balance of convenience and overall justice.

[52] On this point, Mr Wicks' primary submission was to the effect that there is a jurisdiction to award an interim injunction having regard to the relevant equity and good conscience provision. Although counsel referred to the provision which relates to the Court, s 189, the applicable provision as it relates to the Authority is s 157 of the Act. For present purposes it is not in materially different terms. It states:

> …
>
> (2) The Authority must, in carrying out its role,–
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> …
>
> (b) aim to promote good faith behaviour; and
>
> (c) support successful employment relationship; and
>
> (d) generally further the object of this Act.
>
> …
>
> (3) The Authority must act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with–
>
> (a) this Act; or
>
> …

[53] I refer to the requirement in s 157(3) that the Authority may not do anything that is inconsistent with the Act. This limitation requires a consideration of whether the use of the Authority's equity and good conscience provision to source a

jurisdiction for the making of an interim order of injunction would result in an inconsistency with any other provision of the Act.

[54] The first provision to be considered is s 127 of the Act which provides the Authority with the jurisdiction to make orders of interim reinstatement. In doing so, the Authority is enjoined to apply the law relating to interim injunctions. [32]

[55] Secondly, I refer to s 162 of the Act. It provides that the Authority possesses the power to grant injunctions as a consequence of the application of law relating to contracts. An order of injunction is a form of relief which may be granted in order to preserve rights under a contract, and as such it is a rule of law relating to contracts.[33]

[56] Also to be noted is s 100 which has already been mentioned; it bestows a full and exclusive injunction jurisdiction on the Court with regard to strikes and lockouts.

[57] These provisions suggest that the scheme adopted by Parliament was to refer expressly to the making of injunctions, or to relevant rules or principles, where it was intended that the Authority or Court is to have such a jurisdiction.

[58] To conclude that the Authority has jurisdiction to award interim injunctions for breaches of good faith by utilising the equity and good conscience provision of s 157 of the Act, would go too far. That is because such a conclusion would be inconsistent with express provisions of the Act; it would mean that the Authority could act beyond the scope of powers which had been specifically bestowed on it.

[59] There is a further point relating to this possibility which was raised by Mr Wicks when delivering his submissions in reply. He submitted that since it is established the Authority possesses the ability to order injunctions as an aspect of rules relating to contracts, there is jurisdiction in this case since what is in issue is the obligation of good faith, which was "arguably part of the contractual obligations between the parties".

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[32] Section 127(4).

[33] *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)*, above n 23, at [46].

[60] Were it to be the case that there was a relevant contract between an employer and a union which contained a term that those parties were required to deal with each other in good faith, Mr Wicks' submission might be correct. It may even be possible to argue that such an obligation could be an implied term of any such contract, if one or more of the applicable tests of implication could be met.

[61] However, that was not the basis on which the case was put. Specifically, no contract to which AFFCO and the union are parties was introduced in evidence. Consequently, there is no factual foundation for this submission.

[62] Indeed, on the evidence before the Court, the applicable duty of good faith between AFFCO and the union applies because those parties are bargaining for a collective agreement. The context of their employment relationship is defined by s 4(2)(b) of the Act. It is not a relationship which arises between them because they are parties to an agreement having contractual status.

[63] In the absence of a relevant contractual term, it cannot be concluded that the Authority has the jurisdiction to order an interim injunction based on the rules of contract.

Conclusion

[64] In summary, I am not satisfied that the Authority, and now the Court, has jurisdiction to grant the relief sought by AFFCO; this is firstly because there is no relevant function or power to grant an interim compliance order; and secondly because there is no relevant function or power to grant an interim injunction.

[65] Mr Wicks explained that if the plaintiff could not establish the first of the orders it sought, there would be no foundation for granting the second of the orders it sought. Accordingly, the application must be dismissed in both respects.

Factual issues

[66] Given those conclusions, it is not strictly speaking necessary to review and evaluate the competing factual assertions which the parties have made. However, in

determining whether the Court should do so, and in case this matter goes further, I wish to hear from counsel.

[67] I am aware that since the hearing of this application, the parties have agreed to resume bargaining in good faith for a new collective employment agreement, with the assistance of a private mediator.[34] In those circumstances, it appears that events have moved on, and it may be unnecessary for the Court to review a great deal of material where each party has been very critical of the other; indeed, it may be counter-productive for this to occur.

[68] Accordingly, I require counsel to file memoranda within 21 days of this judgment indicating their views as to whether, in a situation where the Court has found there is no jurisdiction to make the orders sought:

a) It should, alternatively, express findings as to the factual merits which arise on the material before the Court; including whether there is a breach of s 4 of the Act in the circumstances;

b) If so, whether such a judgment should not be issued until after mediation between the parties has concluded.

[69] Once I have received counsel's memoranda, I will consider these issues further.

B A Corkill
Judge

Judgment signed at 10.30 pm on 23 November 2016

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[34] *AFFCO New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2016] NZEmpC 138 at [3].