

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2012] NZERA Auckland 169**

**5377642**

BETWEEN

AFFCO NEW ZEALAND  
LIMITED  
Applicant

AND

NEW ZEALAND MEAT AND  
RELATED TRADES UNIONS  
INC  
First Respondent  
NEW ZEALAND COUNCIL OF  
TRADE UNIONS TE KAUA  
KAIMAHI INC  
Second Respondent

Member of Authority: Eleanor Robinson

Representatives: Vicki Campbell, Counsel for Applicant  
Peter Cranney, Counsel for Second Respondent

Investigation Meeting: 10 May 2012 At Auckland

Determination: 18 May 2012

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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## **Employment Relationship Problem**

[1] The Applicant, AFFCO New Zealand Limited (AFFCO), is seeking remedies in respect of an alleged breach of good faith pursuant to ss 4 and 32 of the Employment Relations Act 2000 (the Act) by the First Respondent, New Zealand Meat and Related Trade Unions inc (NZMWU), and the Second Respondent, New Zealand Council of Trade Unions Te Kauae Inc (CTU).

[2] AFFCO and NZMWU are parties to an expired collective agreement which continues in force pursuant to s 53 of the Act. The parties had entered into a bargaining process agreement and have met for the purposes of bargaining on several occasions.

[3] AFFCO alleges that the NZMWU breached the implied terms of good faith in the employment agreement to which they were party, and that the CTU incited, instigated, aided or abetted the alleged breaches. AFFCO is seeking the imposition of a substantial penalty against the CTU in respect of these alleged breaches.

[4] This preliminary determination addresses only the application by the CTU for a strike out of the cause of action against it, the substantive issues are yet to be determined.

### **The alleged breaches by the NZMWU**

[5] AFFCO claims that on 15 March and 12 April 2012 a SPAM attack occurred on the offices of AFFCO and other related businesses. The cyber attack prevented mobile telephone internet access and severely hampered their business operations.

[6] AFFCO claims that in excess of 2,400 unsolicited emails were sent to AFFCO's server and various other business addresses. AFFCO claims that it had the messages analysed and traced the source of the cyber attack back to NZMWU's website and the CTU's server.

[7] AFFCO claims that the CTU was acting on the instructions of NZMWU, and that it incited, instigated, aided or abetted NZMWU's breaches of the implied duty of good faith pursuant to s4 of the Act and which applies, as set out in s 4(4)(a), when the parties are bargaining for a collective agreement.

[8] AFFCO further claims that the NZMWU has breached s 32(1)(c) of the Act which states: "*the union and employer must meet each other, from time to time, for the purposes of*

*the bargaining*” by failing to consider and respond to proposals made to it by AFFCO, specifically:

- On 24 February 2012 AFFCO gave a proposed core agreement to the NZMWU. AFFCO claims no response has been received to this tabled offer.
- AFFCO also claims that the NZMWU has been asked to respond to AFFCO’s claims fully in order to negotiate and/or explore possible avenues of reaching a compromise, but NZMWU’s response was an outright rejection of all claims.

[9] AFFCO claims that NZMWU has breached s 32(1)(d)(iii) by making comments and publishing communications to the world at large which it claims are dishonest, misleading and exaggerated, and intended to undermine the bargaining e.g.

- i. A press release written by the NZMWU dated 28 February 2012 which stated::

*The bargaining team from Tallies confirmed they were not at mediation to bargain a new collective agreement, but simply to meet the requirements of the Employment Relations Act to meet when a lockout notice has been issued*

...

*The company acknowledged this would give them the ability to unilaterally reduce workers pay without agreement.*

- ii. Banners attached to the NZMWU’s office window in Invercargill on 13 March 2012 which stated:

*Talleys are bullies and liars.*

- iii. On 7 April 2012 the new Zealand Herald quoted the NZMWU’s representative, Mr David Eastlake, as stating:

*Mr Talley had closed down plants before to beat the union and seem bent on a similar plan.*

### **Strike Out Application**

[10] The CTU applies for a strike out on the following basis:

- i. A penalty under the good faith provisions of s4(1A) of the Act may only be imposed on a party to an employment relationship, and the CTU is not a party to an employment relationship in this instance.
- ii. A penalty under the inciting, instigating, aiding, and abetting provisions of 134(2) of the Act does not apply unless there is a breach of an employment agreement. And there is no applicable employment agreement.
- iii. A penalty for assisting the NZMWU to breach the express and implied terms of the employment agreement does not apply unless there is a breach of an employment agreement.

## **Issues**

[11] The issues for determination are whether a strike out should be allowed in respect of the causes of action against the CTU, specifically:

- Should a strike out be allowed in respect of an action against the CTU for a penalty in respect of a breach of the good faith provisions of s4(1A) of the Act?
- Should a strike out be allowed in respect of an action against the CTU for a penalty in respect of the instigating, aiding, and abetting provisions of 134(2) of the Act?
- Should a strike out be allowed in respect of an action against the CTU for a penalty in respect of assisting the NZMWU to breach the express and implied terms of the employment agreement?

## **Determination**

**Should a strike out be allowed in respect of an action against the CTU for a penalty in respect of a breach of the good faith provisions of s4(1A) of the Act?**

[12] Section 4 (1A)(b) states that the duty of good faith:

*Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*

[13] The duty as set out in this section rests upon the parties who are in an employment relationship. Section 4(2) defines the parties who can be in an employment relationship, these being employers, employees and unions.

[14] I accept Mr Cranney's submission that the CTU is not a union.

[15] A union is defined in s 5 of the Act as: "*a union registered under Part 4*". The CTU is not a registered union in terms of Part 4 of the Act, it is not listed as a registered union on the annual Union Membership Return Reports which are compiled in accordance with the requirement as set out in Part 4 s16 of the Act which mandates that unions must deliver by 1 June in each calendar year an annual return of members to the Registrar of Unions.

[16] The CTU is an umbrella organisation, the employees of which are however members of affiliated registered unions.

[17] I do not find that there is any employment relationship between the CTU and AFFCO on the basis of the definitions set out in s 4(2) and Part 4 of the Act.

[18] Because I have found that the CTU is not in an employment relationship with AFFCO, it cannot therefore have breached the good faith provisions of s4 (1A) of the Act.

[19] I determine that this part of the claim should be struck out.

**Should a strike out be allowed in respect of an action against the CTU for a penalty in respect of the instigating, aiding, and abetting provisions of 134(2) of the Act.?**

[20] Section 134(2) of the Act states:

*Every person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.*

[21] The alleged breach claimed is that of the NZMWU breaching the implied terms of good faith in the employment agreement to which they were party.

[22] I consider that the preliminary issue to be addressed is whether there is an employment agreement between the NZMWU and AFFCO as unless there is such an

employment agreement in being, the issue of whether or not any person can incite, instigate, aid or abet any breach of such an agreement falls away.

[23] Mr Cranney submits that there is no employment agreement between the NZMWU and AFFCO.

[24] An employment agreement is defined in s 5 of the Act which states:

***Employment agreement –***

- (a) *means a contract of service; and*
- (b) *includes a contract for services between an employer and a homemaker; and*
- (c) *includes an employee's terms and conditions of employment in –*
- (d) *(i) a collective agreement; or*  
*(ii) a collective agreement together with any additional terms and conditions of employment; or*  
*(iii) an individual employment agreement*

[25] According to s 5 of the Act there are two components to the definition of an employment agreement:

- i. Fundamentally a contract of service (or in a specified case, for services)
- ii. This contract of service includes the terms and conditions of employment which are set out in either a collective agreement; with or without any additional terms and conditions of employment, or in an individual employment agreement.

[26] I accept that employees of AFFCO who are members of the NZMWU have an employment agreement with AFFCO because in that case both components of the definition are fulfilled; there is a contract of service between the employees and AFFCO, and the applicable terms and conditions of employment for those employees are set out in a collective agreement.

[27] In the case of the NZMWU, whilst there is an employment relationship with AFFCO as defined in s 4(2) of the Act, I find that in accordance with the definition set out in s 5,

because there is no contract of service between the NZMWU and AFFCO, the fundamental component of the definition of an employment agreement has not been met.

[28] As a consequence I find that there is no employment agreement between AFFCO and the NZMWU capable of being breached.

[29] A penalty under s 134(2) of the Act is applicable only in circumstances in which there is a breach of an employment agreement, In circumstances in which I find there was no employment agreement between the NZMWU and AFFCO, the CTU cannot have incited, instigated, aided or abetted a breach thereof and no penalty is applicable.

[30] I determine that this part of the claim should be struck out.

**Should a strike out be allowed in respect of an action against the CTU for a penalty in respect of assisting the NZMWU to breach the express and implied terms of the employment agreement?**

[31] In light of my reasoning as set out above, I determine that this part of the claim should be struck out.

### **Costs**

[32] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Second Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

### **Next Steps**

[33] The Authority will shortly convene a case management conference to set timetable directions for the investigation of AFFCO's substantive claims.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**