

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2014] NZEmpC 85
ARC 14/13**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SHAUN MICHAEL McCARTNEY Plaintiff
AND	ATLAS CONCRETE LIMITED First Defendant
AND	FIRST UNION INC (FORMERLY THE NATIONAL DISTRIBUTION UNION INC) Second Defendant

Hearing: By memoranda of written submissions filed on 22 April and 26 May 2014

Appearances: Plaintiff in person
P Cranney, counsel for second defendant

Judgment: 29 May 2014

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] In this case Shaun McCartney sued not only his former employer, Atlas Concrete Limited (Atlas), for unjustified dismissal, but named as a party also the union of which he was a member, First Union Inc (formerly the National Distribution Union Inc) (the Union). He alleged that it wrongly failed to pursue his personal grievance with Atlas as he says it was obliged to do as a membership service to him.

[2] The preliminary question for the Court (posed by counsel for the Union and not disagreed with by Mr McCartney) in this aspect of the proceeding between Mr McCartney and the Union is as follows: “Is the union’s policy not to act in cases of

insufficient prospects of success [of a union member's personal grievance] in accordance with its rules?"

[3] The starting point is, therefore, the relevant rules of the Union at the time it declined to continue to represent Mr McCartney in the matter of his personal grievance with his former employer.

[4] Mr Cranney has, at the Court's request, supplied certified copies of the Union's rules for the years 2007 and 2008. Those were then the rules of the National Distribution Union Inc (NDU) but the fact that the rights and obligations in law of the NDU have been assumed by a newly created union, the second defendant, First Union Inc, does not change the position so far as this case is concerned.

[5] The events forming the basis of Mr McCartney's complaint against the Union occurred in the period covered by the rules.

[6] The particular relevant rule is r 54 ("Representation") which is contained under the heading "Part VIII - Other Matters" and states:

54. REPRESENTATION

54.1 The union may be represented before any Court or Tribunal by such person or persons as the National Secretary may appoint.

54.2 Any member of the union may request the union to act in any legal proceedings and/or the negotiation and/or enforcement of any contract/agreement or other arrangement affecting them in their employment.

54.3 Where any request is made pursuant to rule 54.2 the appropriate Regional, National or Sector Secretaries shall decide whether or not to so act.

54.4 Where it is decided to so act, representation will be free to the member unless any fee is set.

54.5 Where the union acts for a member in negotiations the union may initiate and undertake the negotiations as it sees fit in accordance with the appropriate ratification procedure, including the determination of the scope of the agreement to be negotiated. Where a collective agreement is sought, a majority of the workers to be bound by it may bind all workers in relation to its negotiation.

- 54.6** The agreement shall only be settled and agreed to when the worker parties to it have approved it either by a simple majority vote, or such other majority vote as may be agreed by meeting/s of workers held prior to any settlement.
- 54.7** The union shall advise any member upon request of their rights and obligations in their employment.
- 54.8** The union may act for a non-member of the union in any matter relating to that person's employment only with the approval of the Regional, National or Sector Secretaries who shall prescribe the appropriate fee. The National Executive will determine fees.
- 54.9** Every financial member of the union shall be deemed to have authorised the union to:
- 54.9.1 To represent the member in negotiations in respect of his/her employment agreement;
- 54.9.2 Act as the member's representative generally in the exercise of the member's rights or powers as an employee under the Employment Relations Act 2000.

[7] At issue particularly is r 54.2 set out above. The Union accepts that r 54.2 includes a member's request to initiate proceedings including to raise and prosecute a personal grievance.

[8] Mr Cranney for the Union points to the following rule, r 54.3, which vests in an office holder ("the appropriate Regional, National or Sector [Secretary]") the power to decide whether to so act.

[9] The Union accepts (and I agree) that such decisions must be made in accordance with the objects of the Union which are identified in r 2. These include, materially:

- 2.1.1 To negotiate, protect and improve the wages and conditions of employment in the industries to which these rules apply.
- ...
- 2.1.4 To further the social and economic interests of working people, their families and communities.
- ...
- 2.1.6 Such other objects as are not inconsistent with the above objects.

[10] Mr Cranney points to the "Complaints Procedure" contained within r 55 of the Union's rules. This provides materially:

- 55.1** Where a member is dissatisfied with a decision of an officer, or official or authorised agent and that member wishes to invoke the complaints procedures that member must notify the relevant Regional or Sector Secretary or National Secretary, who shall require a written report from that officer, official or authorised agent.
- 55.1.1** Where the officer concerned is the Regional or Sector Secretary the member shall notify the National Secretary.
- 55.2** The Regional Secretary, or the National Secretary may at his/her discretion require of the member, that the member furnish a written statement.
- 55.3** If the Secretary is unable to resolve the complaint to the member's satisfaction it shall be referred to the National Executive who shall determine the process for dealing with the complaint.
- 55.4** This process should include participation of a National Executive sub-committee made up of an appropriate number of executive members.
- 55.5** Any decision of the sub-committee which affects a member may be appealed by either party to the National Executive.
- 55.6** Any such member shall notify the National Secretary in writing of his/her dissatisfaction with the sub-committee's decision. The relevant Secretary shall compile a report which shall include all relevant documents which shall then be referred to the next meeting of the National Executive, who shall rule on the disputed matter.
- 55.7** The member and any officer or paid official concerned in the matter shall be entitled to attend and speak on the matter at the meeting of the National Executive. Each and every one of them shall be entitled to be represented.
- 55.8** Any member dissatisfied with the decision of the National Executive may appeal to the next Regional/Biennial Conference of the union, whose decision shall be final.

[11] Mr Cranney points next to what he says is a further protection for members in Mr McCartney's situation, being an appeal to the next regional biennial conference of the Union under rr 38 and 39. Mr Cranney categorises these protections available to a dissatisfied member in Mr McCartney's circumstances as "very strong". Counsel submits that the rules expressly contemplate that the appropriate union official may decide that the Union will not act as requested, so that there can be no breach of the rules by the Union in this case.

[12] Whilst it is true that those avenues of review or appeal exist, that does not answer sufficiently whether the Union is entitled in law to refuse to prosecute a

member's grievance or, importantly, how it must go about making a decision not to. I address that latter question now.

[13] Although not referred to in Mr Cranney's submissions, I conclude that there are also statutory obligations at issue in cases such as this. The good faith requirements under s 4 of the Act apply to the "employment relationship" between a union and a member of a union: s 4(2)(c). Although the current issue in that employment relationship is not one of the matters specified in subs (4), subs (5) emphasises that the specified matters are examples and do not limit the good faith obligations set out in subs (1). I conclude that, in relation to rr 54.2 and 54.3, the parties were engaged in dealings requiring both to act in good faith towards the other.

[14] Those good faith obligations in s 4(1) require the parties (Mr McCartney and the Union) to "deal with each other in good faith" and not, whether directly or indirectly, to do anything to mislead or deceive the other or that is likely to mislead or deceive the other.

[15] The particular good faith requirements under subs (1A) include requiring the parties "to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative".

[16] Accepting, as I do, that the Union was entitled under its rules to decline to represent Mr McCartney in the pursuit of his personal grievance, nevertheless its decision had to be taken in compliance with those good faith obligations. In practice, that should have meant:

- giving a proper consideration to Mr McCartney's grievance;
- undertaking proper inquiries to establish its probable chances of success;

- assessing all of that information with an open and appropriately informed mind;
- involving Mr McCartney in those inquiries and decision making; and
- giving him objectively assessable reasons for its refusal to act for him.

[17] So, whilst the answer to the narrowly stated question as to whether the Union's policy of not acting in cases of insufficient prospects of success is in accordance with its rules is "Yes", the qualifying factors just referred to must also be satisfied. They have not been established at this stage of the plaintiff's challenge to the Authority's determination that they were met by the Union.

[18] The Union must, in making a decision under r 54.3, act both objectively and reasonably and not arbitrarily. Although assessing the prospects of success of a personal grievance is a notoriously difficult exercise, it is nevertheless one that can be made and justified objectively in appropriate cases. Those with long memories and experience in the field will recall what were called s 117(3A) cases under the Industrial Relations Act 1973.¹

[19] The Authority's determination issued on 8 February 2013, to which this case is a challenge, records that Mr McCartney was dismissed summarily on 7 April 2009.² It records that the Union took up Mr McCartney's grievance and, by letter to Atlas dated 15 May 2009, raised an unjustified dismissal grievance on his behalf.³ Atlas is said to have responded to the Union in a letter dated 21 May 2009, asserting that Mr McCartney had no valid grievance and that its dismissal of him was justifiable.

¹ This section provided that: "Where any worker who considers that he has grounds for a personal grievance is unable to have his grievance dealt with or dealt with promptly because of a failure on the part of the worker's union or the employer or any other person to act or to act promptly in accordance with the procedure applicable under the provision included or deemed to be included in the award or collective agreement, that worker may, with the leave of the Arbitration Court and notwithstanding anything in that procedure, refer it to that Court for settlement and paragraph (i) of subsection (4) of this section shall apply in respect of every grievance so referred. Leave under this subsection may be given subject to such conditions as the Court thinks fit."

² *McCartney v Atlas Concrete Ltd* [2013] NZERA Auckland 46 at [1].

³ At [2].

[20] Atlas said in the Authority that the Union's 15 May 2009 letter was not sufficient to raise a grievance although it was prepared to await discussions with the Union organiser to identify the matters that Mr McCartney wanted it to address.⁴

[21] The Authority concluded, however, that at a meeting with the employer in June 2009, the Union organiser and a Union Secretary indicated to the employer that the grievance was either to be withdrawn or would not proceed. The Authority's determination records that the Union accepted that in June 2009 it indicated to Atlas that it would not continue to represent Mr McCartney in the matter of his grievance and that, having discussed that decision with him in both June and July 2009, the Union confirmed, in a letter written to him on 13 August 2009, that it would not represent him further in the matter of the grievance.⁵

[22] The Authority found that the Union's 15 May 2009 letter to Atlas did meet the statutory requirements for raising a grievance.⁶

[23] Turning to whether the Union "withdrew" Mr McCartney's grievance in June 2009, the Authority accepted the company's evidence that Atlas's Chief Financial Officer, Gregory Stewart, and the NDU's Karl Andersen, met face to face on or about Monday 29 June 2009, at which time Mr Andersen confirmed that the NDU was no longer representing Mr McCartney.⁷ Mr Stewart's evidence was that Mr Andersen also advised him that the Union did not consider that there was any basis for the grievance and it should be withdrawn or treated as having been withdrawn, with which Mr Andersen disagreed. The Authority found that, irrespective of the truth or otherwise of those comments, the Union had no authority to "withdraw the grievance" if it was no longer acting for Mr McCartney "and Mr Stewart should have recognised that".⁸ The Authority concluded that the purported withdrawal of the grievance was not, in these circumstances, a withdrawal authorised by Mr McCartney whose grievance it was. It held that even if the Union was not prepared

⁴ At [3].

⁵ At [4].

⁶ At [7]-[9].

⁷ At [10].

⁸ At [12].

to advance the grievance further on Mr McCartney's behalf, the plaintiff remained entitled to do so personally.⁹

[24] As to the question now in issue, and having referred to r 54.3, the Authority determined:

[15] The union declined to act for Mr McCartney because it considered his case had insufficient prospects of success. The mere fact of Mr McCartney's membership did not oblige the union to represent him in his grievance, and the rules permitted it to decline to do so. The union did not make its decision arbitrarily or without sufficient knowledge of the background, and engaged with Mr McCartney on a number of his concerns before confirming its position to him in writing in August.

[16] I do not accept that the union breached an obligation to Mr McCartney in respect of his personal grievance. Although Mr McCartney is dissatisfied with other aspects of his exchanges with the union at the time, none of these give rise to any breach of obligation.

[25] Mr McCartney's submissions on this point are contained in a lengthy handwritten "Notice of Opposition" (using a template affidavit form) and are not easy to follow, although I have attempted to do so reaching this decision.

[24] Mr McCartney's claims against the second defendant are also set out coherently in his amended statement of claim filed on 17 April 2013. Mr McCartney now challenges only the Authority's determination that the Union did not act in breach of its obligations to him as a member and, therefore, that it was not obliged to repay to Mr McCartney his union membership fees. The plaintiff asserts that the Authority's determination was wrong in that he says that the Union's rules required it to act on his behalf in accordance with them but that it failed or refused to do so. Mr McCartney asserts that the second defendant's policy in not acting in cases which have insufficient prospects of success was not in accordance with its rules. The relief claimed against the Union is, in effect, a declaration that it breached its obligations to the plaintiff and that it should have acted for him in his personal grievance. Mr McCartney also seeks repayment of his union membership fees paid over the course of his membership of the Union, amounting to about \$1,400 together with interest on these, and costs.

⁹ At [13].

[25] Mr McCartney's personal grievance against Atlas alleging that he was dismissed unjustifiably, was investigated and determined by the Authority. Its determination was delivered on 27 August 2013.¹⁰ It found that Atlas had dismissed Mr McCartney justifiably. Although Mr McCartney filed a challenge to that determination in this Court on 23 September 2013, his solicitor subsequently filed a notice discontinuing that challenge on 25 November 2013. That has, effectively, disposed of Mr McCartney's claims against Atlas.

[26] The Authority's determination shows that he was represented on legal aid by counsel in respect of his claims against Atlas.¹¹ It is conceivable that Mr McCartney's financial loss resulting from a breach by the Union of its rules (if there was a breach) might be any cost (beyond his grant of legal aid) to him of counsel engaged for his personal grievance instead of having had representation provided to him by the Union at no cost. It is difficult to understand as a remedy the plaintiff's claim for a refund of his membership fees of the Union over several years for the majority of which time he presumably had no, or at least no sufficient, complaint about the value of the membership. Even if Mr McCartney is successful in his claims against the Union, his monetary remedies must be very modest at best.

[27] So, while the narrow question posed by the Union is able to be answered in the affirmative as it would wish, it does not thereby dispose of Mr McCartney's non-de novo challenge to the Authority's determination dismissing his claims against the Union. Just because the Union was empowered under its rules to decline to represent a member on grounds of insufficient prospects of success, whether it did so in compliance with its statutory and implied obligations is another question not decided by the answer to the question posed.

[28] Before Mr McCartney's challenge is set down for hearing, however, I am directing the parties (Mr McCartney and the Union) to mediation or further mediation. The landscape has changed significantly since these proceedings were originally issued. The Authority has found that Mr McCartney was dismissed

¹⁰ *McCartney v Atlas Concrete Ltd* [2013] NZERA Auckland 381.

¹¹ At [44].

justifiably by Atlas and, there being no longer any live challenge to that determination, Mr McCartney must accept the finality of that determination.

[29] Mr McCartney's claim will turn not on the entitlement in law of the Union to decline to act for him, as I have determined it was entitled in law to do. Rather, it will depend on compliance by the Union of its implied obligations and its express obligations under the good faith provisions of s 4 of the Act in how it went about making its decision not to continue to represent Mr McCartney.

[30] The other landscape change that has now occurred emerges from the Authority's determination about the circumstances in which Mr McCartney came to be dismissed and Atlas's justification for doing so. If the Union is able to either persuade Mr McCartney in mediation or, if not, to establish to the Court's satisfaction that it fulfilled its statutory good faith obligations towards the plaintiff as a member, the Authority's conclusions about what led to Mr McCartney's justified dismissal may strengthen the Union's case that it was correct to have assessed that his grievance had insufficient prospects of success.

[31] These are considerations upon which Mr McCartney will need to reflect carefully and, I respectfully suggest, take professional advice.

[32] Mr McCartney and Mr Cranney are directed to report to the Registrar once mediation has taken place, either notifying the Court that the proceeding has been settled or, if not, seeking a directions conference with a Judge to set the case down for hearing.

[33] I do not propose to make any orders as to costs on this preliminary application. Although, in a sense, the Union has been successful, its own question on which it succeeded was so narrowly drawn that it only assists in determining the scope of the Court's inquiry rather than having the effect of determining Mr McCartney's challenge.

GL Colgan
Chief Judge

Judgment signed at 4.20 pm on Thursday 29 May 2014