IN THE EMPLOYMENT COURT
AUCKLAND

AC 6/08
ARC 69/07
ARC 72/07

IN THE MATTER OF a point of law challenge to a determination of the Employment Relations Authority

AND IN THE MATTER OF a preliminary issue

ARC 69/07

BETWEEN WAIKATO DISTRICT HEALTH BOARD
First Plaintiff

AND TAIRAWHITI DISTRICT HEALTH BOARD
Second Plaintiff

AND BAY OF PLENTY DISTRICT HEALTH BOARD
Third Plaintiff

AND NORTHLAND DISTRICT HEALTH BOARD
Fourth Plaintiff

AND THE NEW ZEALAND PUBLIC SERVICE ASSOCIATION INC
Defendant

ARC72/07

BETWEEN THE NEW ZEALAND PUBLIC SERVICE ASSOCIATION INC
Plaintiff

AND WAIKATO DISTRICT HEALTH BOARD
First Defendant

AND TAIRAWHITI DISTRICT HEALTH BOARD
Second Defendant

AND BAY OF PLENTY DISTRICT HEALTH BOARD
Third Defendant

	AND	NORTHLAND DISTRICT HEALTH BOARD Fourth Defendant

Hearing: 12 March 2008
(Heard at Auckland)

Court: Chief Judge G L Colgan
Judge B S Travis
Judge C M Shaw

Appearances: Doug Alderslade and Paul White, Counsel for Plaintiffs
Tanya Kennedy and Fleur Fitzsimons, Counsel for Defendant

Judgment: 20 March 2008

JUDGMENT OF THE FULL COURT

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[1] This judgment deals with an important preliminary issue in the parties' litigation about ratification of settlements reached in collective bargaining. There are two issues. What is the status and effect of a collective agreement if it is in writing and signed by the employer and union parties but it has not been ratified by relevant union members? Does s163 of the Employment Relations Act 2000 ("The Act") prohibit the Employment Relations Authority or, on a challenge as in this case, the Employment Court, from granting to the employer party or parties any remedies for non-ratification.

[2] These preliminary questions of law arise from the findings of the Employment Relations Authority, the accuracy of which is challenged by the defendant. What occurred by way of ratification will have to be determined by the trial Judge after hearing and considering evidence. This judgment does not attempt to resolve those conflicts but proceeds only on undisputed facts and is intended to give guidance to the trial Judge and to other parties faced with this question.

[3] Collective agreement ratification practices of many unions may be affected by the judgment in this case. We are aware from the facts of other cases heard and decided by us about collective bargaining, that there is a variety of practices among

unions seeking ratification of collective agreements from their members before voting takes place. This ranges from providing each union member employee with a complete and final copy of the collective agreement at one extreme, to the provision of written or even oral summaries limited to advice of wage rates and other important changed terms and conditions, at the other extreme.

Background

[4] The following are taken from what appear to be common elements of the parties' chronologies and the documents filed.

[5] While collective bargaining with the four plaintiff district health boards ("the Midland DHBs") for a multi-employer collective agreement ("meca") covering PSA members in allied health positions at those boards was under way, core national wage negotiations for all PSA members in all district health boards began. The meca bargaining with the plaintiffs was suspended pending the outcome of the national wage negotiations. This was because government agreement to provide sufficient funds was required to meet increased wage and salary rates. These rates would then be incorporated into the numerous collective negotiations (including those with the plaintiff boards) that were then under way.

[6] The national wage negotiations did not amount to bargaining for a collective agreement instituted under s42 of the Employment Relations Act and did not follow the statutory scheme for bargaining. Nevertheless, the parties to that national wage negotiation (the PSA and all district health boards collectively) entered into an arrangement for the conduct of those negotiations that not only resembled a bargaining process arrangement under s32(1) of the Act but indeed adopted the terminology of statutory collective bargaining. This may have given the appearance that the parties were engaged in bargaining for a meca. The process arrangement for those national wage negotiations included a requirement that the settlement be ratified according to the PSA's rules and *"according to advice on ratification procedures given for regional MECA negotiations"*.

[7] The national wage negotiation concluded in September 2000. Its outcome was recorded in a document entitled *"PSA/DHB National Negotiations 2005 Terms of Settlement – Core Material 14 September 2005"* that is known to the parties as "NTS". The NTS was signed by the parties' advocates on 22 September 2005. It required the subsequent approval of government funding but in the meantime negotiations for the Midlands meca with the plaintiffs continued between October 2005 and April 2006.

[8] In accord with the collective wage bargaining process arrangement, the PSA took the terms of the NTS settlement to its relevant members for *"ratification"* in late December 2005 and early February 2006.

[9] By an e-mail dated 8 February 2006 the PSA advised the plaintiffs that its members had ratified the NTS describing this as *"The Midlands Region MECA ratification process"* and that the PSA would then seek *"endorsement of the whole document"*. There were further meetings between the bargaining representatives of the PSA and the Midlands DHBs in February, March and April 2006. What occurred at these meetings is the subject of dispute yet to be resolved but following them the advocate for the Midlands DHBs provided the PSA with a draft meca in the form that was subsequently signed by all parties and dated 21 April 2006.

The Employment Relations Authority's determination

[10] Although these include matters of disputed fact to be determined by the trial Judge, the following are nevertheless the findings of the Authority that stand unless or until set aside.

[11] The Authority found that at the union's "ratification" meetings held in December 2005 and, (in the case of employee members at Waikato DHB), in February 2006, members of the union voted for *"the concept"* of a regional meca to be made up of the details negotiated in the NTS, together with any further or varied provisions that might be settled during the meca negotiations. Following these *"ratification meetings"*, negotiations between the Midlands DHBs and the PSA continued about the content and wording of what was intended to be the Midlands

meca including changes affecting the categories of employees to be covered by the salary scales. These negotiations continued until late March 2006 but the additions and alterations made after the *"ratification meetings"* were not ever taken back by the PSA to its affected membership for ratification or rejection. The Authority concluded that, at most, the only terms and conditions that were ratified at the meetings in December and February were those that had been settled in the NTS negotiations, essentially addressing wage/salary rates.

[12] As to whether there is a lawful or effective collective agreement, the Authority had regard to s54 that requires such to be in writing and signed by all union and employer parties. The document meets that test and the Authority so found, despite acknowledging that the PSA should not have signed the meca because the agreement had not been ratified. However, the Authority also found that s163 prohibited it from cancelling or varying a collective agreement or any term of a collective agreement. We infer that the Authority considered it was precluded thereby from declining to give effect to the document.

What is "ratification" in employment law?

[13] Ratification is a procedure in contract by which negotiation and settlement of an agreement is undertaken by an agent or other representative for a party. It is not insignificant that the concept was first incorporated into employment law in the Employment Contracts Act 1991. It has, however, been continued, albeit in different terms, in the less contractually focused Employment Relations Act 2000. In the 1991 legislation the process applied to employers as well as to employees collectively who were represented in negotiations by a bargaining agent. Ratification is now only required of unions' settlements in bargaining.

[14] Black's New Zealand Law Dictionary provides the following relevant definition of ratification:

> ***Ratification,*** *…. **1.** Adoption or enactment, esp. where the act is the last in a series of necessary steps or consents … In this sense, ratification runs the gamut of a formal approval of a constitutional amendment to rank-and-file approval of a labor union's collective-bargaining agreement with*

> *management. … **2.** Confirmation and acceptance of a previous act, thereby making the act valid from the moment it was done …*

[15] This was explained in employment law terms in a judgment of the Employment Court under the 1991 legislation, *New Zealand Medical Laboratory Workers Union Inc v Waikato Medical Laboratory Ltd* [1998] 1 ERNZ 162, 170:

> *Precisely what is ratification is not defined in the legislation. Having regard both to the general law of agency and to employment law and the reality of employment relations in New Zealand, I am satisfied that ratification is the principal's consent to a proposed settlement negotiated by an agent, confirmation of a provisional agreement or the giving of formal consent or sanction. When ratified a contract is held to have been made on and as from the date of settlement, not from the subsequent date of ratification.*

[16] The first issue turns on the question of what it is that must be ratified and we begin with the legislation.

The relevant legislative provisions

[17] Part 5 of the Act addresses "*Collective bargaining*". Among its objects in s31 are "*to promote orderly collective bargaining*" (s31(d)).

[18] Section 51 appears immediately under the heading "*Collective agreements*" and is at the heart of this case. It provides:

> ***51 Ratification of collective agreement***
>
> *(1) A union must not sign a collective agreement or a variation of it unless the agreement or variation has been ratified in accordance with the ratification procedure notified under subsection (2).*
>
> *(2) At the beginning of bargaining for a collective agreement or a variation of it, a union must notify the other intended party or parties to the collective agreement of the procedure for ratification by the employees to be bound by it that must be complied with before the union may sign the collective agreement or variation of it.*

[19] Section 52 provides that a collective agreement comes into force on the date specified in it for doing so or, in the absence of such, on the date on which the last party to the agreement signed it.

[20] Relevant provisions of s54 are also at the heart of the case and provide:

> ***54 Form and content of collective agreement***
>
> *(1) A collective agreement has no effect unless—*
> *(a) it is in writing; and*
> *(b) it is signed by each union and employer that is a party to the agreement.*
>
> *(2) A collective agreement may contain such provisions as the parties to the agreement mutually agree on.*
>
> *(3) However, a collective agreement—*
> *(a) must contain—*
> *(i) a coverage clause; and*
> *(ii)* Repealed.
> *(iii) a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised; and*
> *(iv) a clause providing how the agreement can be varied; and*
> *(v) the date on which the agreement expires or an event on the occurrence of which the agreement is to expire; and*
> *(b) must not contain anything—*
> *(i) contrary to law; or*
> *(ii) inconsistent with this Act.*

[21] Section 163 contains restrictions on the powers of the Authority in relation to collective agreements and says:

> ***163 Restriction on Authority's power in relation to collective agreements***
> *The Authority may not, under section 162 or any other provision of this Act, make in respect of a collective agreement an order cancelling or varying the agreement or any term of the agreement.*

[22] Finally, s192 affects the Employment Court and provides:

> ***192 Application to collective agreements of law relating to contracts***
>
> *(1) The Court may not, under section 162 (as applied by section 190(1)), make in respect of a collective agreement an order cancelling or varying the agreement or any term of the agreement.*
>
> *(2) Despite subsection (1), the Court may, instead of making an order of the kind described in that subsection,—*
> *(a) make an order—*
> *(i) suspending some aspect of the agreement; and*

> *(ii) directing the parties to the collective agreement to reopen bargaining with regard to the suspended aspect of the agreement; and*
>
> *(b) in addition to an order under paragraph (a), make an order requiring the parties to make use of mediation in the bargaining required by paragraph (a)(ii); and*
>
> *(c) in addition to orders under paragraphs (a) and (b), make a declaration that the employees and employers covered by the collective agreement (or either of them) are, or are not, to have the right to strike or lock out available to them, while the bargaining required by the order under paragraph (a)(ii) continues.*
>
> *(3) Every declaration under subsection (2)(c) must state the date on which the right to strike or lock out is to become available or is to cease to be available.*

[23] We note that the authors of one of the leading texts, *Mazengarb's Employment Law*, make reference to the background to the statutory reforms in 2004 to the Employment Relations Act. The text notes:

> *Finally, cl 16 of the Employment Relations Law Reform Bill 2003 originally proposed to amend s 51 by permitting a union to use the ratification procedure to obtain authorisation, during collective bargaining, to sign a collective agreement without having to go back to its members again to obtain ratification. This was designed to enhance the ability to settle a collective agreement and to assist in the object of promoting collective bargaining … The clause was struck out by the Select Committee considering the bill, after submitters had expressed concerns that the existing ratification process under s 51 acts as a safeguard, by ensuring that union members have the ability to agree to final recommendations …*

Is ratification the business of the employer?

[24] It was a prominent plank of the PSA's opposition to the employers' claims for relief that matters of ratification are between the union and its members and that an employer should not be permitted to interfere in those arrangements in practice. Mrs Kennedy argued that in respect of any collective negotiations s51 gives the union and its members complete freedom over the ratification procedure. However, while that is correct, that is not the same question as is in issue in this case, namely what it is that must be ratified by that union-employee determined procedure and when ratification must take place. So, put shortly, while the "how" of ratification is, as counsel submits, not a matter for decision by the employer party or parties to bargaining, the "what" and "when" of ratification are matters governed by the statute

and therefore on which the employer(s) may have justiciable rights. Ratification is one of several union member interactions that Parliament has specified that employers are entitled to be told of and know about. It is noteworthy that, at the commencement of collective bargaining, the statute requires a union to advise the employer of the ratification procedure that will be used. Likewise, the statute requires a union initiating bargaining for either a multi-employer collective agreement or a single employer collective agreement to advise the employer of the result of the statutory secret ballot that must be conducted by the union among its employee members: ss45(6) and 47(5).

[25] All these requirements that might arguably be thought to be matters between the union and its members, and not the concern of the employer, illustrate the statute's pervasive requirements of information transparency and exchange, important elements of the overarching obligation of good faith between such parties.

[26] It is not only union members who may hold unions to account in their exclusive bargaining role in collective negotiations. Statutory requirements referred to tend to confirm also that Parliament intended to allow employers to hold unions to account for statutory compliance in the bargaining process, just as, of course, unions are entitled to do so in respect of the participation of employers.

[27] While some remedies may be open to union members but not to employers if a breach of the statutory ratification procedure is established, these reflect the different interests that union members may have. However, the entitlement in law to challenge compliance with the legislation is not with union members alone.

[28] Finally, what the employers are seeking to do in this case is to ensure compliance with the legislation, not with union rules that are a contract between the incorporated society (union) and its members. So we do not agree that the plaintiffs should be refused the relief they seek on grounds amounting to, or at least analogous to, a lack of standing. These grounds of defence do not assist the union.

Decision

Issue 1 The effect of non-ratification

[29] A collective agreement is an agreement between a union and an employer or employers but affects vitally the terms and conditions of employees who are not parties to it in the contractual sense and on whose behalf it has been negotiated and settled. The Act therefore requires strict compliance with the mechanism of affirmation of that agreement by affected employees before the agreement becomes effective. Although the legislation is flexible in the sense of permitting the affected employees alone to determine the ratification procedure in a particular case, it is strict and inflexible in requiring that ratification take place before the agreement becomes effective.

[30] Section 54(1) provides that a collective agreement has no effect unless the two prerequisites of writing and signature are present. We conclude that the requirement for signature by the parties and the union in particular cannot be read in isolation of the equally plain requirement in s51 that a union must not sign a collective agreement until it has been ratified.

[31] Mrs Kennedy emphasised the absence of an express sanction for non-compliance with s51. She contrasted this with the sanction for a breach of s54(1) that a collective agreement is of no effect if the section's prerequisites are not satisfied. So, she argued, a breach of s51 does not create invalidity of the document expressly as does a breach of s54 expressly. We do not accept that submission. Compliance with s51(1) is a necessary prerequisite to the separate prerequisite of signing in s54. If a collective agreement has not been ratified, it cannot be signed and therefore is of no effect.

[32] There are in reality four prerequisites to a collective agreement having effect. Apart from the requirements that it be in writing and the content inclusions and exclusions that are not in issue in this case, the first of the remaining two prerequisites is that the agreement has been ratified. A union is not permitted in law

to sign an agreement unless and until ratification has taken place. A signature otherwise applied to the agreement is not legislatively compliant. An essential ingredient will have been omitted and, as s54(1) necessarily incorporates s51, such a collective agreement *"has no effect"*. If the Judge at trial concludes that the collective agreement had not been ratified, then it has never come into effect.

[33] Mrs Kennedy argued that this question was determined in a case decided by the former Chief Judge of this Court, *Taylor Preston Ltd v Metuariki* [2003] 1 ERNZ 420. Counsel argued that the Chief Judge there found an "implicit" acceptance of terms of settlement that had been put to members for ratification. The judgment does not, however, address the question at issue in this case. Because it does not appear to have been argued, we do not think the judgment can be said safely to have decided it "implicitly" in the way favourable to the PSA's case that Mrs Kennedy now asserts.

[34] We do not agree with counsel's submission that "terms of settlement" may be ratified as was the position under the 1991 legislation. There is now no reference to the phrase "terms of settlement" and Parliament has deliberately substituted for it, in an equivalent provision, reference to "the collective agreement". Other post-2000 cases relied on by counsel do not support the PSA's position any more than the *Taylor Preston* case. These include *Service & Food Workers Union Nga Ringa Tota Inc v Heinz Watties Ltd* WA 67/06 24 April 2006 and *National Union of Public Employees v New Zealand Customs Service* [2004] 1 ERNZ 347. The questions now for decision are unique.

[35] In their bargaining process arrangement, the PSA and the dhbs purported to provide for ratification of *"agreed terms of settlement"*, but that appears to follow erroneously the scheme of the 1991 legislation that required ratification of *"terms of settlement"* (s16). The 2000 Act has now expressly set a different and arguably higher standard for ratification. What must be ratified is *"the collective agreement"* which must include the various statutory minima required to constitute such an agreement. Parties cannot modify the statutory requirement by the terms of a bargaining process arrangement under s32(1)(a) of the Act by adopting different and arguably lesser requirements. For the same reasons, we conclude that the provision

in the parties' bargaining process arrangement in this case (para (o)) that *"an agreement will be reached when ratified by both parties"* does not comply with the statute which requires the bargaining parties (the union and the employers) to settle a collective agreement. That collective agreement will not be effective until it is ratified and then signed.

Issue 2 Does section 163 preclude any remedies?

[36] The PSA supports this part of the Employment Relations Authority's determination. Mrs Kennedy argued that, even if there had not been ratification, the only remedies that might be available would be at the suit of employee members of the union alone and would include penalties for breach of good faith. As was accepted by both counsel, however, the facts of this case would not meet the very high tests of egregious bad faith required under s4A of the Act before a penalty can be imposed for a breach of good faith.

[37] Mrs Kennedy also suggested that it would be open to the Employment Relations Authority to order compliance with the ratification procedure, although this could only be at the suit of dissatisfied employee members of the PSA not by the boards. A failure by a union to obtain ratification of a collective agreement may well be amenable to compliance during bargaining. However, a difficulty arises where, as is argued here, any alleged failure to obtain statutory ratification only emerges after purported signing of the collective agreement and its operation de facto. Compliance might not be an effective remedy.

[38] In concluding that it could not grant any remedy for failure to ratify, the Authority relied on s163 of the Act. It prohibits the Authority from cancelling or varying a collective agreement or any of its terms. Ignoring variation, which is not in issue in this case, the Authority appears to have concluded that it was asked to *"cancel"* the collective agreement. As the Court recently concluded in *NZ Tramways & Public Passenger Transport Authorities Employees IUOW (Wellington Branch) v Cityline (NZ) Ltd t/a Cityline Hutt Valley and Wellington City Transport Ltd t/a Stagecoach* WC 23/07, 19 September 2007, cancelling a collective agreement

connotes the termination by judicial order of an agreement that was previously extant and in effect. As Judge Shaw put it at para [26] of that judgment:

> *[26] I conclude that the purpose of s163 and s192(1) is to prevent the Authority or the Court from interfering with a collective agreement that is in force. This is in accord with the Act's purpose of promoting collective bargaining and with the Part 5 purpose of the promotion of orderly collective bargaining. If a collective agreement is in force it cannot be cancelled or varied under the law relating to contracts and can only be varied by the process of collective bargaining.*
>
> *[27] … if a document is not correctly formed under the statutory process and does not meet the statutory content requirements it is open to question whether it is in fact a collective agreement in terms of the Act. It is therefore possible that a collective agreement could be held by the Court or the Authority to be void, without legal effect, and unenforceable if the grounds are properly made out. If this were the case, then the question of cancellation or variation does not arise.*

[39] If the Court were to find that the collective agreement would not ever have been in effect because of the failure to ratify, this would not be a cancellation of that agreement. Rather, it would be a declaration of its status from which other legal consequences may flow. It would not be the cancellation (or variation) of a previously effective collective agreement. By operation of ss51 and 54, if one of the statutory prerequisites to give it effect (ratification) has not been satisfied, the Midland Allied Health collective agreement settled between the PSA and the dhbs may never have been effective in law.

[40] The Authority was erroneous in its conclusion of law as to the effect of s163. It was not precluded from declaring that the collective agreement was of no effect. That part of its determination must be and is set aside. Whether the Authority's conclusion that the Midlands Allied Health meca was not ratified by PSA members was correct, will be for the trial Judge at the hearing of the challenge proper. We therefore make no comment about the correctness of that other aspect of the Authority's determination.

Summary

[41] For the reasons set out we conclude:

- Unless a collective agreement is ratified in accordance with the relevant ratification procedure notified to the employer(s) at the commencement of bargaining, a collective agreement that is in writing and purports to have been signed by the parties will nevertheless be of no effect.

- What must be ratified is a collective agreement settled between the union(s) and employer(s) and, as to form and content, as defined in the Act.

- The Employment Relations Authority is not precluded by s163 from declaring that a collective agreement that has not been ratified is of no effect.

[42] We deliberately do not comment on such questions as the nature of written or oral advice given to union members at or for a ratification meeting, or how a collective agreement that is of no effect because of an absence of ratification, can be given effect.

[43] These will be questions either for the trial Judge in this case after determining the evidence or, more properly, for another case in which they arise.

[44] We reserve questions of costs.

GL Colgan
Chief Judge
for the full Court

Judgment signed at 3 pm on Thursday 20 March 2008