IN THE EMPLOYMENT COURT
WELLINGTON

WC 15/06
WRC 9/06

IN THE MATTER OF	an application for declarations and injunctions
BETWEEN	OCS LIMITED Plaintiff
AND	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INCORPORATED First Defendant
AND	LALOPUA SANELE Second Defendant

Hearing: 9, 10, and 11 May 2006
(Heard at Wellington)

Appearances: P A McBride and G G Ballara, Counsel for Plaintiff
P Cranney, T Oldfield, and A Hughes, Counsel for Defendants

Judgment: 31 August 2006

JUDGMENT OF JUDGE C M SHAW

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[1] OCS Limited has directed its employees to attend training for the use of a new timekeeping system which requires them to have their fingerprints scanned. The employees, represented in this case by Ms Sanele, and their union have objected to that and advise that they will not participate until the dispute has been resolved.

[2] OCS says that if its direction to the employees to use the timekeeping system is lawful then their failure to do so amounts to unlawful strike action. It has applied for a declaration that by these actions the defendants are threatening or undertaking unlawful strike action. It asks for an injunction restraining the defendants or their representatives from participating in strike action about the timekeeping system. It also seeks an inquiry into damages sustained by it and costs.

[3] The defendants deny strike action and assert that OCS has failed to obtain informed consent of the employees to the electronic scanning of fingerprints; failed to consult; breached its statutory obligations of good faith; breached the privacy of employees and has 'unclean hands' which disentitles the plaintiff to equitable remedies. They also seek costs.

[4] The issues in this case are:

1. Whether OCS's direction to its employees was lawful and reasonable.
2. Whether OCS is required to obtain the agreement of the employees before implementing the new system.
3. Whether the employees' refusal to engage with a new system amounts to unlawful strike action.

The facts

[5] OCS and its related companies employ a total of about 4,000 employees throughout New Zealand primarily in the commercial cleaning and health services field. On 1 April 2005 it took on the Wellington Hospital contract from its competitor, Spotless Services NZ Ltd and as part of a national programme OCS sought to implement a new timekeeping system. The old paper-based system was labour intensive and had the potential for a range of inaccuracies including data input errors and abuse. A decision was made to introduce a computer based integrated timekeeping system involving fingerprint scanning of employees. It entered into a contract with Panztel Ltd for the supply and installation of finger scanning terminals at a number of its large sites throughout New Zealand. At Wellington only its staff would be required to use it. Other people employed by the hospital board are not.

[6] Panztel Ltd markets a system called "iGuard" which uses biometric data terminals to scan employees' fingers to allow employers accurately to record hours worked by those employees. Panztel Ltd also provides a time attendance service called "eziTracker". During the hearing, the system was referred to as "the Panztel" and I will continue to do so.

[7] Mr Christiansen, who is the partner manager for Panztel Ltd, explained that the Panztel does not store a fingerprint image in the way that, for example, a person's actual fingerprint can be taken using paper and ink for forensic purposes. Instead, when a finger is placed on the sensor, the Panztel creates a set of characteristics unique to the user's finger, called "minutia". The minutia is then stored as an encoded string of numbers and letters. There is no fingerprint image stored, and the data stored is insufficient to be "reverse engineered" so that an actual fingerprint image can be created.

[8] Mr Christiansen says the technology affords greater accuracy and efficiency in a business's administration by (a) reducing time fraud, (b) stopping buddy clocking, (c) creating electronic attendance records, and (d) reducing administrative overheads.

[9] The Panztel document setting out the method of operating the scanning is called the "Biometric & SmartCard Terminal Fingerprint Enrollment". It says that before an employee can use the Panztel, they must give their informed consent to be enrolled with the system. Each employee must receive an explanation of the enrolment process and the fingerprint technology, and by signing the consent form agreeing to their fingerprint enrolment for the sole purpose of recording their work times. Each person must register two fingers, one as primary and the other as secondary. If the primary finger cannot be used for any reason, such as when the finger is hurt, then the secondary finger can be used. Each finger is analysed three times to ensure that the Panztel recognises variations in positioning and pressure. The process was to be performed in groups of five employees, taking about half an hour per group.

[10] OCS had earlier implemented the system at Auckland Hospital. This was possible because, after consultation with the union, agreement was reached to include reference to electronic timekeeping in the collective agreement that applied there. When it sought to do the same at Wellington Hospital, it did not consider that agreement was necessarily required, because the union had been fully consulted with in Auckland although it says it was happy to discuss the issue with the defendants.

[11] Of the affected employees who are members of the union, eight gave evidence. Most of them have been employed at Wellington Hospital as cleaners for many years although there have been several different employers. Several of them are over the age of 50 and the youngest is 38. All of them are immigrants with the majority coming from Samoa although one was Greek and another from India. Some required the assistance of an interpreter to give their evidence. All have English as a second language, all are women.

[12] On 25 May 2005, at the commencement of collective bargaining negotiations with the union, OCS's general manager human resources, Mr Clive Menkin, advised John Ryall, then regional secretary of the union, that OCS was looking to implement the Panztel finger scanning system at Wellington Hospital. Although he was not called as a witness, Mr Ryall allegedly said that would be fine, but asked for some information about the system.

[13] There is conflicting evidence about when the employees were told about OCS's plans. Arlene Kyle, OCS's contract manager at Wellington Hospital, said that she had raised the Panztel implementation with staff in at least one staff meeting and had some discussions with individual staff when they asked her about the Panztel. She said she had no response

from the union or its members and felt that no news was good news. The first Ms Sanele, who is a cleaner and a union delegate, heard of the Panztel was when Ms Kyle mentioned it to her in August 2005. Ms Sanele asked her what the Panztel was. She was told it was "*like a machine, and we use our thumb.*" Ms Sanele told her they would not be using it because it was for criminals. The other employees who gave evidence said they had not heard of it before September.

[14] On 13 September 2005 a Panztel terminal was installed at Wellington Hospital. Another of the union's delegates, Kolopa Uiese, queried the installation when she saw it. OCS claimed that the terminal was installed because a Panztel technician was available in Wellington that day, and that at that point it had not made a decision about how or when the Panztel would be implemented.

[15] On 22 September 2005 Mr Menkin e-mailed Mr Ryall, attaching the fingerprint enrolment document. The e-mail said:

> *As mentioned when we were having discussions at the beginning of our initial round of wage bargaining, I am sending you the information on the Biometric Reader Time keeping system that we will be introducing in the next few weeks – probably between 4 and 8 weeks depending on the availability of the training consultant.*
>
> *This system has been in place for almost a year at the Auckland Hospital and has been successfully utilised. Prior to implementation a full training session is conducted with all staff with a consultant from the organisation.*
>
> *The key factor with this system that is asked for us each time we implement, is does it keep a record of the person's fingerprint and can it be used or given to anyone else?*
>
> *The answer to that is – no. The fingerprint records on the system as a series of numbers and can not be reproduced as anything other than a number so no "image" of the fingerprint is recorded.*
>
> *Please give me a call if there is anything else that you would like to know on it – I will get the experts to provide the answers.*

[16] Mr Menkin told the Court that when he wrote this e-mail he was aware that the Employment Relations Authority and the Privacy Commissioner had previously considered essentially the same system and concluded that it was not a privacy issue.

[17] On 28 September 2005 Luci Highfield, the then union's assistant regional secretary, asked Mr Menkin by e-mail whether a Privacy Impact Assessment ("PIA") had been carried out on the proposed system. Mr Menkin replied by e-mail the following day, saying:

> *Hi Luci*
>
> *No PIA has been completed nor is it relevant in this case. The system in no way impacts on the privacy of an individual and does not store any fingerprints within its system or anywhere else. It is purely a timekeeping device.*
>
> *This type of system and process and its impact on privacy has been tested in the case PMP Print Ltd v Barnes and in particular in response to a query raised by the*

NZ EPMU – Case Note 33623 [2003] NZPrivCmr 5 - where it was found to have no impact on the privacy of an individual.

Before the system is implemented all staff will be advised of how the system works and what information is collected by the system. They will also be educated in the correct use of the system. Once that process is complete then the system will be connected and the implementation process will begin. The only information stored in this system is the name of the employee, their pay-number and a mathematical representation of their fingerprint (in fact 2 fingerprints are taken in the event that a finger is injured and can not be used). It is purely a time clock that records their entry and departure times. This information is transferred to our payroll office where it is processed in the normal way for weekly wage payments. All information that is captured is accurate and kept under secure conditions. Time records captured are only accessible in read-only format and can not be altered.

I trust that this answers your question.

Regards

Clive

[18] When no further communication was received from Ms Highfield, Mr Menkin assumed that his answer had been satisfactory. He then wrote to Mr Ryall on 7 November 2005, informing the union of OCS's arrangements for the implementation of the Panztel system and for staff training on it. The letter proposed an implementation date of 19 December 2005, and looked forward to the union and its members' cooperation. The letter was resent by e-mail on 30 November 2005 to remind the union of the implementation date, and that staff training was to commence the following week. No reply from the union was received. The reason for this was that the union's general election had caused changes in its hierarchy.

[19] Claire Neate, OCS's Auckland based project manager for Panztel, travelled from head office to Wellington in early December to conduct the training. While she was there, Ms Kyle introduced her to Ms Sanele and showed her how the system worked. Ms Kyle was encouraged by her approach to it and said that she appeared to understand the system and put her thumb on the scanner a few times. Ms Kyle said that later the staff advised that they would not attend the scheduled training because the union had told them not to. Ms Neate therefore spent time training Ms Kyle to use the Panztel and then returned to Auckland early.

[20] On 13 December Ms Highfield, who had taken over the role of regional secretary from John Ryall on 1 December 2005, called a union meeting with OCS and the employees to discuss the Panztel system and to hear OCS's responses. Due to fog in Wellington that day Ms Neate was unable to attend. Ms Kyle attended but was unable to answer all questions raised by the employees. After the meeting Ms Kyle e-mailed a list of unanswered questions to Mr Menkin in Auckland to provide a response.

[21] On 15 December 2005 Ms Highfield also sent a letter to Ms Kyle regarding various "*Outstanding issues at Wellington Hospital*", including the introduction of the Panztel, requiring a written response from Ms Kyle or Mr Menkin by 16 January 2006.

[22] In that letter, Ms Highfield raised various concerns and questions and recalled an agreement from the meeting that the Panztel would not be implemented until those "*questions, concerns and issues*" were addressed. These included the issue of whether agreement was needed from the union before the system could be implemented. She relied on the terms of the collective employment agreement (CEA). She said that:

> *People feel distressed and deeply hurt by the way the company have simply placed this machine on the wall (appearing as it has like a fait accompli), but also by the implication that there is a lack of trust in workers. … this very personal means of timekeeping… is equated in people's minds with criminals and prisoners) …*

[23] It further asserted that OCS required the union's agreement to implement the Panztel, and that at that point the union did not authorise any change or training sessions on the new system.

[24] Although Ms Highfield had alerted Mr Menkin on 19 December 2005 that she would be on annual leave from 20 December 2005 until 16 January 2006, he e-mailed his responses to Ms Highfield's questions on 21 December 2005. An auto generated response was sent back to Mr Menkin notifying him of Ms Highfield's leave. It also provided a contact number for urgent matters. In his e-mail, Mr Menkin said:

> *Hi Luci*
>
> *Attached please find the responses to your (and our staffs') questions on the Timekeeping System.*
>
> *We have now provided all necessary information in this regard and will commence training of staff on 23 January and will implement from the payweek starting 30 January 2006.*

[25] The attachment consisted of a two page document displaying boxed summaries of each of the union's 16 questions, followed by OCS's answer. The questions posed by Ms Highfield appeared in a grey box and the answers appeared in a white box immediately underneath. The relevant parts of these documents are:

1.	*There is nothing in the CEA about using a different system and what right do we have to implement this system.*
	It is quite clear under the Act that we are required to maintain time and wage records. It is up to the employer to provide the timesheets (system) and it is the responsibility of the employee to see that they comply with using them. If the CEA is silent, legislation will apply and provides the minimum guidelines.
15.	*The Engineers case that was lost was because there was something in their CEA which stated that an electronic system could be used.*
	Our CEA refers to the requirements of s130 – 132 of the ERA. We are entitled to use whatever system is available to us to record time.

16.	*We can't do it without their agreement.*
	Incorrect, we have provided all the information necessary and we have answered all of your questions. We have consulted in good faith. The decision is now with OCS as to whether to implement and when to implement. It will be the obligation of the employees to comply with the new requirements and our legal obligation.

[26] Ms Highfield received Mr Menkin's e-mail on her return from her holidays on 16 January 2006. She replied to him the following day, rejecting his suggestion that OCS could unilaterally implement the new time keeping system. Ms Highfield advised Mr Menkin of the existence of an employment relationship problem, and said that until the problem was resolved, it was inappropriate to implement the system. She also requested mediation.

[27] As Mr Menkin was on leave at that time, Ms Highfield copied the e-mail to Ms Kyle and Mr McBride, OCS's solicitor. She further requested that the new timekeeping system and associated training be put on hold pending mediation of the employment relationship problem.

[28] Mr McBride responded that OCS's view was that the implementation of the system was well within its management prerogative, that it had consulted with the employees and the union, and that it intended to proceed with the implementation without delay. Mr McBride did not specifically mention the mediation request, but said that OCS was always open to discuss issues with the union.

[29] As a result of these interactions, I find that there had been an agreement to leave outstanding issues to be resolved in the New Year. Mr McBride confirmed this in a letter dated 3 February 2006 and Ms Kyle agreed in evidence. However on 3 February notice was given to all cleaning staff that training on the Panztel timekeeping system would commence the following week.

[30] Ms Highfield responded by e-mail to Mr McBride, stating that OCS had not replied to her mediation request, and that employees would not be undertaking any training or implementation until the dispute had been resolved.

[31] By 20 January 2006 OCS was of the view that all the union's queries had been answered, no further queries had been raised by the union or the staff and they were not aware of any outstanding issues so Ms Kyle placed a notice to all cleaning staff on the notice board in the sign-on room. It advised of the commencement of staff training on the Panztel from 24 January 2006.

[32] Ms Neate returned to Wellington to conduct staff training but again the union staff refused to take part based on what the union had told them. Three non-union members on the staff did attend the training.

[33] On 25 January 2006, Ms Kyle found a notice attached to the staff notice board in the sign-on room stating that:

> *ALL UNION MEMBERS. NO THUMB PRINT TRAINING BEFORE THE UNION COMES BACK TO US. THANK YOU U/REPS.*

[34] Ms Kyle believes that that was put up by Ms Sanele.

[35] OCS alleged this action amounted to an unlawful strike action. However, it agreed to defer legal action in relation to the alleged unlawful strike, or disciplinary action against the employees, pending the mediation.

[36] After the first unsuccessful mediation on 20 February 2006 the union held a secret ballot amongst its members as to whether they agreed to the implementation of the new finger scanning system. The outcome of 47-0 against the system was communicated to OCS.

[37] A second mediation on 3 March 2006 failed to resolve the matter.

The issues

Lawful and reasonable instruction

[38] The well established principles for determining whether an instruction is lawful and reasonable are[1]:

- The instructions must not require the employee to perform an illegal act.
- It must be within the scope of the employee's contractual obligations.
- It must not demand the performance of any possible or dangerous tasks.

Lawfulness

[39] Mr Cranney for the defendants submitted that the instruction given by OCS was not lawful. His first point was that, as the parties had a dispute about whether the employees were bound by contractual obligation to be enrolled and scanned for the Panztel, OCS should have sought resolution of the dispute before issuing the instructions. In *Sky Network Television Ltd v Duncan*[2] in the context of a personal grievance for unjustified dismissal the Court of Appeal found that the legal position between the employer and the employee was not clear cut and the dispute "*cried out for an attempt at resolution*".

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[1] *Wellington Clerical Workers IUOW v College Group Ltd* [1984] ACJ 315 at 324

[2] [1998] 3 ERNZ 917at 924

[40] The definition of a dispute in s5 of the Employment Relations Act 2000 is a dispute about the interpretation, application, or operation of an employment agreement. Section 129(1) provides that where there is such a dispute any party may pursue that dispute by means of the mediation service and the employment institutions.

[41] It is clear from the correspondence between Ms Highfield and Mr Menkin that there was a genuine dispute between the parties. OCS had a clear view of what it regarded as its rights and obligations both in law generally and pursuant to the CEA but this was not shared by the union. The matter certainly cried out for an attempt at resolution but Ms Highfield's offer of mediation was not accepted before OCS gave notice of implementation.

[42] To the extent that OCS did not properly follow the statutory procedure for resolving a dispute, it was not acting in accordance with the law. By doing so it ran the risk that it could be requiring its employees to perform an act that was unlawful in the sense that it was in breach of the CEA. There was no certainty of avoiding that risk without having the dispute determined.

[43] I therefore accept the defendants' submission that the dispute over the OCS requirement should have been resolved before the implementation request was made. As it is, the matter having been brought before the Court for decision and fully argued, it is appropriate to give the parties an answer.

Scope of employees' contractual obligations

[44] The plaintiff argues that the CEA has express and implied terms that makes its request lawful. I begin with the material express clauses of the CEA.

[45] Clause 7 is about overtime. It sets rates of overtime payments and requires an employee to furnish particulars in writing of any overtime worked within 24 hours of the completion of the week's service within which overtime occurs.

[46] Clause 7(b) concludes:

> *Employers shall provide time sheets or other means for this purpose. Failure to comply with the requirements of this clause shall constitute a breach of this Agreement.*

[47] This clause is limited to the recording of time by the employee for the purposes of overtime calculations rather than for the day to day recording of the beginning and end of each work day by the employee. The legal obligations imposed by it cannot be extended to create binding obligations on either party other than for the purposes of overtime.

[48] Clause 28 states:

> ***28. TIME AND WAGES RECORD***
>
> *Attention is drawn to sections 130-132 of the Employment Relations Act 2000.*

[49] Sections 130 to 132 of the Employment Relations Act 2000 concern the employer's obligation to keep a wage and time record. Section 130 specifies the content of such a record. Section 131 relates to the recovery of wages by an employee and s132 stipulates what evidence may be given about wage and time records when there is a claim before the Authority by an employee.

[50] The plaintiff relied on the statute and other clauses in the CEA to show that it is bound to keep a proper record. That fact is incontrovertible, however the CEA is silent as to the means by which information for this record is to be gathered apart from the employer's requirement to provide timesheets or other means for the purpose of the employees recording their overtime. The binding legal obligation in ss130 to 132 is on the employer alone.

[51] Clause 32 is the industrial democracy clause. It states:

> *General* –
>
> *(1) The employer and the union accept that change in the Health Service is necessary in order to ensure the efficient and effective delivery of health services.*
>
> *(2) The employer and the union recognise that they have a mutual interest in ensuring that health services are provided efficiently and effectively and that each have a contribution to make in this regard. The involvement of the union should contribute to:*
> - *improved decision-making;*
> - *greater co-operation between union and employer;*
> - *a more harmonious, effective, efficient, safe and productive workplace therefore, the employers agree to the following provisions for consultation, recognition of delegates and access to facilities.*
>
> *(3) The employer accepts that union job delegates are the recognised channel of communication between the union and the employer in the workplace. It is recognised that some time off will be required to carry out activities provided for.*

[52] In Clause 32(4) the parties recognise the value of effectiveness studies to review systems, procedures and methods of work and other similar matters. The active participation of union and employer representatives is contemplated for this purpose.

[53] I find there is a complete absence of direct reference in the CEA to methods of regular timekeeping and nothing at all that contemplates electronic methods.

[54] Next, the plaintiff sought to rely on implied terms.

[55] Mr McBride argued that there were nine terms that can properly be implied into the agreement, any or all of which entitles OCS in law to require its employees to undergo finger scanning. These terms are that the employees:

> *a. Will act in good faith, including being active and constructive in building a productive employment relationship;*
>
> *b. Will comply with all lawful and reasonable instructions of the employer given in the context of the employment relationship;*

c. *Will use such products as the employer might select in performance of duties under the employment;*

d. *Will accurately record the times when they are in the workplace undertaking employment;*

e. *Will accept and undertake such training as the employer provides in the context of the employment;*

f. *Will co-operate fully with the employer in securing optimum efficiency in the workplace;*

g. *Will co-operate fully with the employer in ensuring that accurate time and wage records are made;*

h. *Will make the most effective use of new technology available to and provided by the employer; and*

i. *Will not sabotage, disrupt, or seek to countermand the employer's directions as to performance of duties under the employment;*

[56] The defendants deny that these terms exist and if they do so they were not breached.

[57] The obligation to act in good faith is now statutory[3]. The requirement to be active and constructive in building the relationship is part of the statutory obligations of good faith. So, although not strictly necessary, the first term may be implied into all CEAs.

[58] I accept Mr Cranney's submission that by relying on an implied term that employees will comply with all reasonable lawful instructions OCS has fallen into a circular argument which does not advance OCS's case.

[59] The rest of the terms pleaded such as the requirement to undertake training, to accurately record work times, cooperate to achieve efficiency, to use new technology, etc are all reasonable expectations of an employer being corollaries of the good faith term but none of the terms are sufficiently specific to answer the question whether the request for the employee to undergo finger scanning was lawful and reasonable.

[60] In the absence of neither an express contractual provision in the CEA nor agreement between the parties to require employees to undergo finger scanning, it is not sufficient to invoke inchoate implied terms to make an instruction lawful. The implied terms relied on by the plaintiff in this case are, like the s4 obligations of good faith, about how the parties will conduct themselves. That leaves the lawfulness of such a request to be decided in terms of the parties' obligations under the Employment Relations Act 2000 and the CEA.

Consultation

[61] It is necessary to objectively analyse first whether it is sufficiently certain that the employer has an obligation to consult over the Panztel issue and, if so, whether OCS met that obligation. OCS does not concede that consultation is necessarily required but submits that in any event there was adequate consultation.

[62] In support of the necessity for consultation, Mr Cranney relied on the provisions of s4(1)(a) and 4(1A) which set out the general obligations of parties to deal in good faith, to be reactive and responsive in maintaining the employment relationship, to be constructive and responsive, and the specific obligation to provide information relevant to matters that are likely to have an adverse effect on employment.

[63] Because s4 now creates a statutory duty, the content of which is defined, it is possible to find that an otherwise uncertain provision such as found in clause 32 of the CEA, the industrial democracy clause, is one that can be enforced as a good faith requirement. In considering the enforceability of process agreements in general contract law, the Court of Appeal made obiter reference to this issue[4]:

> *Some types of* [contractual] *consensus are too elusive or illusory to be contractually enforceable. A statutory duty imposed by Parliament is in a different category. Section 4(1) of the Employment Relations Act imposes a statutory duty on parties to an employment relationship to deal with each other in good faith. The content of that duty is set out in a non-exhaustive way in the remaining subsections of s4, and in s32 where applicable.*
>
> *The employment relationship itself immediately provides a degree of contextual objectivity – as in the case of the utmost good faith obligations in insurance relationships. The problematic element of subjectivity attaching to good faith negotiations in the law of contract is therefore significantly reduced in the case of the good faith obligations referred to in s4 of the Employment Relations Act. It would therefore be a mistake if it was thought that the reasoning which applies in ordinary contract cases such as the present could simply be translated into the employment relations arena. There the good faith obligation must be regarded as having sufficient general certainty; what effect it has in particular cases will be for the Courts to assess on a case-by-case basis.*

[64] Apart from the industrial democracy clause there is no specific reference to consultation in the CEA, however it does recognise the desirability of consultation between the employer and the union. I find that this provision, together with the statutory obligations to act in good faith, including the necessity for both sides to be responsive and communicative, creates an obligation on OCS to precede any changes of workplace practices with consultation.

[65] What is required to meet the obligation of consultation depends on the context in which consultation is required. A general statement of the ingredients of consultation was made by the Court of Appeal in *Auckland City Council v NZ Public Service Association Inc*[5]:

> *There can be no dispute that the parties to an employment relationship must deal with each other openly and fairly. They must communicate and, where appropriate,*

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[3] Section 4, Employment Relations Act 2000

[4] *Wellington City Council v Body Corporate 51702* [2002] 3 NZLR 486 at 496

[5] [2003] 2 ERNZ 386 at 394

> *consult in the sense of imparting and receiving information and argument with an open mind when that still realistically can influence outcomes. To adopt an approach calling for mandatory consultation at specified times risks inflexibility. What is practicable in the exigencies of particular business operations and workplaces must be kept in mind.*

[66] In relation to proposed changes to workplace practices, the Employment Court has specified[6]:

> *… that consultation needs more than mere notification, that the change should not be made until after consultation, that the parties being consulted should know what is proposed before they can be expected to give their views, and should have a reasonable opportunity to do so, that an effort must be made to accommodate their views, and that it involves a statement of proposal not yet finally decided upon, listening to what others have to say, considering their responses, and then deciding what will be done.*

[67] In the present case the evidence of consultation does not meet these standards. The parties to the collective agreement are the union and the employer. Section 18 of the Act provides that a union is entitled to represent its members in relation to any matter involving their collective interests as employees. The CEA expressly recognises that union job delegates are the recognised channel of communication between the union and the employer in the workplace.

[68] Mr Menkin's oral and e-mailed advice in May 2005 to Mr Ryall that OCS was looking to implement the Panztel system at Wellington Hospital was a notification of OCS's proposal to implement the Panztel. It was not consultation. It was not preceded by information about the technology and this evidence was not sent to the union until after the machine had been installed.

[69] Ms Kyle's informal discussions with individual staff and at one staff meeting was not a consultation. The staff did not have the necessary information properly to consider the issue. A conversation between Ms Kyle and Ms Sanele in August 2005 similarly was not consultation. Ms Kyle simply mentioned it to Ms Sanele who expressed her opposition.

[70] I conclude that by 22 September 2005 when Mr Menkin indicated by e-mail to Mr Ryall that the system would be introduced in the next few weeks there had been no consultation at all. There was an exchange of information and correspondence between OCS and the union following that but it is plain that OCS had made up its mind to install the system much earlier and its attempts to communicate after that with the union were for the purpose of persuading the union and its members to accept a decision which had already been made. The fact that a Panztel terminal was actually installed in September is good evidence that the decision had been made even if the details of how or when it would be implemented had yet to be finalised.

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[6] *Toll NZ Consolidated Ltd v Rail and Maritime Union Inc* [2004] 1 ERNZ 392 at 417

[71] What followed between OCS and the union was most unfortunate. From the union's point of view a change of its personnel meant that there was a delay in responding to OCS but the delay by OCS in sending answers to the questions raised by Ms Highfield until after she had gone on leave was, to say the least, unfortunate. OCS, through Ms Kyle and Mr Menkin, adopted the view that unless they heard anything adverse then they would proceed. In the circumstances that existed between the parties at that time this was an unwise position to take. It certainly was not the action of an employer making an effort to accommodate the views of its employees.

[72] I conclude that, because OCS's instructions to its employees were made before it had met its CEA and statutory obligations to consult with them and their union, the instruction was unlawful.

[73] The reason why proper, full, and timely consultation in this case was essential was revealed by the defendants' evidence which was supported in large measure by two expert witnesses. Their evidence in particular traversed the impact of cultural matters on the attitude of the predominantly Samoan employees to the Panztel technology.

[74] It was correctly pointed out by OCS that, during the period when the union and the employees were voicing their objections to the Panztel, the question of cultural values was not explicitly raised by the employees or the union. It was, however, quite apparent from those employees who gave evidence that this was an important if not articulated aspect of their opposition. The appropriate time for them to have raised these issues would have been during the initial consultations by OCS about whether the system was to be introduced, however because the consultation did not happen the employees had no opportunity to explain this to OCS.

[75] The assistance of a Samoan interpreter was particularly necessary when it came to employees explaining sensitive spiritual concepts.

[76] The employees made the point that they have no objection at all to accurately recording their work time and continue to do so by using timesheets. They would be happy with a card clock-in system. It is the particular characteristics of the Panztel system that they are afraid of and object to.

[77] OCS believes that the cultural issues are afterthoughts brought up by the defendants to bolster their case. However, the evidence of the defendants did not support that belief. For example, Vailima Hughes said that when she saw the Panztel machine in September and was told it was a thing where you use your thumb instead of signing the book her reaction was to tell her supervisor that in her life she had never seen such a thing and it was against her customs and it was rude to ask people to sign in with their thumb. She said she would be

ashamed and embarrassed to put her finger in the machine and if she had to she would wait until no one was there. Similarly, Maveve Holmes said that the Samoan workers felt affected as Samoans as it is very rude to ask them to use the machine and that it is only when people do something wrong that they should have to provide a fingerprint.

[78] At short notice OCS called an unbriefed witness, Su'a Kevin Thomsen, to comment on the questions of Samoan culture that had been raised by the employees in their evidence. In response, the defendants called Tupua Mea-Ole Hans James Keil who was an employee of the defendant union.

[79] Both of these men come from distinguished Samoan families and both are acknowledged by the Court as experts in Samoan genealogy and custom. Each gave their evidence with polite diffidence because of the sensitivity in discussing matters such as genealogy in front of others.

[80] It is not necessary or even possible to relate all of the evidence they gave but some common threads emerged which are relevant to the reasons why the employees genuinely felt deeply uncomfortable about using the Panztel machine.

[81] They explained that in Samoa it is bad manners to say "no" to anyone. A refusal is generally couched in metaphorical terms by which a person asks the questioner to withdraw the question in order to avoid having to say no. In this context, silence is not agreement but as Mr Keil said is sparing the parties the agony of saying "no".

[82] A common thread of their evidence was to emphasise the need to approach communications on sensitive issues in a careful and appropriate way with a view to obtaining consensus. They both agreed about the Samoan concept of the sacredness of the parts of the body. Because of this, pointing with the finger at anything is regarded as intrusion which invites retaliation.

[83] Perhaps the most telling of Mr Keil's evidence was when he was asked about his view that the employer was never going to get agreement from the Samoan employees. He said:

> *I am not worried about the machine or anything. What I'm worried about is the relationship between the employer and the employee. Machines don't count.*

[84] Because Mr Thomsen had been called by the plaintiff at very short notice, he was not aware who the defendants were or that the case was about their refusal to use a finger scanning device. He did not become aware of that until he was cross-examined.

[85] He described the Samoan concept of Va Fealoia or the sacred space which governs and manages all relationships between people including between employers and employees. In his view the cultural perspective which has arisen in this case highlights the difference between an act and the intent behind an act. For example, if the Panztel system was being

introduced because of the perceived dishonesty of the employees, this would be regarded as offensive to the principle of Va Fealoia. If a system were introduced which appeared to single out a particular group that would also be offensive to that principle. Mr Thomsen also said that he could understand the embarrassment of Samoan people being required to use the Panztel system. He said:

> *…its to do with that relationship that space which the finger has theoretically invaded. And I think its really to do with having your own personal space but in this sense its actually having that invaded by another person's appendage whatever description you want to say a finger. And that is quite an offensive gesture.*

[86] The relevance of this evidence is that it explains the opposition of the employees who thought they were being singled out for differential treatment from others employed in the hospital who were not being required to use the Panztel. They thought they were being suspected of dishonest or criminal behaviour as well as their objections to placing their fingers in the machine about which they had little or no knowledge.

[87] Those factors combined with an inherent unwillingness to make their objections explicit meant that without an opportunity to have the finger scanner properly explained and their concerns met there would always be opposition from the employees. Applying Mr Keil's analysis, I conclude that it was not so much the use of the machine that was objected to but the perceived intent and motives of OCS in introducing it along with suspicions and fears based on incomplete understanding of the technology.

[88] It is the case for OCS that there was no negative intent towards its employees and the introduction of the Panztel was solely for the purpose of making timekeeping more efficient although it was also to prevent abuse. That should have been explained in a proper consultation process long before the machine was introduced.

[89] Mr Cranney pointed out that clause 5 of schedule 1B of the Employment Relations Act 2000 requires employers in the public health sector to be good employers as defined in s6(1) of the New Zealand Health and Disability Act 2000 and s118 of the Crown Entities Act 2004. Among the requisites of a good employer is recognition of the cultural differences of ethnic or minority groups.

[90] There is no evidence that OCS took any steps to ascertain if there were any cultural difficulties before the machine was installed in September. Given the composition of its workforce at Wellington Hospital, it is not an unreasonable requirement for an employer such as OCS to be open to such matters.

Is the request for employees to use the finger scanner otherwise lawful and reasonable?

[91] Putting aside the breach of the requirement to consult, there remains the issue of whether an employer can lawfully require its employees to use finger scanning technology. For the defendants, Mr Cranney submitted that while the principles in s6 of the Privacy Act 1993 do not give rise to legally enforceable rights outside that Act, they are important in an employment law context and are regarded as relevant factors in the Court's decision. He cited a number of cases where this principle has been applied.[7]

[92] He relied on the first principle in the OECD recommendation upon which the Privacy Act is based to submit that personal data should be obtained by lawful and fair means and where appropriate with the knowledge of all concerned of the data subject.

[93] In summary, it was the case for the union that where an employer requires an employee to submit to an invasive and pervasive transfer of information it is appropriate that consent rather than just knowledge be a prerequisite.

[94] For the plaintiff, Mr McBride submitted that the introduction and use of finger scanning technology identical to the Panztel, without further employee consent, has already been upheld in New Zealand. He relied on *PMP Print Limited v Barnes*[8]. However, I accept Mr Cranney's argument that that case can be distinguished. The Employment Relations Authority determined that the applicable contractual provision about timekeeping in that case was sufficiently broad to encompass finger scanning. In that case it was held to be a contractually sanctioned method of timekeeping and therefore lawful. The CEA in this case has no such provision and must therefore be distinguished.

[95] I do accept, however, that the legality of employers using biometric technology, including finger scanning technology, has been confirmed in Australia, the UK, and Canada. Some non-exclusive principles for judging the lawfulness of technology may be distilled from these judgments, rulings and recommendations of a variety of privacy related bodies and courts.

1. Is the technology compatible with the contractual obligations of the parties?[9]

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[7] *Talbot v Air New Zealand Limited* [1994] 2 ERNZ 216; *Cooper v Dunedin City Council* unreported, H Doyle, 9 July 2003, CA 77/03; *L v M Limited* [1994] 1 ERNZ 123; *New Zealand Police Association Inc v Commissioner of Police* [1995] 1 ERNZ 658

[8] Unreported, D King, 28 September 2004 AA 317/04

[9] *Australian Liquor, Hospitality and Miscellaneous Workers Union, New South Wales Branch v North Sydney Leagues Club* [2002] NSWIRComm 299 (30 October 2002)

2. There is to be a balance between the need for the technology and the level of personal intrusiveness involved for the individual concerned.[10]

3. The employer has the right to introduce different systems of timekeeping technology subject only to reasonable consideration of valid concerns raised by the union and/or employees.[11]

4. The employer must take the appropriate steps to inform employees of the new measures and to obtain their consent.[12]

[96] Applying those principles to the present case, I conclude:

1. The CEA in this case is silent on the method of timekeeping and therefore the introduction of new technology for this purpose should be by agreement with the union as a party to the agreement.

2. On the basis of the evidence of Panztel Ltd of what is recorded by the finger scanner and the limited use to which the information can be put, I am satisfied that this technology is at the lower end of intrusiveness when compared with eye or face scanning. It does not record or store actual fingerprints but an electronic mark.

   I accept that OCS is justified in wanting to introduce the technology as a matter of practicality.

3. Although it has the right to introduce this new method of timekeeping, OCS failed to give any reasonable opportunities, before making the decision, to hear the valid concerns of its employees. To some extent the disruptions to the management of the union at that time meant that there was not a single individual who could take charge of the issue during the crucial months of May to September, but the onus was on OCS as a good employer to introduce the technology in a planned, consultative, and educative manner.

4. Appropriate steps were not taken by OCS to inform its employees of the new measures or to obtain their consent before introducing it. I hold that

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[10] *McCrory re Application for Judicial Review* [2001] NIQB 19 (01 June 2001)

[11] *Cascadia Terminal v Grain Workers' Union, Local 333* [2004] C.L.A.D. No. 43

[12] PIPED Act Case Summary #185 Privacy Commission of Canada

> their consent was necessary if only because Panztel Ltd's own protocols for enrolment required that. The obligation was on the employer to obtain that consent. In addition, given the nature of its workplace, OCS as a good employer should have been alert to the cultural sensitivities that the new technology would give rise to.

[97] In conclusion, I find that OCS's decision to implement the Panztel would of itself have been an adequate basis for a lawful and reasonable instruction to its employees but only if it had complied with its obligations to consult in a timely and appropriate way with its staff. Its failure to do so means that its instruction was unlawful because it was in breach of both its contractual and statutory obligations.

[98] Further, because the union had initiated an employment relationship problem, it was not appropriate for OCS to persevere with the implementation of the Panztel until the dispute had been resolved. As a consequence, the refusal by the employees was justified and did not constitute unlawful strike action. The OCS decision to bring the matter before the Court by way of an application for discretionary relief of injunction was not a constructive way to resolve a genuine dispute. In those circumstances, discretionary relief would have been refused in any event.

Costs

[99] If the question of costs cannot be agreed, counsel for the defendants is to file a memorandum within 28 days of this judgment. The plaintiff will have 14 days to respond.

C M Shaw
JUDGE

Judgment signed at 3.15pm on 31 August 2006

Solicitors: