



cullings

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cullings is the newsletter of
**Cullen – the Employment
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Panel for External Legal Services to Government

We are pleased to announce that we have been appointed to the Panel for External Legal Services to Government. Appointment to the Panel was highly sought after and competitive. We were one of only eleven firms appointed to the Panel to provide employment law advice to government (and all of their associated entities) throughout New Zealand.

Loss of remuneration for breach of good faith?

The question of whether employees can be deprived of remuneration when there has been a breach of the duty of good faith was looked at recently by the Court of Appeal in *New Zealand Tramways and Public Transport Employees Union Inc v Mana Coach Services Limited*.

Parties

Mana Coach Services Limited (Mana) owns and operates a bus service on the outskirts of Wellington. It has contracts with the greater Wellington Regional Council to provide scheduled bus passenger services and also with the Ministry of Education to provide school bus services. In addition, Mana operates ad hoc charter and tourist services. Mana employs 160 staff, some of whom are members of the Tramways Union (the Union), others of whom are members of the Central Amalgamated Workers' Union, and others of whom are not union members.

Notice of Strike

The Union gave notice to Mana of a strike by some of the Union members, which was to take place for 4 hours the next day. Because Mana provides a "passenger road service", the Union gave 24 hours notice of the proposed strike to Mana, as it was required to do under the Employment Relations Act 2000 (the ERA).

Mana took a number of steps to deal with the effect of the intended strike action. For example, it was required to take all practicable steps to notify the public of the strike.

Notice of Cancellation

Just eight minutes before the strike was scheduled to commence, the Union gave Mana notice of cancellation. By this time, the Union members had presented themselves at Mana's premises for work. Mana refused to deploy them for work because it had already implemented alternative arrangements.

The Employment Court

The Employment Court found that the Union had acted in bad faith by deliberately delaying withdrawal of its cancellation notice for the purposes of maximising Mana's loss and disruption. It found that the Union members were not entitled to be paid for the time that they were not working as a result of the late withdrawal.

Court of Appeal

In the Court of Appeal, the Union accepted the Employment Court's finding that it had acted in bad faith. However, it argued that the Employment Court was wrong in finding that the Union's bad faith disentitled its members to their wages.

Loss of remuneration continued...

In deciding the case, the Court of Appeal looked at the three key provisions:

1 Duty of Good Faith

Under the Employment Relations Act 2000 (the ERA), the parties to an employment relationship (union, employer and employee) must:

- deal with each other in good faith and;
- must not, whether directly or indirectly, do anything to mislead or deceive each other or that is likely to mislead or deceive each other.

The duty of good faith:

- is wider in scope than the implied mutual obligation of trust and confidence; and
- requires the parties to be active and constructive in establishing and maintaining a productive employment relationship, which includes being responsive and communicative.

2 Wages Protection Act

The Wages Protection Act 1983 provides that subject to certain prescribed exceptions, an employer shall, when wages become payable to a worker, pay the entire amount of those wages to the worker without deduction. One of the exceptions is where the employee consents, in writing, to a sum being deducted from his/her wages.

3 Equity and Good Conscience Jurisdiction

Under the ERA, for the purposes of supporting successful employment relationships and promoting good faith behaviour, the Court has the jurisdiction to determine all matters before it and to make such decisions and orders, not inconsistent with the ERA or any other Act or any applicable agreement, as in equity and good conscience it thinks fit.

Decision of Court of Appeal

The Court of Appeal unanimously held that the Employment Court erred, by finding that the Union members were not entitled to remuneration following a finding of bad faith. In exercising its equity and good conscience jurisdiction, the Employment Court must act consistently with applicable legislation and employment agreements. The Court had acted inconsistently with the Wage Protection Act, reinforced by the ERA.

The Court of Appeal unanimously set aside the decision that Mana did not have to pay wages to Union members who had given notice of an intention to strike. Further, it ruled that Mana must pay the Union costs.

Further decision pending

While unanimous on the appeal, the Court of Appeal was split on other issues and accordingly sent the proceeding back to the Employment Court. The rehearing will determine whether bad faith can operate in some other way to disentitle the Union members from payment for the hours at issue.

Conclusion

The question of whether bad faith can disentitle Union members from payment for an intended strike period is still to be decided by the Employment Court.

Watch this space.