IN THE EMPLOYMENT COURT
WELLINGTON

WC 8/09
WRC 30/07
WRC 22/08

WRC 30/07	
IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
WRC 22/08	
IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION Plaintiff
AND	TAYLOR PRESTON LIMITED Defendant

Hearing: 26 and 27 November 2008
(Heard at Wellington)

Appearances: Peter Cranney, S R Mitchell, and Anthea Hughes, Counsel for Plaintiff
P C Chemis and J B Opie, Counsel for Defendant

Judgment: 22 April 2009

JUDGMENT OF JUDGE C M SHAW

Introduction

[1] Taylor Preston Limited operates a meatworks in Wellington. It employs up to about 600 people at any one time. Of these a minority are members of the plaintiff New Zealand Meat Workers and Related Trades Union ("the union") who were covered by a collective agreement (CA) which expired in June 2005.

[2] As at the date of hearing the parties have been unable to conclude a new collective agreement and the union member employees are now covered by an

individual employment agreement (IEA) based on the expired agreement and the pay rates set in that agreement.

[3] In contrast, non-union employees who previously received the same pay rates as union members have received increases to their pay since early 2006 by accepting the conditions offered to them in written individual employment agreements of a 10 percent pay rise spread over 3 years. There is now a significant differential in pay rates between union member employees and other employees doing the same work.

[4] The union has applied for the following declarations:

1. That the defendant's conduct has breached s9(1)(b) of the Employment Relations Act 2000 ("the Act") (unlawful preference).

2. That each of the plaintiff's members have been discriminated against on the grounds of union membership.

3. That the defendant's actions constitute unjustified action affecting the members to their disadvantage.

[5] The union also seeks orders requiring the defendant to end the discrimination and requiring the defendant to pay its members back pay as well as unspecified compensation and costs.

The proceedings

[6] There are two sets of proceedings. The first of these was raised and determined in the Employment Relations Authority. The union alleged that the company was in breach of its lawful obligations because its decision to pay non-union member employees more than union member employees constituted unlawful preference, discrimination on the grounds of union membership and/or an unjustifiable action to their disadvantage.

[7] In its determination dated 23 August 2007[1] the Authority found that there was a preference given to non-union member employees in terms of s9 of the Act, however the company's motives in conferring that preference were not such as to

[1] WA 118/07

make it unlawful. It found that the preference existed as a result of the union's position on pay rates rather than the fact of union membership.

[8] The Authority also found that there had been no discrimination as alleged because there was no evidence that union member employees had been involved in union activities as defined in s107 of the Act. The union challenged this determination in the Employment Court by filing proceedings on 20 September 2007.

[9] In April 2008 the company offered union member employees the same pay rise as the individual workers on the condition that they agreed to withdraw the legal action in the Court. In response the union brought further proceedings in the Authority for a declaration that this offer constituted unlawful discrimination and/or preference. The union sought an order that the union member employees receive the same wage increases as other employees as well as arrears and costs. Those proceedings were removed to the Court to be heard at the same time as the challenge to the first determination.

[10] The union does not seek a full hearing of the entire matter but a hearing only as to whether the Authority made errors of law and fact. The alleged errors of law in the Authority's determination are:

1. Its conclusion that, if an unlawful preference were held by the Authority to exist within the meaning of s9 of the Act, the effect of the Authority's conclusion would be to retrospectively deprive the non-members of the preferential treatment.

2. Its conclusion that the defendant's motive for the preferential treatment was not union membership.

3. Its conclusion that, the defendant's ongoing position – that is, that employees can resign from the union, take the pay rise and rejoin it – is not an unlawful preference or unlawful discrimination.

4. Its conclusion that because union members are able to accept a 3-year collective that would "*substantially mirror*" the individual agreement, there is no unlawful preference.

[11] The alleged errors of fact in the Authority's determination are:

1. Its conclusion that employees were not told that to get a pay rise they had to leave the union.

2. Its conclusion that there was no evidence before it that union member employees had been involved in union activities in terms of s107 of the Act.

3. Its conclusion that the defendant's motive for the preferential treatment was not union membership.

[12] Evidence in the Court covered the history of the unsuccessful negotiations for a collective agreement and the reasons why these broke down. Nineteen union members gave brief evidence about how their personal situation has been affected by the ongoing dispute.

[13] Mr Chemis correctly submitted that as the proceedings are brought by the union the Court is unable to order the company to pay individual union member employees wage increases obtained by non-union member employees. Claims for wages are individual to each employee and can only be dealt with in subsequent proceedings.

[14] Similarly the applications for a declaration that there has been disadvantage in employment and the claim for discrimination. These are both personal grievance claims which are also personal to an employee[2]. No individual is a party to these proceedings. For these reasons the present judgment is limited to the claim that the defendant has breached the unlawful preference provisions in s9 of the Act.

The issues

[15] The principal issues for decision are whether the company's actions amounted to a preference in favour of non-union member employees and if so whether the preference is unlawful.

The facts

[16] Between 2001 and 2005 the company and the union were parties to successive collective agreements. The union initiated bargaining for a new

[2] Section 102 of the Act

collective in May 2005 and negotiations began in July 2005. The company engaged a consultant, Rod Lingard, to conduct these on its behalf. At that time about 50 percent of the company's processing work force did not belong to the union. Their terms and conditions including pay rates were the same as those union member employees covered by the collective agreement.

[17] Mr Lingard said that the company found the negotiations particularly difficult. It wanted to achieve a 3-year collective agreement with what it considered reasonable annual wage increases, minimal changes to existing conditions, and no concessions on the existing flexible workplace provisions. For its part the union wanted the bargaining to deal with conditions before the questions of pay rises or the term of the agreement.

[18] It was the company's practice to wait until completion of the collective bargaining before making new offers to non-union member employees, but in 2005, with settlement looking increasingly unlikely, it became concerned that its employees on individual employment agreements should not be adversely affected by the difficulties the company was experiencing with the union in settling a new collective agreement.

[19] Mr Lingard advised the union that the company had reached the stage where it wanted to make new offers to employees on IEAs but was persuaded to agree not to make any such offers until after the union held a shed meeting with its members. This meeting was for the members to make decisions regarding the negotiations for the collective agreement. This included whether they would accept the company's latest and final offer presented to the union in November 2005 of a 10 percent wage increase spread over 3 years.

[20] On 15 December 2005 the offer was rejected by the union members. In their view the wages offered were too low, there was no offer on other working conditions and they did not want to be locked into a term of 3 years. The company was told of this decision and on 20 December 2005 it offered its non-union member employees new IEAs which included the same offer as that made to the union.

[21] Mr Lingard wrote to the union on 22 December 2005 enclosing one of the IEAs and explaining the reasons for the offer to the non-union member employees.

This included that because bargaining had been delayed the company wanted to give workers on IEAs a pay increase to ensure they remained engaged. He went on:

> *To reassure you of the company's good faith in this matter, the company wishes to advise the union that its proposed new IEA offer will only be made to processing employees not known to be members of the union. If such employees express an intention to join the union or advise they have already done so without previously informing the company, then those employees will be instructed to immediately return the letter and IEA to their respective supervisors on the grounds they are, or soon will be, covered by the collective agreement.*
>
> *Furthermore, employees known to be union members will not be communicated with in any way in regards to the proposed IEA offer and such employees will not be offered the new IEA even if they resign from the union. Union members approaching the company on this matter will be referred by its supervisors to the plant union officials ...*

[22] Following this letter, Mr Walkinshaw, the company's processing manager, told supervisors at the works that the IEA was only being offered to employees who were not members of the union at the time and that they could pass this message on to union members. He also told them that if union member employees requested the IEA they were to be referred to the union delegate. He told the Court that in spite of what he regarded as clear instructions to his supervisors he could understand how employees could misunderstand the difference between being told that to get the deal they could not be in the union, and being told they would have to resign from the union to get the deal.

[23] By January 2006 virtually all non-union member employees had signed the new IEAs. Following notice of strike action by union member employees the parties went to mediated bargaining which was unsuccessful.

[24] The company then revised its strategy. On 13 March 2006 it brought bargaining to an end by formally advising the union it was withdrawing from it. It also advised the employees in writing *"With collective bargaining having ended, Union members will remain indefinitely on their existing terms and conditions of employment."* Mr Walkinshaw said the company was coming under a lot of pressure from union member employees who wanted to resign their membership to take up the offer. Mr Lingard said the purpose of the tactic was to encourage the union to re-engage with the company to conclude a collective agreement. The bargaining

process agreement provided for a formal withdrawal and they wanted to see whether that would bring the union back to the bargaining table.

[25] The company also decided to offer the IEA to any members of the union who resigned from the union. In a notice to employees on 24 March 2006 Mr Walkinshaw said:

> …
>
> *Although the NZ Meat Workers Union has recommended its members sign up to the new individual employment agreement being offered to non-union employees, we need to emphasize to all staff that Taylor Preston has not and will not be offering any individual employment agreement to Union members.*
>
> *If the Company was to make the new individual employment agreement available to Union members, it could be seen as a breach* (sic) *our employment law obligations.*
>
> *More importantly, Taylor Preston would prefer to settle a new collective agreement for Union members.*
>
> …
>
> *In the meantime, Union members will remain on their existing terms and conditions of employment based on the expired collective agreement.*
>
> …

[26] A number of employees resigned from the union and accepted the increase offered in the individual agreement. The union did not condemn or discourage this. Some union members resigned, took the increase and then rejoined the union. Those members who refused to resign have not received any pay increases.

[27] The union relies on the 24 March 2006 notice as evidence of preferential treatment for non-members. Roger Middlemass, an organiser for the union, said the company had unequivocally brought the bargaining to an end and was now attempting to place pressure on the union to accept an inferior and long-term collective agreement by giving non-union member employees and those who resigned from the union immediate benefits not available to union member employees unless they immediately and unequivocally accepted a 3-year collective agreement without bargaining, ratification, or otherwise.

[28] On 5 April 2006 Mr Walkinshaw met with the union plant president Tuki Teautama. Mr Walkinshaw's diary note of that conversation notes that he told Mr Teautama that union members were covered by the collective agreement, that the IEA was available for non-union member employees and that if union member

employees wanted the increase they should sign the collective agreement offered to them.

[29] The union did not object to the company ending bargaining as it recognised it would not result in a collective agreement. The union organiser, Mr Middlemass, said that the union was not strong enough to initiate and settle a decent collective agreement at the plant then or now.

[30] As the company had made it clear that its offer of a 10 percent increase over 3 years would not be made available to union member employees unless they resigned and signed an IEA, the union recommended to its members to resign and accept the IEAs taken up by the non-union member employees. The union would initiate bargaining at a later date for a collective agreement.

[31] In May 2006 the union filed its first statement of problem with the Employment Relations Authority. The Authority's investigation began in November 2006 but was adjourned to 24 April 2007 for a further hearing. In the meantime there were continuing negotiations between the parties.

[32] In August 2006 the company again offered the union a collective agreement containing the same terms and conditions apart from the later dates at which the new rates would come into effect. The union member employees were also offered a sum of money to take account of back pay issues. This offer was rejected by the union on the basis that it was not the same as that received by non-union member employees in January 2006.

[33] On 29 March 2007 the company made an open offer to the union in the following terms:

> *… Taylor Preston has now reached the point where its concern about some of its employees being paid lower rates outweighs its concern about the union's strategy, and from 9 April it would like to extend the increases to all union members who have not yet received those increases. There are no strings attached to this offer in that there are no restrictions on collective bargaining in the future. However, Taylor Preston wants this gesture to bring all aspects of the litigation to an end. It offers the increases on that basis.*
> …

[34] The union was authorised by its members to accept the offer on the condition that the question of back pay was to be dealt with by the Employment Relations Authority when the hearing resumed on 24 April 2007 because, if accepted, the offer

to the union would come into effect over a year after the non-union member employees received their increases. The union member employees wanted to claim for the shortfall. The company rejected that proposal and the wage increase did not proceed.

[35] During this time some employees left the union but were denied the pay rise. The Authority recorded that in November 2006 the company had agreed that all workers who left the union after 13 March 2006 would be paid the new rate even if they subsequently rejoined the union.[3]

[36] In August 2007 the Employment Relations Authority dismissed the union's claims. The union challenged that determination.

[37] On 6 December 2007 the company made a second formal non-negotiable offer to the union of a 3-year collective agreement expiring in January 2011. This included an increase in the wage rates in the new collective by 16 percent - 10 percent in the first year to match non-union rates and a further 3 percent each in the second and third year. It was conditional on the union settling the litigation. The company offered $500 tax free compensation to union member employees still involved in the legal action who would be covered by the proposed collective. This again was rejected by the union. Mr Middlemass said it was opposed to settling a 3-year collective agreement without initiation, bargaining, consideration and response and genuine good faith bargaining. The union did not want a collective agreement until it was able to bring membership up to a significant level.

[38] In April 2008 the company communicated directly with each of its employees by giving them a package in a brown envelope at the end of the working week. Peter Rakanui, a union delegate working on the beef chain at Taylor Preston received such an offer addressed to him. It offered him a new individual employment agreement *"…in the hope that it will break the bargaining stalemate and bring their* [union members] *rates into line with non-union staff."* The offer was conditional upon the union member employee withdrawing from legal action being taken by the union against the company. The letter enclosed a settlement agreement for individuals to sign.

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[3] WA 118/07 at para [15]

[39] The union regarded this offer as another example of unlawful preference and discrimination against its members whom it represented in both proceedings.

[40] Mr Lingard and Mr Walkinshaw both denied that the company's tactics were designed to persuade employees to leave the union. They wanted to get a collective agreement which could not be done by encouraging workers to leave the union. They said they wanted to achieve similar terms and conditions for union and non-union member employees but their intention was to protect the company from what they saw as the union's strategy of having its members accept the pay offer without concluding a collective agreement and initiating bargaining later.

Preference

[41] Section 9 of the Act (Prohibition on preference) provides:

> *(1) A contract, agreement, or other arrangement between persons must not confer on a person, because the person is or is not a member of a union or a particular union,-*
>
> *(a) any preference in obtaining or retaining employment; or*
>
> *(b) any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.*
>
> *(2) Subsection (1) is not breached simply because an employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer.*
>
> *(3) To avoid doubt, this Act does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits-*
>
> *(a) of a collective agreement:*
>
> *(b) arising out of the relationship on which a collective agreement is based.*

[42] In *Air New Zealand Ltd v Kippenberger*[4] Randerson J described a preference as some advantage in the terms or conditions of employment conferred on a person.

[43] Although s9 prohibits a preference where it is conferred because a person is or is not a member of a union, s9(2) acknowledges that mere difference in employment terms in a workplace does not make preference unlawful. Section 9(3) licences collective agreements to contain terms and conditions that recognise

[4] [1999] 1 ERNZ 390

benefits. Different terms and conditions conferred on employees employed by the same employer may amount to preference but of itself this is not prohibited by s9.

[44] In *National Union of Public Employees (Inc) v Asure New Zealand Ltd*[5] a full Court of the Employment Court held that s9(2) means that the conferring of different terms and conditions does not of itself constitute an unlawful preference and the Court should focus on the reasons for the preference. The Court stated that the relevant test involves both causation and motive, that is, the purpose for which the preference was conferred. The Court held:[6]

> *… A preference cannot lawfully be conferred simply because a person is a member or non-member of a union. If it were conferred for some entirely different purpose, for example because that the employee has conferred a greater benefit on the employer by agreeing to work extra hours, it would not amount to an unlawful preference for the purposes of s 9. In the end it is a matter of fact whether there is a preference and if so, what was its purpose.*

[45] As Chief Judge Colgan pointed out in *Eastern Bay Independent Industrial Workers Union v ABB Ltd*[7] Parliament added s9(3) in 2004 to follow and statutorily confirm the effect of the *NUPE* judgment. While subsection (3) is concerned with terms contained in a collective agreement and is not directly relevant to the facts of this case, it reinforces my view that one of the purposes of s9 is to permit preferences which recognise benefits arising out of agreements between employers and employees.

[46] In *ABB* Chief Judge Colgan examined the real substance of a preferential payment to members of one union over another. After analysing the provision and the history of negotiations leading to it the Chief Judge found that in spite of the preferential payment being labelled a *"relationship premium"* it was unlawful. The *"premium"* was an additional payment the employer made to settle bargaining with one union which he characterised as a strategy to immunise a discriminatory lump sum payment to one union from a legal challenge.

[47] In contrast, the preference in *NUPE* was found to have been lawful. Members of one union received a preference over members of another union because

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[5] [2004] 2 ERNZ 487
[6] At page 504
[7] AC 41/08, 26 September 2008

of the benefits that they had brought to the employment relationship as a result of a Partnership for Quality (PfQ) agreement between their union and their employer. The difference between the two cases is that in *NUPE* there was an objectively identifiable reason for the preference other than membership of a union. The full Court found there was a greater benefit to the employer from those members agreeing to work extra hours than members of another union who had not entered into the same PfQ. In *ABB* there was no such added value.

[48] Chief Judge Colgan found that the employer in that case preferred to deal with one union over another and made preferential payments to members of that union giving those payments a "*convenient label.*"

[49] Although the full Court referred to motive in its discussion of s9, I do not read the *NUPE* decision as requiring an examination of the employer's subjective motives for conferring a preference to the extent urged on me by counsel. Motive is defined as "*a factor inducing a person to act in a particular way.*"[8] Section 9 does not refer to motive but uses the word "*because*" which means "*for the reason that.*"[9] The question is to be determined as a matter of fact. In both *NUPE* and *ABB* the Court inquired into the real substance of the preferential payments, that is, the reason why they were conferred. The issue is what caused the preference to be conferred. If it was union membership then it is prohibited

Was there a preference?

[50] It is the case for the company that there was no preference let alone an unlawful one because the same terms and conditions were offered to both groups – first to the union member employees and then to the non-union member employees. Mr Chemis submitted that until 13 March 2006 the collective agreement remained in force and bound union members and the terms and conditions in the IEA were not available to union members. After 13 March when the union member employees were not bound by the collective agreement any advantage to the non-union member employees had already been conferred.

[51] He also submitted that any advantage to non-union member employees was not created by the actions of the employer but by the union's refusal to accept the

[8] Concise Oxford Dictionary 10th Edition
[9] Supra

collective agreement offered to them. The same terms and conditions were offered to both groups.

[52] I find that before the collective agreement expired and while bargaining was continuing the company properly felt constrained from having individual contact with union member employees least it be seen as unlawfully interfering with bargaining. Its offers to the non-union member employees were made against that background and did not constitute a preference. However, from 13 March when bargaining ended, although all of the company's employees were then covered by IEAs,[10] the non-union member employees had the advantage of higher payments than their fellow employees doing the same work. A preference was conferred on non-union member employees from then.

[53] I do not accept that there was any preference arising from the 2007 and 2008 offers of increased pay rates in return for settling the litigation. At that time the same terms and conditions as referred to in s9 were available to both groups of employees. The fact that the offer to union member employees was conditional on the settling of the litigation does not relate to those conditions of employment. This is a similar distinction to that found by Randerson J in *Kippenberger* between terms and conditions of employment in a collective agreement and those conferred in that case by a mutual benefit fund which offered other benefits to its members. The litigation was not part of the terms and conditions of employment.

Was the preference prohibited?

[54] On behalf of the union Mr Cranney submitted that the sole reason for the payments to non-union member employees and those who had resigned from the union was union membership. He then focused his submission on the company's motives. He invited the Court to look behind the stated reasons for pay increases offered to the non-union member employees and to establish the true reasons why the company made such payments.

[55] Mr Chemis submitted that any preference conferred was lawful for a number of reasons. I will address those reasons in turn:

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[10] Under s61(2)(a) of the Act once a CA has expired employees become employed on an IEA based on the expired CA – amended to the extent necessary to make it read sensibly as an IEA.

1. Any advantage had already been conferred before March 2006 and an IEA which is lawful one day cannot be unlawful the next just because of the failure of bargaining which is unrelated to the IEA.

[56] Before March 2006 the offer made to the non-union member employees was exactly the same as that offered to the union member employees during collective bargaining. Up to that point the collective agreement was in force. Twelve months had not expired since the collective agreement came to the end of its term in June 2005 and bargaining to replace it was continuing.[11]

[57] The collective agreement expired when the bargaining came to an end on 13 March 2006. It would have ended in any event in June 2006 at the end of the 12-month period. At that point the company began to materially differentiate between union and non-union member employees in relation to the pay rates offered although both groups by then were on IEAs. This is evidenced by the company's notices to employees on 13 and 24 March 2006.

[58] I conclude at the point when bargaining ended and the company announced that union member employees would remain indefinitely on their existing terms and conditions while non-union member employees were offered and took increased pay rates, the preference was prohibited. It was expressly and unequivocally because of union membership.

2. The preference was created by the refusal of the union to accept the collective agreement offered to it.

[59] I find that this submission misconstrues the application of s9 which is concerned with agreements which confer a preference. It was the company which presented the agreements which led to the prohibited preference. Following the withdrawal from collective bargaining it adopted a tactic by which it hoped to persuade the union and its members to accept the non-negotiable collective agreement which it had placed before them. This outcome was to be achieved by withdrawing from bargaining and offering non-union member employees

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[11] Section 53 of the Act:

(1) A collective agreement that would otherwise expire as provided in section 52(3) continues in force—
(a) if subsection (2) is complied with; and
(b) for the period specified in subsection (3).

(2) This subsection is complied with if the union initiated collective bargaining before the collective agreement expired and for the purpose of replacing the collective agreement.

(3) The period is the period (not exceeding 12 months) during which bargaining continues for a collective agreement to replace the collective agreement that has expired.

preferential agreements in order to apply pressure to individuals who were union members. If employees were not union members or resigned from the union they received the preference. I conclude that the refusal of the company after 13 March 2006 to make the same pay increases available to union member employees was unlawful. It was done because they were members of the union and was therefore in breach of s9(1).

3. The only difference between the offers was that the one to the union members relied on the requirement to sign a collective agreement. In Mr Chemis's submission this did not create an advantage for the non-union member employees who were offered the same rates of pay.

[60] Again, following withdrawal from bargaining the union member employees were no longer covered by a collective agreement but were told that union members would not be offered the same individual terms and conditions as their co-workers. The end of bargaining meant that they were to remain on their existing terms based on the expired collective while their co-workers received an increase.

4. The company had the good reason or motive of trying to protect itself from the union's strategy of accepting all that was on offer in the bargaining and then bargaining for a collective agreement at a later date.

[61] The company's representatives did not want to have its union member employees leave the union, accept the pay increases and then rejoin the union and initiate bargaining. This fear was overstated. It was open for any employee whether a former union member or not to subsequently join the union and seek a collective agreement. Eventually, in spite of this fear, the company relaxed its position and allowed ex union members to take up the offer and keep the increases even though they rejoined.

[62] While this may have been the company's motive this is not sufficient to make the preference lawful because the preference was given to non-union member employees because they did not belong to the union. The non-union member employees were performing the same work as their union colleagues. There was no arrangement whereby the non-union member employees gave an extra benefit to the company over union member employees which would justify a preference. Non-union member employees were unconditionally offered and accepted increases to their pay rates. The union member employees were not offered those same rates

unless they resigned from the union. An employee who wished to remain in the union was not able to take up the preference.

Conclusions

[63] For the reasons given I conclude that the Employment Relations Authority misconstrued the application of s9 to the facts in this case by focusing on the company's motives in pursuing its strategy rather than on ascertaining the basis upon which the preference was conferred. It was correct to find that the motive for the company's actions was to encourage the union to conclude a collective agreement but this motive was the precursor of the company's decision not to offer the preferential wage rates to union member employees. In the end, they were not offered these rates because they were union members.

[64] The Authority found that the offers made to the union substantially mirrored the individual agreements. That is the case but only up to 13 March 2006 after which the offers were only available to non-union member employees.

[65] Section 10 of the Act provides that a contract, agreement, or other arrangement has no force or effect to the extent that it is inconsistent with s9. The Authority said that if it had found that there were an unlawful preference it would have to conclude that non-union member employees would have to be retrospectively deprived of their additional remuneration. While that may well be an outcome it is not a reason for finding that there was no unlawful preference.

Declaration

[66] The individual employment agreements entered into between the defendant and its non-union member employees conferred a preference on those employees in relation to their conditions of employment because those employees were not members of a union. That preference began in March 2006 and ran until 29 March 2007 when the company made an open offer to the union member employees.

Consequences of decision

[67] Counsel requested that questions raised by the consequences of a finding of unlawful preference including any entitlements to arrears of wages for individual employees be left open to be dealt with at a later date. It is to be hoped that the parties will now attempt to resolve those issues between themselves particularly in

the light of the indication from Mr Chemis at the end of the hearing that the company's offer of 29 March 2007 is still open. Leave is granted to the parties to apply to the Court for any further directions as a result of this judgment should that be necessary. Due to my impending retirement such directions may be given by any other Judge of the Employment Court.

Costs

[68] Costs are reserved. If these cannot be settled between the parties the plaintiff is to file a memorandum as to costs within 21 days after the date of this judgment. The defendant will have 21 days to respond. Costs may also be dealt with by any other Judge of the Employment Court.

C M SHAW

JUDGE

Judgment signed at 11.00am on 22 April 2009