IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY

[2013] NZEmpC 224
CRC 17/12

IN THE MATTER OF	a challenge to a dtermination of the Employment Relations Authority
BETWEEN	LYTTELTON PORT COMPANY LIMITED Plaintiff
AND	THE RAIL AND MARITIME TRANSPORT UNION First Defendant
AND	KIERAN BREWSTER, RICHARD CATTAWAY, STEWART GRAINGER, DARRYL HAINES, ALAN HEALY, RUSSELL RINGDAHL, DAVID VINEY and TIM LAWTON Second Defendants

Hearing: 25 - 27 February 2013 (3 days)

Appearances: Rob Towner, counsel for the plaintiff
Geoff Davenport, counsel for the defendants

Judgment: 3 December 2013

JUDGMENT OF JUDGE A A COUCH

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[1] The Lyttelton Port Company Ltd (the Company) operates the port at Lyttelton. Historically, its business was conducted on or near to the town's waterfront on Lyttelton Harbour. In recent years, the Company has also operated a container handling facility called CityDepot at Woolston, 6 kilometres from Lyttelton.

[2] The second defendants are employed by the Company at the CityDepot. They are members of the first defendant, the Rail and Maritime Transport Union (the

Union). The Company and the Union are parties to a collective agreement which covers members of the Union who do specific work and are "employed by the Company at the Port of Lyttelton". The issue in this case is whether the coverage clause includes the second defendants. The defendants say that they are covered. The plaintiff says they are not.

[3] This dispute was investigated by the Employment Relations Authority which determined it in favour of the defendants.[1] The Authority concluded that "the phrase *at the Port of Lyttelton* is principally a functional reference linked to the type of work rather than strictly a geographical reference."[2] The plaintiff challenged the whole of that determination and the matter proceeded before the Court in a hearing de novo.

The Collective Agreement

[4] There is a history of collective documents fixing the terms of employment of workers at the port of Lyttelton. Five were produced in evidence. The current document came into effect in September 2011 and runs until September 2014. The coverage clause in that agreement, however, is identical to that first included in the agreement in 2003 and for that reason, attention in this case focussed on the meaning of the clause at that time. The coverage clause states:

> 1.2 This agreement covers members of the Unions[3] who are or become employed by the Company at the Port of Lyttelton as:
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> Foreman Stevedore, Timekeeper, Cargo Handler, Tally Clerk, Coal Services Foreman, Coal General Hand, Container Terminal Administration Officer. Container Terminal receptionist/Typist, Relieving Logistic Officer, Dock Foreman, Tughand, Launchmaster, Launch Deckhand, Relieving Tug Masters, Relieving Tug Engineers, Signalman, General Maintenance Foreman, Skilled General Hand, Storeman, Plumber, Waterman, Carpenter, Foreman Electrician, Electrician, Mechanical Maintenance Supervisor, Mechanical Maintenance Foreman, Boilermaker, Fitter, Mechanic, Breakdown Man, Security, Cargo Controller, Casuals, Temporary, Fixed Term and Permanent Part Time.

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[1] [2012] NZERA Christchurch 92.
[2] At [39].
[3] The NZ Foremen Stevedores Union was also a party to the collective agreement but was not a party to this proceeding.

> The parties agree that the functions of the Cargo Handler position are varied, but include the following:
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> Cargo and coal handling, driving and operation of mechanical equipment (straddles, forklifts, front end loaders, hoists, cranes, ship loaders, stationary machines, ships' cranes, gantries, ships' gear used in cargo handling, water cart, coal shiploader, bulldozer), lashing work, hatchman work, signalman work, cargo tallying, monitoring and movement of reefer containers, receival and delivery of containers and other cargo to and from rail, CFS, and container wash area, receival and delivery of coal, relieving as Leading Hand/Foreman, the cleaning of containers, container handling equipment and coal handling equipment.

[5] The 2003 collective agreement was successively superseded in 2005, 2008 and 2011 by three other collective agreements whose coverage clauses are identical.

[6] The document in effect prior to the 2003 collective agreement was a collective employment contract concluded in 1999. It provided that any employee of the Company could become a party to the contract.

Background

[7] Lyttelton has been the site of a major port for 150 years. For more than 100 years, it was developed and operated by a statutory harbour board. In 1988, the Company was formed to take over the commercial operation of the port. In doing so, the Company became the employer of the many workers involved. The Company occupies a substantial area of land at the edge of Lyttelton Harbour, immediately adjacent to the town of Lyttelton. This includes numerous wharfs, quays and cargo handling areas.

[8] With the introduction of containers to transport cargo, specialised container handling facilities were developed in the wharf area. As the use of containers increased, so the facilities for handling them expanded. Those facilities included specialised equipment to move containers and dedicated areas for storage and unloading. Facilities for cleaning, surveying and repairing containers were also established in the wharf area and operated by contractors.

[9] Flat land in and around the port is limited. As the number of containers passing through the port increased, constraints had to be placed on the time for

which containers could be stored and the land used for servicing containers was required for other purposes. This created the opportunity for other businesses to offer container storage and maintenance facilities at a distance from the port. There were three such facilities developed by independent operators. One of these was a facility in Woolston developed by NZ Express Transport (Christchurch) Ltd.

[10] That facility was purchased by the Company in 2005 and became known as CityDepot. The terms on which the business was acquired included the Company becoming the employer party to a collective agreement with the Amalgamated Workers Union of New Zealand (AWUNZ) which expressly covered the staff employed there. That collective agreement has been successively renewed since then and continues to cover a number of employees of the Company at the Woolston site. Most of the second defendants were members of AWUNZ and covered by that collective agreement until May or June 2011 when they resigned from AWUNZ and joined the Union. Their becoming members of the Union prompted the current claim for coverage of their work under the collective agreement between the Company and the Union.

[11] The CityDepot occupies a 15 hectare site in Chapmans Road in Woolston.[4] It is about 6 kilometres from where the Company's main operations are located in the wharf area at Lyttelton. The two sites are separated by the Port Hills but there are both road and rail tunnels through the hills. These permit road travel between them in as little as 5 minutes and direct rail transport.

[12] Operations carried out at the CityDepot are principally the storage of containers going to and from the wharf in Lyttelton and the servicing of empty containers, including cleaning, surveying and repair. Most of the containers handled there are empty but about one in six contains cargo.

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[4] Chapmans Road would more properly be described as being in the suburb of Hillsborough but, as all of the witnesses referred to it being in Woolston, I have done so in this judgment.

Issues

[13] Whether the second defendants are covered by the collective agreement between the Company and the Union involves two issues. The first is whether they are employed in one of the positions listed in the second paragraph of the coverage clause. The evidence and argument on this issue focussed on whether they are "Cargo Handlers".

[14] If the second defendants are "Cargo Handlers", the second issue is whether they are employed "at the Port of Lyttelton".

Principles of interpretation

[15] The principles of construction applicable to collective agreements are relatively well settled and are based on those applicable to contracts. In their submissions, both counsel relied on *Association of Staff in Tertiary Education Inc: ASTE Te Hau Takitini o Aotearoa v Hampton*[5] where Judge Colgan summarised the basic principles:

> [19] Next, what is the correct approach? Agreements should be interpreted with reference to their factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question. The law has now moved on from the earlier position that such evidence was only admissible when the words of the agreement were ambiguous or unclear. Indeed, the current state of the law appears to be that in all cases such reference is possible and even desirable. The Court of Appeal has developed the following approach in contract cases. One looks first at the words used — they must obviously be the starting point — and then at the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words. This approach has been described as "cross-checking": *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789 (CA).
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> [20] The Court is required to adopt an objective approach to interpretation and this has always been so. What matters is not what the parties say they actually intended the words to mean, but what a reasonable person in the field, knowing all the background, would take them to mean. So evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier drafts. That is because if such evidence

[5] [2002] 1 ERNZ 491.

> was admissible, it would often, perhaps inevitably, be concluded that the parties disagreed. Second, the whole point is that a final written agreement supersedes the negotiations; positions may have changed in the course of negotiations and the final document is the agreed version which might involve a compromise of the respective parties' positions. Third, there is a sense in which an agreement takes on a life of its own, liable to be used and relied on by third persons who were not privy to the negotiations. That is particularly so in the case of employment agreements. Those other parties may include new employees, persons wishing to purchase a business whose operations are covered by an employment agreement and other employer/employee/unions in the same sector looking to settle their agreements.

[16] Although that statement of principles was made in 2002, it still provides a sound foundation on which to base the interpretation of employment agreements. In addition, both counsel also relied on the principle enunciated by Judge Colgan later in that decision that the interpretation of an agreement "should not be narrowly literal but should be in accord with business common sense."[6]

[17] I also adopt three more principles which are relevant to this case:

(a) It is permissible to have regard to the history of the provisions of a collective agreement as evidenced by prior agreements.[7]

(b) Evidence of subsequent conduct may assist the Court in the interpretation of a collective agreement as a further means of cross checking the natural meaning of the words used.[8]

(c) The provision of the agreement under consideration must be read to give effect to all of its words.[9]

Are the second defendants "Cargo Handlers"?

[18] In his written submissions, Mr Towner relied on evidence that the second defendants are employed in positions described as "Forkhoist Operator" and I was referred to documents describing that position in different terms to the position of "Cargo Handler". In the course of oral argument, however, Mr Towner accepted that the issue must be decided on the basis of what the second defendants actually do

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[6] At [23].
[7] *Hansells (NZ) Ltd v Ma* [2007] ERNZ 637 at [25].
[8] At [37]-[38].
[9] *New Zealand Merchant Service Guild IUOW Inc v InterIsland Line* [2003] 1 ERNZ 510 at [34].

rather than how their positions are described. That was an entirely proper concession.

[19] The evidence was that the second defendants' principal task is to move containers using machinery, particularly forklift trucks. There is cargo in a significant proportion of the containers, some of it in refrigerated containers known as "reefers".

[20] The coverage clause in the collective agreement mentions "Cargo Handler" in the list of positions covered and then goes on to say "The parties agree that the functions of the Cargo Handler position are varied, but include the following:". There follows a lengthy list of specific tasks and duties. That sentence and the following list must be read to mean that, if an employee is substantially engaged in performing any one or more of the listed tasks, he or she will be a "Cargo Handler" for the purposes of the agreement. In his final submissions, Mr Towner did not contend otherwise. The only other possible interpretation would be that an employee had to be engaged in all of the listed tasks in order to be a "Cargo Handler" but that would be physically impossible and cannot have been the parties' intention.

[21] I find as a fact that, in their day to day work for the Company, the second defendants were substantially engaged in cargo handling, the driving and operation of mechanical equipment (specifically forklifts), the monitoring and movement of reefer containers, and the receival and delivery of containers to and from rail. All of these tasks are specifically defined in the collective agreement as functions of "Cargo Handlers". It follows that, for the purposes of the collective agreement, the second defendants are "Cargo Handlers".

Are the second defendants employed "at the Port of Lyttelton"?

[22] The second issue is whether the second defendants comply with the requirements of the opening sentence of the coverage clause:

> 1.2 This agreement covers members of the Unions who are or become employed by the Company at the Port of Lyttelton as:

[23] It is common ground that the second defendants are employed by the Company and that they are members of the Union. The issue, therefore, is whether they are employed by the Company "at the Port of Lyttelton".

[24] Applying the principles of interpretation identified earlier, the starting point must be the normal meaning of the words used. The preposition "at" is normally used to indicate a location. Giving it that meaning, the term "Port of Lyttelton" would mean the place known by that name. This must be the starting point for the construction of the disputed provision. The issue then becomes whether there is any good reason to depart from that construction.

[25] Mr Davenport submitted that the expression "Port of Lyttelton" was not a precise location and that this made the meaning of the term uncertain. He based this submission on the answers given by witnesses for the Company to questions he asked them in cross-examination about exactly where the boundaries of the "Port of Lyttelton" were. I do not accept this submission. The real point here is not where the boundaries of the "Port of Lyttelton" are but whether the CityDepot is within the "Port of Lyttelton". There can be no doubt that, applying common knowledge of the geography, Woolston is not within the "Port of Lyttelton". It is six kilometres away on the other side of the hills which surround Lyttelton Harbour. The area between them consists largely of rural land and a reserve.

[26] For the defendants, Mr Davenport's principal submission was that, in using the expression "Port of Lyttelton", the parties intended to refer to the business of the Company rather than a geographical location. In support of this submission, he relied on evidence that the operations of the Company at the CityDepot are an integral part of its overall operations. I have considered all of that evidence and find that, to a significant extent, this is so but that the CityDepot is also a standalone operation in many ways. Examples of integration include the use of a single computer system to coordinate the movement of containers both at Woolston and at Lyttelton. The Company has a single set of policies and single systems for payroll and human resources. All employees of the Company receive the same newsletter and received the same commemorative gifts from the Company. On the other hand, there is very little exchange of staff or equipment between the two facilities and they

operate different rosters and working hours. The CityDepot also has a manager responsible for its overall operation.

[27] In advancing this submission, Mr Davenport also relied on the proposition that the work done at the CityDepot was work which would otherwise be done at the facility in Lyttelton. He noted evidence that, before the Company acquired the CityDepot, all of its container handling was done in Lyttelton and suggested that the acquisition was made in order to relieve congestion in the wharf area.

[28] A third aspect of the evidence relied on by Mr Davenport was that the Company, on its website and in its literature, described the CityDepot as its "inland port" which was "just 5 minutes down the road".

[29] Based on these propositions, Mr Davenport submitted that the CityDepot was simply an extension of the "Port of Lyttelton" and therefore a part of it. He referred me to the decision in *New Zealand Meat Processors IUOW v Auckland and Tomoana Freezing Works IUOW*[10] as an example of two geographically separate sites being regarded by the Court as a single integrated operation.

[30] On balance, I do not accept this submission. That is for three reasons. The first is that it relies on events which occurred in or after 2005 to interpret a clause inserted into the collective agreement in 2003. The clause in question must be interpreted in the context in which it was agreed. The evidence was that, in 2003, the Company had no plans for having its own container handling operations other than at Lyttelton. It is artificial therefore to suggest that the parties intended the collective agreement to apply to operations which were not even in contemplation.

[31] The second reason is that the interpretation proposed by the defendants is inconsistent with the use of the preposition "at" in the coverage clause. Giving that word its natural meaning indicating location does not produce an absurd result or one that the parties could never have intended. Nor does it produce a result inconsistent with business common sense. I accept Mr Towner's submission that it would have

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[10] [1989] 1 NZILR 1006.

been good business sense to limit terms of employment developed in the context of the loading and unloading of ships in the wharf area to employees based there.

[32] Thirdly, there is an evidential difficulty with the second proposition. The evidence was that limitations on space in the wharf area restricted the Company's operations there. It was this which led to container handling facilities in Christchurch being developed by three other operators. Thus, had the Company not acquired the CityDepot, the work being done there would not have been done in the wharf area. Rather, it would have continued to be done at Woolston by NZ Express or another independent operator.

[33] As to the decision in the *New Zealand Meat Processors* case, it is clearly distinguishable. It concerned a demarcation dispute between two unions and was decided by reference to the statutory provisions governing such disputes at the time.[11]

[34] A good deal of evidence was led about the conduct of the parties after the collective agreement was concluded and both counsel invited me to take aspects of this into account. The evidence went both ways and, on balance, I found it unpersuasive. An example of what the plaintiff relied on was an event in which maintenance workers based at Lyttelton resisted doing work at the CityDepot on the grounds that the collective agreement did not cover work on that site. An example of what the defendants relied on was a maintenance worker who transferred from Lyttelton to the CityDepot while remaining employed on the terms of the collective agreement. In each case, sensible explanations for the events were given and neither was of great moment.

[35] Mr Towner also invited me to have regard to evidence of the claims made by the Union in bargaining for the collective agreements which have succeeded the 2003 agreement. That evidence was open to conflicting interpretations and I can place no weight on it

[11] Labour Relations Act 1987, ss 108-110.

[36] Evidence was led that, if the second defendants were covered by the collective agreement, it would result in considerable cost and inconvenience to the Company. I accept Mr Davenport's submission that this is an irrelevant consideration.

[37] Overall, I find that there is no good reason to depart from the normal meaning of the words used in the opening sentence of the coverage clause in the collective agreement. The expression "at the Port of Lyttelton" restricts coverage to employees whose employment is based in Lyttelton in or around the port. This excludes workers based at the CityDepot in Woolston, including the second defendants.

Summary

[38] In summary, my decision is:

(a) The second defendants are "Cargo Handlers" as that term is used in the 2011 - 2014 Lyttelton Port Company Ltd Combined Unions Collective Agreement.

(b) The second defendants are not employed "at the Port of Lyttelton" as that term is used in the 2011 - 2014 Lyttelton Port Company Ltd Combined Unions Collective Agreement.

(c) The second defendants are not covered by the 2011 - 2014 Lyttelton Port Company Ltd Combined Unions Collective Agreement.

(d) The challenge is successful. By operation of s 183(2) of the Employment Relations Act 2000, the determination of the Authority is set aside and this decision stands in its place.

Comment

[39] During the hearing, extensive evidence was adduced and a large volume of documents produced. Counsel made thoughtful and detailed submissions. Although I have referred specifically to only small parts of that material, I confirm that I have reviewed and considered all of it again in the course of reaching this decision.

Costs

[40] Costs are reserved. My first inclination is that costs should lie where they fall. Although the Company was ultimately successful, its claim that the second defendants were not "Cargo Handlers" was never viable. The proceeding was also in the nature of a test case. That is not, however, a final view and I am open to persuasion. If the Company wishes to seek an order for costs, a memorandum should be filed and served within 20 working days after the date of this decision. The defendants will then have 15 working days in which to respond.

A A Couch
Judge

Signed at 9.00 am on 3 December 2013.