IN THE EMPLOYMENT COURT
AUCKLAND

AC 11/09
ARC 20/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS UNION INC Plaintiff
AND	PEDERSEN INDUSTRIES LIMITED Defendant

Hearing: 23 March 2009
(Heard at Rotorua)

Appearances: Lou Yukich, Advocate for Plaintiff
Russell Drake, Advocate for Defendant

Judgment: 23 March 2009

ORAL JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This is a challenge to a determination of the Employment Relations Authority on an application for a compliance order made by the union. To get to the compliance issue, the Authority had to interpret and apply a provision of a collective agreement. Because the Authority determined that question of interpretation in the employer's favour, it declined to issue a compliance order. The real dispute between the parties remains the interpretation of their collective agreement rather than whether there should be a compliance order made.

[2] At the start of the hearing, I upheld a number of Mr Yukich's submissions objecting to the admissibility of evidence intended to be called by the defendant. Indeed, logically, Mr Yukich's position demanded that some of his intended evidence and documentary exhibits be excluded for the same reasons.

[3] The Court has a broad discretion under s189 of the Employment Relations Act 2000 to admit evidence in its discretion for the overriding objective of doing justice between the parties to an employment proceeding.[1] But based on longstanding and authoritatively recognised rules, not all intended evidence is admissible when determining a disputed provision of a collective agreement.[2]

[4] The Court looks first at the plain words of the agreement and if there is any ambiguity or other reason to go beyond those, then at relevant background circumstances. The Court has consistently declined to consider the evidence of the parties and the particular negotiators as to what they say subsequently, when a dispute has arisen, they meant when they used the words originally incorporated into the collective agreement.[3] Much of the evidence intended to be called, not only by the defendant but also by the plaintiff, dealt with those sorts of inadmissible sources of evidence. I have to say that, reading the Employment Relations Authority's determination, it seems to have admitted much of that evidence and decided important parts of the case on it.

[5] The relevant facts are these. The defendant operates the Tasman chip mill near Kawerau and has done so since about 2004 when it purchased that aspect of the operation from its former owner, Carter Holt Harvey Ltd. There are a number of employees at the site and for the purpose of this case the nature of their employment can be defined in one of two ways. There are operators who operate machinery and plant used in the business, both fixed plant and mobile plant. The other broad group of employees the subject of this case are trades employees. They are generally engaged to undertake maintenance repairs and other essential tasks to ensure that the plant keeps operating.

[6] The trades employees tend to be skilled and qualified tradespeople including, for example, electricians. There is a degree of cross-over between the work of the two groups. Operators are encouraged to undertake day to day and more minor maintenance and even repair tasks that would otherwise require the intervention of tradespeople. At times, operators can assume the role of TAs (Trades Assistants) to assist and support tradesmen at the site. During times of the "annual shut" the company uses its operators, who would

[1] *Maritime Union of NZ Inc v TLNZ Ltd* [2007] 1 ERNZ 593
[2] *Dwyer v Air New Zealand Ltd* [1996] 2 ERNZ 146
[3] *ASTE v Chief Executive of Bay of Plenty Polytechnic* [2002] 1 ERNZ 491

otherwise be without work to do, to undertake essential maintenance and repair work at the plant to avoid the greater cost of contractors for that purpose.

[7] When operations staff are undertaking trades or trades-type work, the evidence is that they are provided with the appropriate tools for that work by the company. After Pedersen took over the chip mill in about 2004, all operations and trades employees were engaged on individual employment agreements. Allowances, including for tools' purchases by employees, were incorporated in hourly rates of pay. In 2005 the union, whose members of the plant include both operators and tradespeople, initiated bargaining for a first collective agreement covering those employees who were and are its members. After bargaining, a 3-year collective agreement was settled and this has recently expired.

[8] The case turns on what is known as Appendix 1 to the collective employment agreement which is as follows:

> ***APPENDIX 1***
>
> ***REMUNERATION STRUCTURE***
> *The parties agree that this Collective Agreement provides all rates for wages and allowances and that wages and allowances more favourable to individual Employees than provided herein shall be inconsistent with the provisions of this Collective Employment Agreement.*
>
> *The rates of pay detailed in Appendix 1 are in full satisfaction and discharge of all working conditions that may arise in the performance of the normal duties of the employees concerned.*
> …
> ***Tool Account:***
> *Each fortnight the employer shall, in respect of each employee party to this agreement, deposit the sum of $1.00 per worked hour to an account to be used for the purpose of reimbursement of employee tool costs, (Tool Allowance).*
>
> *Each employee shall be entitled to claim against the tool allowance for reimbursement of the cost of tools for which orders are placed through the employer.*
>
> *A signed company purchase order must be completed for all purchases.*
>
> *The employee shall not be entitled to make any claims for unused portion of the tool allowance during any annual period or on termination of the employee's employment.*

[9] The tool allowance provision, as it is called, operates in practice in the following way. Every fortnight the employer credits to a notional individual employee account, the sum of $1 per hour worked by that employee in the previous fortnight. There is no

distinction between trades and operations employees in this exercise. The notional account held by the employer is individual in the name of the employee and is maintained and can be inspected by computerised record. If an employee wishes to use the tool allowance and there is sufficient money in the employee's notional account to purchase the tools required, the employee makes out an application to the company to have access to that account. Included among the details required by the company is the nature of the tools sought to be purchased. The company makes a decision based on a number of criteria as to whether it considers the application meets the tests in the collective agreement. If it does, the company makes out a purchase order in its name which is presented to one of its tools suppliers. The tools are purchased, the company is charged by the supplier, and the company then credits its own account with the appropriate amount from the employee's notional account. The employee receives the tools and they then become the employee's own tools. On occasions, if there is insufficient money in the employee's notional account to purchase the tools sought, the company may allow a form of advance against future hourly payments so that the tools can be purchased or perhaps even allow the shortfall to be made up by the employee in cash.

[10] Following the scheme in the collective agreement, any unused portion of an employee's fund at the end of a year is lost to the employee and is returned to the company. The position is likewise where an employee ceases to be employed by the company during the course of a year and there is a credit balance in the employee's notional account.

[11] The parties' positions are essentially these. The union says that the contractual provisions should be read literally and so long as what is intended to be purchased is a tool or tools (very broadly defined), the employer is not permitted to impose conditions or otherwise withhold the money in the employee's notional credit with the company. The company says, on the other hand, that the reference to the reimbursement of the cost of tools is subject to two necessary and implied qualifications. The first is that the tools to be purchased must be work-related tools. The second qualification is that the employer does not provide those tools for the employee in the course of work on the site.

[12] Post-contractual performance of the agreement is relevant to its interpretation[4] and there were two instances outlined to me in evidence. The first concerns Alan Yardley who was at the time of these events an operator and in particular a *"bully"* (bulldozer) driver. It is part of that job that the underside of the bulldozer needs to be cleaned periodically for safety reasons and in doing so Mr Yardley dismantled an underside protective plate using a socket set to undo bolts to drop the plate away. He then used appropriate cleaning equipment to remove woodchips that might otherwise have been a fire hazard. Mr Yardley applied to the company for use of monies to his credit to purchase tools including a socket set or similar collection of tools but was denied because the necessary tools for this job were provided by the employer.

[13] The other instance given in evidence is of Leonardus de Kroon. He is a trades employee, an electrician. Mr de Kroon has his own tools as a tradesman and after the implementation of the contractual scheme, applied to use money to his credit to purchase a piece of computer hardware. The company considered that this tool was not then related to Mr de Kroon's employment and declined to agree to purchase this using his credit balance. Subsequently, when Mr de Kroon's job required him to use a laptop computer, he applied again to purchase the same piece of equipment and this was agreed to by the company and purchased using the fund accumulated to Mr de Kroon's credit.

[14] As I have already noted, the Employment Relations Authority's determination was based substantially on the history of the negotiations between the parties but also upon what it categorised as the commonsense of some of the employer's other grounds for determining applications. It found in essence that the tools that were sought to be purchased had to be work-related. Upon reflection, that would not be sufficient, however, for the defendant's case which relies both on the work-related nature of the tools and also upon the absence of their provision by the company when they are used by employees.

[15] Viewed by itself, but also in the context of the whole of the collective agreement, I find that Appendix 1 and, in particular, the part of that under the heading *"Tool Account"*, is not unambiguous without reference to extraneous material. I am satisfied that the employer's interpretation of the clause is correct and there are a number of indicia of that interpretation elsewhere in the provision and in the collective agreement generally. These

[4] *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2008] 1 NZLR 277

other indicia of necessary qualifications to the bare words include that the money in employees' notional accounts reverts to the employer if it is unused and also the requirement of an employer's purchase order being the vehicle by which tools are acquired as opposed, for example, to an employee purchasing those tools and then seeking reimbursement from the company.

[16] I have concluded that it is necessary and appropriate to imply the two terms that the employer says must be implied for a number of reasons. These include giving the employment agreement business efficacy for reasons of employment relations commonsense, and because the added implied conditions are so obvious that they really go without saying.[5] So I have concluded, although for reasons other than those used by the Employment Relations Authority, that the reference to tools in Appendix 1 to the collective agreement must mean both work related tools, and tools that the employer does not provide to the employee.

[17] It follows that it is for the employer to determine whether individual applications by employees meet these criteria. I find, however, that there is no warrant for the employer to apply other criteria to those decisions. It is, and remains, open to the union to use the disputes procedure in the collective agreement if it is dissatisfied with the result of any particular decision made by the employer using the two implied criteria that I have found necessary to properly interpret the collective agreement.

[18] For these reasons I dismiss the union's challenge and uphold the Authority's conclusion, although on other grounds.

[19] There are four further things I need to add. The first is that I am told that bargaining for a replacement collective agreement has been instigated by the union, probably about 4 months ago, but that effective progress in the bargaining has been precluded by the existence of this dispute. The decision should enable bargaining to resume or even commence effectively now that the parties have some certainty of their positions.

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[5] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 (PC)

[20] Second, I detect that there is understandable concern that the provision as it operates, acts to disproportionately advantage trades employees over operators. That is borne out in the fact that few claims against the tool allowance have been agreed to by the company when made by operators as compared to claims made by tradespeople. It appears that the difficulty with this is in the fact of membership of the same union, and coverage of both groups of employees by the same provision. That advantage or disadvantage is a matter that may be able to be dealt with in bargaining.

[21] The third matter that I wish to comment on briefly was the allegation made in the course of presentation of the union's case of bad faith by the company. On the evidence I heard there was no bad faith conduct by the company and it should have that significant slur against it dismissed by this judgment.

[22] The fourth and final supplementary question is that of costs. The Employment Relations Authority reserved costs, indicating that they would be available to the employer on application. The parties have lodged their submissions with the Authority but it appears to have been agreed generally that any decision would await the outcome of this challenge. In these circumstances I think the best course is for the Authority to now determine costs in that venue and for the Court to determine costs in respect of the challenge. The defendant having succeeded on the challenge is entitled to costs but the detail of that should be the subject of memoranda, if the company pursues costs against the union. In that event, the company may have the period of 1 calendar month from the date of this judgment to apply for costs by memorandum with the union having the following period of 1 month to respond likewise.

GL Colgan
Chief Judge

Judgment delivered orally at 4.30 pm on Monday 23 March 2009