IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 12/09
CRC 41/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA Plaintiff
AND	SANFORD LIMITED Defendant

Hearing: 27 August 2009
(Heard at Nelson)

Appearances: Tim Oldfield, Counsel for Plaintiff
T P Cleary and M Kirk, Counsel for Defendant

Judgment: 23 September 2009

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff union has challenged a determination of the Employment Relations Authority, dated 26 November 2008[1], which declined to resolve a dispute about the interpretation and application of a collective agreement in the plaintiff's favour. The dispute concerned how employees would be placed on new pay grades in a new collective agreement. The Authority concluded at paragraph [46]:

> *I have reluctantly reached the conclusion that I am unable to interpret the CEA to support either Sanfords' position or the Union's position because I consider that the CEA is silent in respect of the meaning which either party seeks to derive from it. However, I think it*

[1] CA 177/08

> *more rather than less likely that the Union, in ratifying the agreement, ratified it on the understanding advanced by Mr McDonald so that the ratifying members in assenting to the proposed agreement were actually assenting to the* [sic] *Sanfords' view of it.*

[2] The plaintiff is pursuing this matter as a dispute under s129 of the Employment Relations Act 2000. The defendant recently sought leave and, at the commencement of the hearing obtained leave, to file an amended statement of defence. It pleaded, for the first time, that if the Court did not accept the defendant's interpretation of the collective agreement the plaintiff and the defendant were each mistaken as to the same matter of fact. This was their view of each other's conclusion about the grade and level that employees would be on once the collective agreement commenced. It is pleaded that the plaintiff thought the defendant had concluded that employees would maintain their previous grades and levels and the defendant thought the plaintiff had concluded that employees would transition to different grades and levels. It is alleged that this mistake resulted in a substantially unequal exchange of value, or conferred a disproportionate benefit to the plaintiff as a result, and "*appropriate relief is claimed under s7 of the Contractual Mistakes Act 1977.*"

[3] Because of the pleading of mistake the parties were able to lead evidence of their subjective intentions during the negotiations, which would have been inadmissible if the matter was restricted to the dispute as originally filed, being one of interpretation of a collective agreement.

[4] There was no issue between the parties as to the principles of interpretation that must apply. Although the parties' subjective intentions cannot be used as an aid to interpretation, the provisions in previous collective agreements may be contrasted with those in the current collective agreement to assist in the interpretation exercise: *Association Of Staff In Tertiary Education v CEO, Unitec Institute of Technology*[2].

[5] Mr Cleary cited from *NZ Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd*[3] where the full Court stated:

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[2] [2006] ERNZ 37
[3] [2006] ERNZ 1005 at para 16

> *[16] The starting-point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of the entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectively, the aim of the transaction; see* Melanesian Mission Trust Board v AMP Soc *[1977] 1 NZLR 391, at pp 394-395 and* Lowe Walker Paeroa Ltd v Bennett *[1998] 2 ERNZ 558 (CA); (1998) 5 NZELC 95,806 (CA).*

[6] I also accept Mr Oldfield's submission that even if the drafting of an agreement is inept, the Court should be able to give effect to the underlying intent. If a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find a more liberal interpretation which satisfies business commonsense and fulfils the parties' purpose: see *ASTE v Unitec*.

[7] The prime issue between the parties is what is the correct operation of the Sanford Havelock collective employment agreement, 2007/2009 (the CA), and whether it permitted the defendant to change piece rate and hourly rate employees' levels and grades when it came into force. The plaintiff sought a declaration that the CA requires that employees (both hourly and piece rate) maintain the same grade and level when the CA came into force.

[8] The defendant's position was that the CA revoked any previous terms, although it repeated provisions in earlier collective agreements showing how employees moved through the wage rates set out in appendices to the collective agreements and described by the parties as the "*wage matrix*".

[9] It is clear the CA did not set out any transitional provisions which showed how any employee's position on the old wage matrix would appear on the new wage matrix. The new wage matrix differed from the old wage matrix in previous collective agreements because, apart from increased levels of pay, the hourly rate steps were reduced from 15 steps to 12 steps and the piece rates were reduced from

12 steps to 10 steps. The defendant's position, maintained through its branch manager, Wayne MacDonald, was that in the absence of a provision Mr MacDonald simply transitioned the employees according to how far they were from the top level of the respective wage matrix. He based this on a document described as "document 3" which he had produced and provided to the union during the course of the negotiations for the CA. It appears that document 3 was attached to an early version of the wage matrix as offered by the defendant's negotiators to the plaintiff union's negotiators. That particular wage matrix was not accepted or ratified and document 3 never formed part of the CA. In order to understand document 3 it is necessary to set out some further factual background.

[10] The Havelock plant operated by the defendant processes mussels from local mussel farms. At the start of the process the mussels go through a hot water bath, then they go through a de-bearding machine and on to a sorting table. There employees flatten the mussels so they can go through infra-red tunnels where the muscle holding the mussel's shell is burnt on one side. This is called *"popping"* as the mussel's shell should pop open. As the mussel comes out of the hot tunnel this enables employees, on what is described as the hot side of the table, to break off the half shell. Some of these employees are paid what is described as the *"flipping rate"* and the hot side of the table is described as the *"flipping side"*. These employees put the broken off reject shell down one shute. The beards of the mussels are removed and the mussel on the half shell is then put down another shute. The quicker the employees on the flipping side can perform these duties, the more they will be paid because they can go onto piece rates and are paid on the basis of the number of good pieces of mussels on the half shell that they can produce.

[11] The unburned and unopened mussels go on to the cold side of the table where they have to be opened with a knife, by hand. The employees wielding knives are paid the knife rate.

[12] Some employees, especially new ones, are paid on an hourly rate but when their efficiency improves they may move on to piece rates based on the flipping rate, when they are working on the hot side of the table, and the knife rate, when they are working on the cold side of the table.

[13] The wage matrix in the CA contains a complex set of wage scale assessment criteria which are used to progress employees through their various grades and also through levels within those grades. They involve consideration of matters such as absences, time keeping, work ethics, hygiene, quality productivity, flexibility, attitude and also the nature of the work in the various grades. These criteria are materially identical to the criteria in earlier collective agreements.

[14] On occasions, particularly when there are work stoppages, piece rate workers may be paid on the hourly rates. There is also a distinction between night and day workers which is not relevant for present purposes.

[15] The following are the relevant provisions in the CA:

> *1.3 This collective employment agreement replaces and supersedes all other terms and conditions of employment, whether those terms and conditions are the same as or similar to, or more or less advantageous than, those contained in this agreement. Employees acknowledge and agree that, by virtue of falling within the scope of this agreement's collective coverage, any individual terms and conditions of employment they may have had prior to this agreement, of whatsoever nature, are revoked. Any previous terms and conditions of employment, written or oral, will be unenforceable against the Employer on and from the date upon which this agreement applies to the Employee.*
>
> *18.2 The hourly rate of payment to employees will be based on a Performance Orientated Pay Scale as listed in the Wage Scale Schedule, Appendix 1 and the Assessment Criteria, Appendix 2, of this agreement. The rate set may fall between the level steps if appropriate. The hourly rate of pay will reflect the requirement of the Employee's job and their performance in undertaking that job. All new Employees will be employed on the Grade 1 Level 1 rate.*
>
> *18.9 The shellfish opening rate shall be subject to a performance scale taking account of the quality of product produced, in accordance with the performance sheet listed in Appendix 2 of this contract and*

the general performance of the Employee and their attitude in undertaking their work with the Company. Advancement to a higher rate will generally require an average Grade of 2 or better together with the criteria to progress through Grade 1 to Level 5 on the wage scale criteria.

18.11 The Employee will have the opportunity to advance their hourly wage rate or piece rate through productivity and achievement as assessed by the Employer. Poor performance may result in assessment to a lower level.

18.12 If the Employee's performance is such that it is likely to have an adverse effect on their assessment they will be advised of that situation by the Employer in order that they have the opportunity to correct it.

18.14 If an Employee is not satisfied with their grading or assessment they may appeal to the Factory Manager whose decision is final. The Employee may have the right to involve a Union Delegate at this stage. Any disagreement over the interpretation or application of this clause may be subject to the appropriate procedure outlined in Appendix three of this Agreement.

18.15 A performance review shall take place annually after 12 months of employment with the Employer. Two months from ratification of this Agreement, each annual assessment shall occur in the 12th month, and therefore completed before the end of twelve month period. Any increase will be effective from the end of the 12 month period. If an assessment is not completed within this timeframe then the Employee will be entitled to move up to the next level until their assessment is carried out. More frequent assessment may be undertaken by request from the Employee and agreement of the Employer or at the discretion of the Employer. If the Employee is a new staff member then the Employer will conduct the first assessment after 6 weeks employment.

18.19 The wage rate of an Employee is confidential to that Employee.

18.19.a. *The Employer will not disclose the Employee's wage rate to any other person other than those officers of the Employer who are responsible for, or have involvement in the setting of pay rates or payment of wages or any person or body as required by law.*

18.19.b. *Similarly, the Employee is encouraged to keep their wage rate confidential.*

APPENDIX 1

Wage Scale Schedule

Grade 1.

All new Employees.

Grade 2.

Grade 2 Employees would normally have worked for the Company for a minimum of 12 months or have sufficient skills with evidence by way of references, referrals or certificates of competency.

Grade 3.

Grade 3 Employees would normally be particularly skilled Employees exceeding the requirements or performance criteria for Grade 2, Machine Operators, or Supervisory Staff.

[16] The appendix also contains a transition clause but this only applies to employees who have greater than 2 months' service but less than 1 year's service on the date of ratification, and is not relevant to the present dispute.

[17] Then follows six pages of wage scale assessment criteria, which includes a mussel opener's grade assessment sheet on which scores are entered according to the way the shells are opened.

[18] I have also omitted the actual wage rates as I have perceived there may be some commercial sensitivity in disclosing those rates. The defendant is apparently

in competition with another company in the area which, according to the evidence, pays higher rates to its employees.

[19] For the purposes of the defence of mistake it is also necessary to go a little further into the negotiations for the CA. The evidence satisfies me that document 3 produced by Mr MacDonald was not agreed to by the union's negotiators nor was it expressly rejected. It was, however, part of a proposal from the defendant which was rejected. Mr MacDonald was invited by Mr Donaldson, the assistant national secretary of the plaintiff union who was engaged in the negotiations, to attend a ratification meeting. The negotiators had reached a settlement but the union negotiators were not prepared to recommend the settlement to the members of the union. The settlement was rejected by the membership. There were two meetings to consider ratification, one for the day shift and one for the night shift. In the course of the meetings Mr MacDonald was asked questions.

[20] Stuart Borrie, who has worked for the defendant for 12 years and is currently a union delegate, was also involved in the negotiations. He said when members asked where they would be on the new matrix, they were told by Mr MacDonald they would stay on the same level and grade.

[21] Mr MacDonald did not produce document 3 at the ratification meetings he attended. He produced a document which is in all material respects appendix 1 to the CA. In evidence-in-chief, Mr Cleary asked Mr MacDonald whether it was correct, as Mr Borrie had said, that Mr MacDonald had answered questions by saying, "*you would keep your grade and level*"**.** Mr MacDonald answered "*No I don't remember that exact question but we did talk about grades and levels and in fact the transition over to that 12 step but I would not have said that you keep the same grades and levels as I had in my mind how I was going to transfer these people over from the 15 step to the 12 step. I wouldn't have said that that would have been misleading*".

[22] However, earlier in his evidence-in-chief Mr MacDonald had explained how the defendant had developed the new matrix because the levels and grades were

confusing and that he had prepared document 3 to show where people would end up on the new matrix. He then stated:

> *… And it was always our intention all along that people would move on to the matrix in the same position on the matrix on the new one as they were on the old but in saying that it would take away those on the very low steps – 15, 14 and 13 they would get promoted up to the very last step which was the 12th step on the matrix. So those were the options that we presented to the union and the reason we provided that little reference table to them during the course of negotiations.*

[23] From his evidence it appears that Mr MacDonald was always intending to fix the employees' positions on the new matrix in relation to the highest level they could achieve. This, he explained, was what he meant by saying that they would have the same position as on the old matrix. I conclude that because he had that in his mind at all times he conveyed to the members of the union present at the first ratification meeting that they would stay on the same grade and level as before and the union and its members were still of that view when the CA was finally ratified. The parties were therefore at cross purposes.

[24] A subsequent exchange between Mr Donaldson and Mr MacDonald during the last ratification meeting would not have assisted the parties. Mr Donaldson rang Mr MacDonald and posed a question to the effect "What is going to happen to those people who are off the matrix. What sort of payrise would they get?" Mr MacDonald considered the question for a moment and then replied to the effect that they would get 3.25 percent like everybody else. That was the end of the conversation.

[25] Mr Donaldson apparently intended that the question was a reference to those persons whose grades would be affected by the new matrix because of the removal of the previous levels. Mr MacDonald said that he understood it to refer to those employees who were already being paid above the matrix, for example Mr Borrie, who was a long serving employee.

[26] This evidence highlights the difficulties in analysing what people actually intended from what they had said during the course of negotiations. It may well be that they will, from time to time, be at cross purposes. Subject, however, to the argument about the doctrine of mistake, the parties are bound by the document they have concluded.

[27] Subsequent to the CA being signed, Mr MacDonald applied to all the relevant employees his analysis of the new matrix in comparison to the old. Unchallenged evidence was led by the plaintiff which showed that the grades and levels of at least three of the defendant's employees were affected by Mr MacDonald's actions.

[28] Luciano Cardoso, who at the date of hearing had worked for the defendant for 3 years at the Havelock processing plant, was on the day shift. He had moved from being a new employee on grade 1 level 1 through various assessments to grade 2 level 1 when the CA came into force. After the CA came into force he was moved to grade 1 level 3. His partner, Leidiane Camargos, was similarly moved from grade 2 level 1 to grade 1 level 3.

[29] Karen Solomon, who had worked at the plant for over 3 years on the day shift, was on level 2 for the flipping and knife day rates when the CA came into force. When the old level 1 was dropped from the pay scale in the new CA she went down to level 1 from level 2. She thought that she would have stayed on level 2 once the new CA was signed. As soon as those affected employees saw the new grades and levels in their pay packets they complained to the union which raised the matter in a very timely fashion with the defendant shortly after the CA came into force.

[30] Mr MacDonald gave evidence that the impact of the union's claim, if successful, would be a further 3 percent increase in wages with each individual moving 1, 2 or 3 steps up the new matrix. The costs would be an unbudgeted expense and he said it was probably more than the defendant could stand because it had experienced an extremely tough year as an export company in the current financial situation. He spoke of a potential flow on effect to all the staff.

The submissions

[31] Mr Oldfield submitted that the defendant's movement of hourly employees' levels and grades in accordance with document 3 was not permitted in terms of the CA. He observed that the defendant had also moved piece rate employees down a grade, even though document 3 does not purport to provide a transition process for piece rate employees. It was common ground that document 3 only referred to hourly workers. Because this document had never been agreed to or formed part of the CA, Mr Oldfield submitted it could not be validly used. He contended that the CA did not allow the defendant to change employees' levels and grades, except by the process set out in clause 18. He observed that employees who had already passed certain criteria in the appendices and had moved up levels and grades, would therefore have to fulfil precisely the same criteria if they were reduced to lower levels or grades, in order to move back into their former positions.

[32] Mr Oldfield contended that the defendant could not rely on clause 1.3 to justify the reassignment of employees' grades and levels as this was a completeness clause which merely excluded terms and conditions of employment that sat outside the collective. He submitted that clause 1.3 could not be used to extinguish individual terms and conditions and that if the defendant's contention was correct it would have enabled it to have reassigned full time employees to part time, casual or temporary roles, or the like.

[33] The plaintiff's interpretation was that employees' levels and grades should not have changed when the CA came into force, in the absence of any agreed transition process. Mr Oldfield accepted that one issue in the plaintiff's interpretation was what would happen to those piece rate employees who were formerly on level 6, or hourly employees who were formerly on level 5, these levels having disappeared in the new matrix. He submitted those employees should simply end up off the matrix and be paid the extra 3.25 percent. Mr Oldfield submitted that the plaintiff was only disputing the fact that the employees' grades and levels were changed. Piece rate workers on level 6 and hourly workers on level 5 did not, in fact, have their levels changed, he submitted. Those levels were simply removed and

the plaintiff did not dispute the way in which the defendant dealt with those employees.

[34] Mr Cleary accepted that ordinarily, absent an express schedule setting out the data, employees' grades and levels for a new collective would be taken as that which pre-existed the commencement of the agreement. He accepted that this was the case with transitions between the 2003 and the 2004-2006 collective agreements and between the 2004-2006 and the 2006 collective agreements. Because the wage matrix in the CA was materially different to the old wage matrix this meant there had to be a transition. He submitted it was not appropriate to take level 6 piece rate and level 5 hourly rate employees, whose rates had disappeared, outside the matrix and simply pass on to them the 3.25 percent increase. Mr Cleary contended that Mr MacDonald's approach of simply transitioning employees according to how far they were from the top level, as set out in document 3, was the logical and reasonable way of approaching the matter. He submitted that clause 1.3 allowed this, because the parties started afresh from the commencement of the CA and there could be no contractual reliance on past terms and conditions, including past grades and/or levels. The employees' wage standing would be governed by the terms of the CA alone.

Conclusion on interpretation of the CA

[35] I have much sympathy for the Authority's position in its determination. It saw that the fundamental difficulty with the union's position was that its understanding of how the CA worked ignored the fact that the matrix had changed from the old collective. If they had been the same there would be no difficulty with the plaintiff's argument. The employees would simply remain in the position they previously were and the wage increases would be applied to them in terms of the CA.

[36] A similar difficulty arises with the defendant's position. It has to rely for its interpretation on a transitional arrangement that is not expressly or impliedly sanctioned by the terms of the CA.

[37] Both positions are unacceptable.

[38] Viewing the CA from the starting point that I am required to, by examining the words used to see whether they were clear and unambiguous and to construe them in their ordinary meaning, I was able to discern from the CA itself a method of resolving the dispute. This turned on the relevant definitions in the CA. I put this to counsel and to Mr MacDonald during the course of the hearing and I am satisfied that if it is properly applied it will not have the financial consequences which so concerned Mr MacDonald.

[39] I start off with the proposition that all employees cannot have the same position on the new matrix that they had under the earlier collective agreements because some of those levels have been removed. This is supported by clause 1.3 which confirms that the CA replaces and supersedes all previous terms and conditions, whether they were the same or similar to, or more or less advantageous to, those provided in the CA.

[40] That does not mean, however, as Mr Cleary's submissions would appear to imply if taken to the extreme, that all previous arrangements by which employees were accorded full time or other status, their length of service, experience or qualifications, could simply be ignored. To this extent I accept Mr Oldfield's submission that clause 1.3 should not be construed to produce such an outrageous result. To do so would be to violate the underlying individual employment agreements to which the terms of the collective agreement adhere.

[41] The exercise which should have been carried out when the CA came into force was to find the appropriate place on the new matrix of employees, whilst preserving their entitlements which flowed from their existing grades and levels. The wording of clause 18.2 supports this approach. The rate is set on the wage scale schedule after applying the most current assessment criteria. The rate may fall between the level steps if appropriate. The hourly rates for each employee must reflect the requirement of that employee's job and their performance in undertaking that job. All new employees are employed on grade 1 level 1.

[42] All experienced and qualified employees are unlikely to remain on grade 1. That conclusion is supported by the descriptions in the wage scale schedule, which remained precisely the same as those in the earlier collectives. They have not been altered in any way to reflect any changes in the matrix.

[43] Thus from the description in the CA, grade 1 contains all new employees. Grade 2 employees, however, would normally have worked for the defendant for a minimum of 12 months. As an alternative, they may have sufficient skills, evidenced by way of references or certificates of competency, which would justify their moving from grade 1 to grade 2. Once they have moved into grade 2, either because of the length of service or because of their particular competency, it would not be appropriate to move them back into a grade reserved for new employees. To do so would be to violate the description of grade 2 employees.

[44] In reaching those conclusions I reject the submission of Mr Cleary that the word "*normally*" in the description of grade 2 in appendix 1 was meant to contrast the situation of abnormality on the introduction of the new matrix. That argument may have had some force if the description had been altered to match the new matrix but, as I have indicated, the description is precisely the same as that which appeared in the earlier collective agreements. Assistance is also to be derived from the description of grade 3 employees who are "normally" to be particularly skilled and to exceed the requirements of performance for grade 2, machine operators or supervisory staff. To apply Mr MacDonald's document 3 transition schedule could result in the movement of a grade 3 level 1 employee down to grade 2 level 4 which the descriptors of grade 3 clearly do not permit.

[45] The CA, as it stands, does not provide any descriptors which may assist in the classification of flipping or knife employees, but again the exercise must be one of finding the closest corresponding level in the new matrix to the position previously held under the former collective agreement.

[46] Any other interpretation is, as Mr Oldfield has argued, to disregard the experience, skills and qualifications of the employees affected. I note that Mr MacDonald put up the preliminary view that to perform the exercise in this fashion

would not be substantially different from the result he achieved by applying his own transition schedule. That may be so when dealing with the levels, but, as I have indicated, the description of the grades, where relevant, will prevent a down grading.

[47] In view of this conclusion the plaintiff would be entitled to a declaration that the transition imposed by the defendant when the CA came into force was not in accordance with the provisions of that document.

Contractual mistake

[48] The defendant has pleaded mistake and sought relief in terms of s6(1)(a)(iii) of the Contractual Mistakes Act 1977 which provides, so far as it is relevant to the defence:

> ***6. Relief may be granted where mistake by one party is known to opposing party or is common or mutual—****(1) A Court may in the course of any proceedings or on application made for the purpose grant relief under section 7 of this Act to any party to a contract—*
>
> *(a) If in entering into that contract—*
>
> *…*
>
> *(iii) That party and at least one other party (not being a party having substantially the same interest under the contract as the party seeking relief) were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and*
>
> *(b) The mistake or mistakes, as the case may be, resulted at the time of the contract—*
>
> *(i) In a substantially unequal exchange of values; or*
>
> *(ii) In the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor; and*
>
> …

[49] Mr Cleary submitted there was a matter of fact over which there was a mutual mistake. It was the parties' understanding of each other's expectations over employees' wage grades and levels after the commencement of the CA. He submitted the respective parties erroneously understood each other's position in relation to that matter of fact.

[50] He submitted that Mr Donaldson had formed the view that Mr MacDonald was not going to apply his transition chart he had put up in the negotiations and that

if he had understood Mr MacDonald's true intention, there would have been no agreement.

[51] Conversely, he submitted, Mr MacDonald formed the opinion that Mr Donaldson understood the transition chart would be used and, again, if the defendant had known the true position the defendant would not have entered into the bargain.

[52] He submitted that the restriction contained in s6(2)(a), that an application for relief cannot be brought in respect of a mistake in the interpretation of a contract, did not apply because the CA did not cover the particular employees' grades and levels. He also rejected Mr Oldfield's submission that three facts were needed for there to be mutual mistake: a mistaken one held by each respective party, making two facts, and the third fact, which was the true fact. He submitted that the Act does not mention the same fact simplicitor but the same matter of fact, a term arguably wider than "*fact*". He submitted that given the remedial object of the Act a wider interpretation would be appropriate.

[53] Mr Cleary submitted that the ongoing benefits or obligations, in terms of s6(1)(b)(ii), will result in either a substantially unequal exchange of values or the conferring of a benefit or obligations substantially disproportionate to the consideration. He submitted that the defendant was entitled to relief under s7 which gives the Court the discretion, without limitation, to declare a contract to be valid, to cancel the contract, to grant relief by way of variation or to grant relief by way of restitution or compensation.

[54] Mr Cleary accepted that the Employment Relations Act, while conferring in s162 the jurisdiction of the Employment Relations Authority to make any order that the High Court or District Court could make under the Contractual Mistakes Act, made this jurisdiction subject to ss163 and 164. Section 163 provides that the Authority may not make any order cancelling or varying a collective agreement or any term of that agreement. Section 164, which deals with individual employment agreements, has no application in the present case.

[55] I do not accept Mr Oldfield's submission that the present application for relief for mistake involves a mistake of interpretation. There is nothing in the CA which expressly deals with the transition from the old matrix to the new. There is no provision therefore to interpret. I also do not accept Mr Oldfield's submission that there need to be three possibilities in relation to the matter in question, two wrong facts and one right. I prefer Mr Cleary's submission on this point. However, I accept Mr Oldfield's submission that the Authority or the Court in a challenge is prevented by the provisions of ss162 and 163 the Employment Relations Act from granting any relief by way of variation or cancellation. The only other relief available would be restitution or compensation. As Mr Oldfield submitted, it is difficult to see what loss the defendant has suffered. There is the further difficulty that any such relief would need to be addressed to the members of the union who might be affected by having to pay back any increased rate of pay, as a result of the interpretation contended for by the plaintiff.

[56] However, I have found that the parties, although they may have suffered from mutual mistake, have concluded an agreement under which it is possible to deal with the transition from the old matrix to the new. I therefore conclude that this is not a case in which the Contractual Mistakes Act should apply to provide any relief to the defendant. The effect of the mistake at the time of the contract has not resulted in a substantially unequal exchange of values or any disproportionate obligations, on the interpretation of the CA that I have preferred. To grant relief in the nature of imposing the transitional arrangement that Mr MacDonald has introduced would not be an appropriate remedy to exercise against employees adversely affected by that transition. I therefore dismiss the claim for relief under the Contractual Mistakes Act.

Conclusion

[57] Because the plaintiff has been partially successful in its challenge the determination is set aside and this decision resolves the dispute in its place.

[58] The plaintiff's statement of claim sought costs. These were not addressed by counsel. If agreement cannot be reached then a memorandum should be filed within 30 days from the date of this judgment with a further 21 days to reply.

B S Travis
Judge

Judgment signed at 3.30pm on 23 September 2009