Determination Number: AA 284/05
File Number: AEA 610/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Corrections Association of New Zealand (Applicant)
AND	Department of Corrections (Respondent)
REPRESENTATIVES	Simon Mitchell for the applicant Justine O'Connell for the respondent
MEMBER OF AUTHORITY	James Wilson
INVESTIGATION MEETING	5 July 2005
DATE OF DETERMINATION	27 July 2005

DETERMINATION OF THE AUTHORITY

The problem

[1] The Public Prisons Collective Employment Agreement (2003 - 2006) (the CEA) says, at page 6:

> ***Operating Capacity***
> *The maximum capacity of each institution at the start of this agreement shall be recorded at the prison concerned, and a copy provided to CANZ.*
>
> …..
>
> *The capacity is not to be exceeded and every endeavour shall be made to reduce the number of inmates when the agreed maximum capacity is reached.*
>
> *The maximum capacity shall only be varied when:*
> - *Extra inmate accommodation and facilities are made available*
> - *Existing inmate accommodation and/or facilities are made unavailable.*
>
> *The variation shall be according to the capacity of the inmate accommodation and facilities.*
>
> *All newly built accommodation shall be one inmate per cell unless cells have been specifically designed for more than one inmate.*
>
> *The capacity shall only be varied after the Regional Manager and CANZ have consulted and negotiated on staffing arrangements and facilities in relation to the variation. The agreed Protocol for Managing Variations to Operating Capacity shall be used for this purpose. Written confirmation of any change to the operating capacity in any institution shall be promptly forwarded to CANZ.*

[2] As required by the CEA there is an agreed maximum operating capacity for each of the Public Prisons operated by the Department of Corrections. CANZ have asked the Authority to interpret this clause to determine what, in practice, *operating capacity* means. They (CANZ) have asked that the Authority issue a ruling:

> *… that the maximum capacity is the total number of inmates that may be held in a prison at any time of the day or night.*

The parties agree that the Authority's interpretation will apply to all of the prisons operated by the Department, but for the purposes of this case concentrated on the operation of the Mount Eden prison.

[3] The Department argues that the agreed *maximum capacity*, limits only the number of inmates accommodated in the particular prison at the final "lockdown" each day. They contend that the number of prisoners actually within the prison confines at other times of the day is not limited by agreed maximum operating capacity. In other words, the Department says, that the total number of prisoners held at the prison during the day may be higher than the agreed operating capacity as long as the numbers are reduced to, or below, the maximum operating capacity at the time of the final muster.

Jurisdiction of the Authority

[4] In written submissions, and subsequent to the Authority's investigation meeting, Ms O'Connell has suggested that, if the Authority was to make a determination that the maximum capacity is the total number of inmates that may be held in prison at any time of the day or night, such a determination would outside the Authority's jurisdiction under section 161(2) of the Employment Relations Act 2000. Ms O'Connell argues that such a ruling would constitute a new term of employment. She argues that the collective agreement does not currently contain any term or condition that determines what the maximum capacity is or when it is to be determined. Should the Authority determine this fact the Authority would be outside its jurisdiction. Ms O'Connell suggests that the parties have already addressed the meaning and operation of *maximum operating capacity* and have set this out in the protocol. It is the Departments view that there is nothing for the Authority to interpret or determine.

[5] I do not accept Ms O'Connell's submission. The CEA clearly establishes a condition of employment i.e. that the parties will agree the maximum operating capacity of each prison. The parties are in *dispute about the interpretation, application* and *operatio*n of that agreement. Section 161(1)(a) of the Employment Relations Act establishes that the Authority has *exclusive jurisdiction to make determinations* regarding such disputes. I am not required, and do not intend, to make a determination to *fix new terms and conditions of employment.* This would, as Ms O'Connell rightly suggests, be outside the Authority's jurisdiction.

Principles of Interpretation

[6] Mr Mitchell, in his submissions for CANZ, has quite rightly drawn my attention to Employment Court's summary of the principles of interpretation set out in *Aberhart v. Air New Zealand Ltd* (unreported) 14 February 2001 Colgan J. AEC 138/00. Although in no way in conflict with that summary it is perhaps more apposite to refer to Judge Shaw's summary of the same principles as set out in *CANZ v. Attorney General in respect of the Department of Corrections (No 2)* [1999] 2 ERNZ 974. Judge Shaw's judgement dealt with the clause which immediately preceded

that which I and now required to interpret. While the clause has been amended (to allow for local consultation and negotiation) the wording of the current clause in all relevant respects remains the same. In the 1999 judgement, at page 984, the Judge set out the principles of interpretation as:

GENERAL PRINCIPLES OF CONSTRUCTION

In Dwyer v Air New Zealand Ltd [1996] 2 ERNZ 146, 151, the full Court accepted that:

> … there is now a well established practice that, with appropriate adjustments to take account of the special nature of employment contracts and of this jurisdiction, ordinary contractual principles of interpretation are applied.

The Court of appeal annunciated this special relationship as one:

> …under which workers and employers have mutual obligations of confidence, trust, and fair dealing.
> Principal of Auckland College of Education v Hagg [1997] ERNZ 116, 129.

Of the many principles applied to the interpretation of contracts the following are relevant to this case:

1. The object sought to be achieved in construing any commercial contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they … chose to express them.
   Pioneer Supply Ltd v BTP Tioxide Ltd [1982] AC 724 per Lord Diplock.

2. *The contract must be construed objectively but that does not confine the Court to looking only at the contract itself.*

   > But where the words are susceptible of more than one meaning, even if one of them be an unusual meaning, the Court is entitled to look, indeed it must look, at the surrounding circumstances in order to ascertain from them, if it can, what the true intention was. This is quite different from listening to the parties' version of what they each meant. A contract must be construed objectively, but not in disregard of its factual context and its purpose.
   > Quainoo v NZ Breweries Limited [1991] 1 NZLR 161, 165 (CA). Hardie Boys J

3. *Where a contract has been varied by agreement, the Court is able to look at the contract both before and after the variation.*

   > … if the parties to a concluded contract subsequently agree in express terms that some words in it are to be replaced by others, one can have regard to all aspects of the subsequent agreement in construing the contract.
   > Punjab National Bank v de Boonville [1992] 1 WLR 1138, 1148 (CA) Straughton LJ

4. *Words in contracts are to be construed according to their ordinary meaning unless there is an ambiguity. However:*

   > … it is not the function of the Court, when construing a document, to search for an ambiguity. Nor should rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used to see whether they are clear and unambiguous.
   > Melanesian Mission Trust Board v Australian Mutual Providence Society [1997] 1 NZLR 391, 394-5 (PC)

5. *It appears that, as a matter of principle, the Courts should be able to have regard to the subsequent conduct of the parties when construing the meaning of an ambiguously worded contract. In Attorney-General v Dreux Holdings Ltd (1996) 7 TCLR 617, 640, Thomas J left*

open the possibility that this principle, a departure from previous rulings on the point, may be developed to apply as:

> an aid to interpretation in contractual disputes where it may not be possible to readily classify the contract as "ambiguous".

Thomas J considered it to be a matter of common sense:

> Why should a party be permitted to depart from the mutual intention of the parties when what they intended is confirmed by their actions after completing the contract? Why should the reasonable expectations of the parties to the contract be defeated by attributing a meaning to the contract which their subsequent conduct demonstrates they did not intend? (p641)

Protocol for Managing Variations

[7] The CEA (as set above) contains a reference to a *Protocol for Managing Variations to Operating Capacity*. Both parties suggested that this protocol might assist me in my interpretation of the words in the CEA. Both also submitted that the protocol supported their interpretation. The protocol is specifically referred to in the CEA and is to be used for the purpose of *consult(ing) and negotiate(ing) on staffing arrangements and facilities* were the parties are considering a variation to the operating capacity. At least for the purpose of *consult(ing) and negotiate(ing) on staffing arrangement*s the parties (via the CEA) have agreed that the protocol, and therefore the definitions contained within it, will apply.

[8] The protocol defines *maximum operating capacity* as

> *The maximum number of inmates who can be accommodated in a particular prison <u>at a point in time.</u>* (My emphasis)

This definition is not contained within the collective agreement. However, as quoted in *CANZ v. Attorney General in respect of the Department of Corrections (No 2)* (see above)

> *But where the words are susceptible of more than one meaning, even if one of them be an unusual meaning, the Court is entitled to look, indeed it must look, at the surrounding circumstances in order to ascertain from them, if it can, what the true intention was. This is quite different from listening to the parties' version of what they each meant. A contract must be construed objectively, but not in disregard of its factual context and its purpose.*
> <u>Quainoo v NZ Breweries Limited</u> [1991] 1 NZLR 161, 165 (CA). Hardie Boys J

The protocol is clearly, part of the *surrounding circumstances* and the *factual context* and must be taken into account in interpreting the words of the collective agreement.

[9] The protocol also sets out the criteria to be satisfied were the parties seek to vary the *maximum capacity*. These criteria are:

- *Extra inmate accommodation and facilities are made available*
- *Existing inmate accommodation and/or facilities are made unavailable.*

That is, the same criteria as are set out in the CEA.

The Department of Correction's position

[10] Leaving aside in the Department's belated suggestion that the Authority lacks jurisdiction to determine this matter, their argument can be summarised as follows:

- The CEA is inextricably linked to the *protocol for managing variations to the operating capacity.*
- The protocol defines *maximum operating capacity* as *the maximum number of inmates who may be accommodated in a particular prison at a point in time*. This definition clearly relates maximum capacity to accommodation.
- The protocol then defines *inmate accommodation* as *beds in cells of any type provided for the use of inmates in accordance with the intended purpose*. This, according to the Department, clearly defines accommodation, and therefore maximum capacity as relating to the number of beds.
- The phrase *point in time* must mean the point at which the maximum capacity is to be assessed and that this means overnight when inmates are actually using the beds which have been included in the maximum capacity.

CANZ position

[11] CANZ disputes the Departments interpretation and suggests the Department have incorrectly focused on the words *accommodation* and *accommodated* without giving proper weight to the words *at a point in time.* Mr Mitchell argues that if the parties had intended to define *maximum capacity* in terms of the numbers of prisoners at night they would have stated this rather than referring to *a point in time.* The maximum number, Mr Mitchell says, is not about who is present at night but who is present at any time.

Discussion

[12] Before I discuss my interpretation and determination of this matter, it is appropriate to repeat a comment I made to the parties during my investigation of this matter. That is, that it would have been preferable for the parties themselves to come to an agreement on what the words of the CEA mean. If the words as they are written do not clearly reflect what one or both of the parties intended they would be better to agree upon a new, more explicit form of words rather than rely on an external arbitrator (the Authority) to impose an interpretation - which may interpret the words as they are written but may not reflect the intention of the parties. Regrettably the parties have been unable to reach common ground on this matter and have left it to me to determine not what the parties might have intended but what the words of the CEA mean.

[13] The Department says that the *maximum operating capacity*, as defined by the protocol, means *the maximum number of inmates who may be accommodated in a particular prison at a point in time* and that the CEA states that this *maximum capacity* shall only be varied when *extra inmate accommodation and facilities are made available.* They point out that the protocol defines inmate accommodation as *beds in cells of any type for the use of inmates in accordance with the intended purpose.* The Department say that this defines *accommodation*, and therefore the maximum capacity, as relating to the number of beds.

[14] Clearly the CEA and protocol provide that any alteration to the agreed maximum operating capacity can only be made where there is an increase (or decrease) in the level of accommodation i.e. beds and other facilities, available. However, the definition also refers *to the maximum number of inmates who may be accommodated in a particular prison at a point in time*. The Department suggests that *a point in time* must refer to a particular time which, they say, must be at night i.e. the time during which inmates are confined to the available accommodation. I do not accept this logic. To do so would give rise to the obvious corollary that there is no maximum at any other point in time. It allows the possibility that any number of additional inmates could be bought into the prison precincts with no regard for the capacity of the prison, its facilities or its staffing levels. If the parties had agreed that the maximum capacity should be assessed at a particular point in time they would (or should) have stated that explicitly. They did not. The plain meaning of the words *at a point in time* can only mean at any point in time.

[15] The relevant definition of *capacity* as set out in the Concise Oxford Dictionary (1990 edition, Oxford University Press) is …*the maximum number that can be contained* …. Although tautological the CEA emphasises the point by referring to the *maximum* capacity. The parties have agreed, as required by the collective agreement, the *maximum capacity* of each prison. As I understand it, each of the prisons covered by the Collective Agreement (and set out in a schedule to the CEA) is formally gazetted and there is no dispute about what constitutes the environs of each institution.

[16] **I find that the agreed *maximum capacity* of any of the prisons listed in Schedule B of the collective employment agreement is the total number of inmates that can be held in a the particular prison at any time, day or night.**

The effect of this Determination

[17] CANZ, in their statement of matter, has asked only that I determine the definition of operating capacity as set out in the CEA. The obvious and immediate implication of my finding is that the Department of Corrections should immediately refrain from exceeding the *maximum capacity*, as defined above, of any of the prisons. Clearly this will have implications for the day to day operation of prisons. As already stated above such operational matters are best dealt with by direct discussion and agreement between the parties directly effected. I therefore make no orders as to how, or in what time frame, this determination might be given effect. I strongly urge the parties to hold urgent discussions with a view to finding a practical solution while meeting the interests and obligations of both sides.

COSTS

[18] This being somewhat of a test case, it is appropriate that costs should lie where they fall and I so order.

James Wilson
Member of Employment Relations Authority