Determination Number: WA 42/05
File Number: WEA 329/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	New Zealand Amalgamated Engineering Printing & Manufacturing Union (first applicant)
AND	Venus Anderson and 52 others (whose names are listed on the attached schedule) (second applicants)
AND	Sally Lewis (third applicant)
AND	Sunbeam Corporation Limited (respondent)
REPRESENTATIVES	Tony Wilton for the applicants Rob Towner for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Palmerston North 1 March 2005
DATE OF DETERMINATION	11 March 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. The problem between the parties is a dispute over whether, by virtue of a collective employment contract, the second and third applicants are entitled to be paid redundancy compensation – statement of problem received on 2 September 2004. The applicants seek a determination that they are and costs.

2. The respondent (the Company) says, amongst other things, that the second and third applicants are not entitled to redundancy compensation – statement in reply received 29 September.

3. The parties undertook mediation but their employment relationship problem remained unresolved.

Investigation

4. During a telephone conference held on 4 November the parties agreed to an investigation in Palmerston North on 1 March 2005. It was subsequently agreed the investigation would commence at 9.00 a.m. and one day would be sufficient.

5. The parties usefully provided written statements in advance of the investigation as well as an agreed bundle of relevant documents. At the conclusion counsel provided written submissions and undertook to provide closing comment by Wednesday, 9 March.

Background

6. The parties are agreed as to the key facts. They are:

7. The Company closed its electric blanket manufacturing business at Feilding during June/July 2004.

8. The second applicants were employed in the business by the Company as temporary workers on a seasonal basis, many of them for a number of years (the longest serving having 12 years continuous seasonal employment).

9. The third applicant had previously been employed as a temporary worker on a seasonal basis for seven years but, at the closure of the business, was employed as a casual worker.

10. The second and third applicants were members of the first applicant (the EPMU).

11. The Company and the applicants were parties to a collective employment agreement, the Sunbeam Victa Manufacturing of New Zealand Collective Employment Agreement 2003 - 2004 (the Agreement).

12. The Agreement contained the following relevant provisions:

> ***22 TEMPORARY EMPLOYEES***
>
> *22.1 A temporary employee is a person employed for a period not exceeding twelve months …*
>
> *22.4 Where employees are employed on a seasonal basis their service shall be aggregated for the purpose of service entitlements.…*
>
> *22.5 When an employee is not re-employed within 24 months of their previous period of employment, their status reverts to that of a new employee.*
>
> *22.6 When an employee is re-employed within the 24 months of their previous employment, they shall recommence at the grade on which they left.*
>
> *27.5 Redundancy*
>
> *27.5.1 All employees to be declared redundant shall receive not less than four weeks' notice of the termination of their*

employment. In lieu of such notice an employee shall receive four weeks' notice.

…

27.5.4 Employees made redundant shall be entitled to the following redundancy compensation: etc.

(document 2 in the agreed bundle)

Applicants' Position

13. The EPMU says that the second and third applicants had a continuing employment relationship with the Company despite the periodic cessation of that work.

14. The employment relationship was terminated not by the conclusion of a season's work but by the decision of the respondent to close its plant.

15. The seasonal workers were therefore surplus to the respondent's needs and hence redundant.

16. The Agreement does not exclude seasonal workers from entitlement to redundancy compensation. In fact it provides for the aggregation of seasonal workers' service for the purpose of calculating service-related entitlements. The entitlement to redundancy compensation is based on service with a minimum of at least one year's service before there is an entitlement to any redundancy compensation.

Respondent's Position

17. The Company says it did not have a continuing employment relationship with the second and third respondents: it was instead an intermittent relationship. The Agreement does not recognise the continuity of an employment relationship between itself and the second and third respondents. The number of weeks worked per year by any given employee also varied.

18. The employment of the latter came to an end in 2004 with the termination of the blanket production season, just as it had in prior years and not because they were redundant.

Discussion and Findings

19. I find against the applicants' claims, and in favour of the respondent's position, for the following reasons.

20. I do not accept, on the evidence made available during the investigation, that the second and third applicants had – as the Union claims – a continuing employment relationship with the Company despite the periodic cessation of that work.

21. I find also that the seasonal employment relationships were terminated by the conclusion of a season's work and not by the decision of the respondent to close its plant. I therefore do not accept that the second and third respondents were made redundant. They were never *"declared redundant"* for the simple reason that – in 2004 – their normal season, and their seasonal employment, came to their natural conclusion.

22. Despite, in some instances, their lengthy histories of seasonal employment, the second and third applicants had no basis to claim an expectation of ongoing employment, nor of future seasonal work. The evidence in support of that conclusion was unambiguous. At the heart of their relationship was the reality that each period of employment came to a conclusion at the end of each season – a date that varied depending on the Company's production requirement. Future employment depended on the respondent's seasonal production requirement and the employees' willingness to continue to make themselves available for that work.

23. In other words, their expectation as to the duration of each season could only be measured in terms of the Company's requirement. While the length of most seasons was, it appears, usually predictable that predictability did not of itself create an entitlement to a season of a defined or specified length, nor that another season would follow the one that was being worked or the one most recently concluded

24. The use of the word *"re-employed"* in sub-clauses 22.5 and 22.6 is, I find, support for my conclusion that the second and third applicants were seasonal employees without a continuing employment relationship, notwithstanding the otherwise anomalous use in the former of the term *"new employee"* to describe those returning after a break greater than 24 months. That is because the parties were clearly intending to disallow the latter from enjoying aggregation of service for the purpose of calculating service entitlements.

25. To repeat, the applicants were never declared redundant at the conclusion of each season, despite no longer being required by the Company. That was because the parties had agreed, at the commencement of their employment relationship, that that relationship would continue only for a season – a season that was only as long (or as short) as the Company's production requirement.

26. I do not accept that the aggregation of service (sub-clause 22.4 of the Agreement) extends to providing the applicants with an entitlement to redundancy compensation. That is because the second and third applicants, as I make clear above, were not made redundant. The Company, bizarrely, seems to have limited the application of that sub-clause only to paying the applicants' service payments (clause 51 of the Agreement). A plain reading of the provision would, I believe, extend the sub-clause to all service entitlements (including leave, etc). Sub-clause 22.4 speaks in the plural of *"service entitlement**s**"* (emphasis added). That is a matter for the applicants and the respondent to address separate to this investigation.

27. But, the aggregation of service provision is not a bridge, *per se*, by which the applicants qualify for redundancy. This is simply because the applicants were never made redundant. Instead, their season expired in the usual way, i.e. when normal production ceased. The Company did not offer another season: it was not obliged to.

28. While not a lock-out situation, these conclusions are supported by proper regard to the relevant key findings in *NZ Meat Workers etc Union Inc* v *Richmond Ltd* [1992] 3 ERNZ and the Court of Appeal's decision in *Principal of Auckland College of Education* v *Hagg* [1997] ERNZ 116: the Company had not in fact at any materially time contractually assured the applicants that it would re-employ the second and third applicants; the contracts of employment of the workers who were seasonally laid off

did not continue to subsist through the off-season suspension; the aggregation of service did not constitute a continuing and enforceable employment agreement; and to allow an agreement to expire is not to dismiss.

29. Also, I have no evidence to conclude that the Company made unfair use of the Agreement's provision for temporary employees or that it was intended that the employment relationship should be ongoing and that the temporary term masked that reality.

30. I am also satisfied there is no evidence to support the claim that the Company breached the requirements of s. 66 of the Act: *Norske Skog Tasman Ltd* v *Clarke*, unreported, CA 181/03, 20 May 2004 applied. At all times there was a genuine reason for the Company specifying that the second and third applicants' employment was to end in the way proposed, i.e. when its production season finished. The contractual intention was clear from the words used and has to be given effect.

Determination

31. For the reasons set out above I find in against the applicants' claims.

32. As requested costs are reserved.

Denis Asher
Member of Employment Relations Authority