Determination Number: CA 129/05
File Number: CEA 192/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Deborah Langford, Rachael Jenkins, Susan Nicol and Clare Webster (Applicants)
AND	Otago District Health Board (Respondent)
REPRESENTATIVES	Tony Corrigan, Advocate for the Applicants Barry Dorking, Counsel for the Respondent
MEMBER OF AUTHORITY	James Crichton
SUBMISSIONS RECEIVED	15 August 2005 22 August 2005
DATE OF DETERMINATION	27 September 2005

INTERIM DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In their statement of problem, Deborah Langford, Rachael Jenkins, Susan Nicol and Clare Webster (the applicants) claimed that the respondent (the Board) had failed to pay them a shoe allowance which they said was due and owing to them pursuant to the relevant clause in the collective employment agreement.

[2] The shoe allowance has not been paid to the applicants since 1992 and there have of course been a number of collective employment agreements since that time. It appears to be common ground that there has been no material change in the wording of the relevant clause over that time.

[3] The applicants have been employed by the Board for six years prior to their application to the Authority and they claim payment of the allowance for each of those six years together with interest and costs.

[4] For its part, the Board denies that the claim is sustainable and argues that its actions do not bring it within the terms of the clause.

The process

[5] The applicants filed their statement of problem on 1 July 2005 and a statement in reply was filed on 18 July 2005.

[6] A directions conference was convened on 22 July 2005 at which it was agreed that it was unlikely that I would need to hear evidence in person and that the matter could be dealt with on the papers.

[7] A timetable was agreed for the filing of submissions, and the parties then filed helpful submissions which I have now had the opportunity to review.

[8] The directions conference determined that the Authority was to issue an interim determination commenting on the process or giving provisional conclusions. My provisional conclusion is that the process agreed is appropriate and in particular that I do not need to hear evidence in person. Accordingly, this interim determination gives my provisional conclusions on the resolution of the dispute between the parties.

[9] The basis on which this interim determination is issued has been canvassed and agreed with the parties' representatives in a further telephone conference on 22 September 2005. in that telephone conference it was agreed that I would issue this interim determination setting out my provisional conclusions and the partner would have twenty-eight (28) days from the date of the interim determination to request that the Authority hear further argument on the matter or hear further evidence. If either party makes such a request then the Authority will convene a further telephone conference to consider further steps. If no such request is made then the decision will, by the effluxion of time become a final one.

[10] If the determination becomes a final one then the parties have the opportunity of challenging this determination in the usual way or of seeking to have the matter reopened in the Authority. In the latter case, the Authority will seek to give the matter priority.

The clause

[11] It is appropriate to set out the terms of the clause in full. It is clause 26.2 of the applicable collective employment agreement. Clause 26.2 reads as follows:

> *Where the employer requires a laboratory worker to wear a particular type of shoe, two pairs shall be supplied free of charge to every whole time medical laboratory worker or an allowance of $130.26 per annum shall be paid in lieu.*

[12] All of the applicants are full time laboratory workers employed by the Board so this provision applies to the parties.

[13] The essence of the Board's position is that as it does not require the applicants to wear *a particular type of shoe* it ought not to be required to pay the shoe allowance.

[14] The applicants say that the Board has issued a number of directives over the years requiring particular kinds or classes of **footwear** to be worn. An example of such a document is the Board's health and safety basic laboratory practice manual which contains this instruction: *Closed footwear shall be worn*. This manual applies to all laboratory personnel which includes the applicants.

[15] The applicants say, and I accept, that there have been these kinds of instructions issued by the Board in a variety of documents over the preceding six years.

The meaning of the clause

[16] In my opinion, the applicants are entitled to be successful in this matter if they can show that the Board has required them to wear a particular type of shoe and I must say that the submissions before me do not disclose any such thing.

[17] I see the matter in quite simple terms. The clause requires the Board to pay an allowance if they make a mandatory direction to applicable staff that they must wear a particular type of shoe and I see no evidence that that direction has been made.

[18] I accept that the Board has made general directions requiring the avoidance of *open footwear* but in my opinion that lacks the degree of particularity that the clause contemplates.

[19] Open footwear would include jandals for instance. It is in my view drawing a very long bow to say that jandals are a type of shoe. I accept that they are a type of footwear but that is not what the clause refers to.

[20] In this respect, I accept Mr Dorking's submission that had the clause intended to provide for footwear rather than shoes it would have said so.

[21] I am not persuaded by Mr Corrigan's submission that by excluding *open footwear* the Board is by implication making a stipulation of a *particular type of shoe*.

[22] Looking at the matter in a commonsense fashion, it seems to me plain that there is no evidence presently before me of a particular type of shoe being required to be worn by the applicants. It is true that the Board made general statements limiting the ability of the applicants (and arguably significantly large numbers of their co-workers in different parts of the Board's enterprise) from wearing footwear that would endanger their health or potentially the health of others.

[23] But evidence of that fact, which I accept without reservation, does not in my opinion go far enough so as to establish the applicants' claim that they are being required to wear a particular type of shoe.

Determination

[24] For the reasons that I have just advanced, my provisional conclusion is that the applicants' application fails.

Costs

[25] Costs are reserved.

James Crichton
Member of Employment Relations Authority