

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN The New Zealand Amalgamated Engineering Printing and
Manufacturing Union Inc (Applicant)

AND Energex Limited (Respondent)

REPRESENTATIVES Garry Pollak, Counsel for Applicant
Paul Tremewan, Counsel for Respondent

MEMBER OF AUTHORITY Ken Anderson

INVESTIGATION MEETING 5 September 2005

DATE OF DETERMINATION 21 November 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

- [1] In October 2004, the New Zealand Amalgamated Engineering, Printing and Manufacturing Union (“the Union”) raised with Energex Limited (“Energex”) a concern relating to certain conditions being “imposed” upon individual Energex employees upon acceptance of an offer from their employer to complete specific training in order to enable the employee to become a Glove and Barrier Live Line Mechanic.
- [2] The Authority has been provided with examples of letters received by two Energex employees, Mr Nicholas Howe and Mr Norman Kesha. The letters are respectively dated 5 August 2004 and 2 March 2005 and are effectively a “standard form” letter. The salient content of the letter, as it relates to the problem, is:

“The cost to the Company for the training of you to a qualified Glove and Barrier Live Line Mechanic is \$12,000.¹ In order for such an investment to be made for an individual, the following conditions must first be agreed to:

- As a requirement of the Code of Practice for live working, a health check is required to be completed by a registered medical practitioner (ENERGEX will arrange and pay for this). This is to ensure that there are no pre-existing conditions that would prevent a team member from satisfactorily carrying out the duties of a Live Line Glove and Barrier Line Mechanic.
- No annual leave will be approved / taken during this training period.
- No overtime will be paid during the Training period (including travel time to and from the Training Centre).

¹ For Mr Kesha the cost is \$8,750.

- No staying away allowances / meal allowances will be paid during this period of training (see paragraph above).
- You will be bonded to the employment of ENERGEX for a period of two years following the completion of training. Should you wish to resign within this two year period, a percentage of the cost of training will be required to be paid back to the company. The amount owed will be pro-rated to the amount of time served following training. (This does not apply to sale of business, redundancy or other circumstances at the discretion of ENERGEX Management).”

The letter provides for signed acceptance of the above conditions.

- [3] The Union objects to the bonding condition in particular, on the grounds that under the *Energex Limited Auckland Area Collective Employment Agreement* (“the CEA”), the Company has an unconditional commitment to provide training in order to enable employees to obtain higher skills and consequent remuneration. The Union says that the requirement for employees to be bonded is a unilateral variation of the CEA with the effect being that employees could have to pay at least a proportion of their training costs in the event that they decide to terminate their employment within the two year bonding period. The Union also says that failure to recognise overtime, allowances, and annual leave conditions, are also in conflict with the provisions of the CEA.
- [4] The Union seeks that the Authority find that Energex has breached the respective provisions of the CEA by imposing or attempting to impose conditions upon employees having access to live line glove and barrier training, and then order Energex to comply with the CEA, by making training available to suitable employees, without bonding or any other conditions, in accordance with the terms and conditions of the CEA.

Background

The Evidence for Energex

- [5] Mr David Williams is the Commercial Manager of Energex. His evidence is that the company had some financial imperatives in 2003 in order to retain a viable business. Mr Williams conveyed that the rationale behind the introduction of the bonding requirement was that while Energex is committed to training and developing staff in order to have a workforce of highly skilled people, the company also has a desire to retain the people that it trains and obtain a return on the investment that it makes to training. Mr Williams says that it can take up to 28 months for the company to obtain a “payback” on the glove and barrier live line training. The *quid pro quo* is that as a result of the training, the employee obtains an enhanced skill base and is paid higher remuneration of a minimum of \$2.00 extra per hour and a further 50 cents per hour every six months for the next two years, subject to acceptable performance.
- [6] The evidence of Ms Yayne Tobeck, the Human Resources Manager for the company, is that when the company identifies a need for Glove and Barrier Live Line Mechanic training (“live line training”), expressions of interest are invited from candidates that have a minimum of two years’ experience as a Line Mechanic. Successful candidates are then informed and the terms and conditions and the basis for the training are discussed. The duration of the training course is full time for a period of seven weeks and trainees are paid for a normal 40 hour week. There is no overtime paid should the training exceed normal hours of work, and travel time is not paid. Annual leave is not able to be taken and the employee is not paid staying away or meal allowances during the seven week training period. A health check is required to be completed by a registered medical practitioner in order to meet the *Code of Practice* for live line working. This is paid for by the company.

- [7] The further evidence of Ms Tobeck is that employees selected for live line training are informed that the training is conditional upon being bonded to remain in the employment of Energex for a period of two years following completion of the training, and should they resign during that period, a percentage of the cost of the training (on a pro-rata basis) will be required to be paid back to the company. Depending upon the numbers in attendance, the cost of the training fees range from \$7,500 to \$16,000. Currently, Energex has an average of six people each year receiving live line training, but the bonding agreements are not exclusive to that training. Ms Tobeck says that employees undertaking extensive Open Polytechnic and University degrees are also required to enter into bonding agreements.

The Evidence for the Union

- [8] Evidence was made available to the Authority by three Energex employees, Mr Norman Kesha, Mr Nicholas Howe and Mr Christopher Kohotea, along with the evidence of Mr Maurice Davis, an Organiser employed by the Union.
- [9] The Union says that suitable candidates for live line training should be given access to that training without charge or impediment and the bonding requirement, along with the restriction on other benefits provided by the CEA, is in breach of clause 31 of the CEA. This clause provides for “Individual Training Plans.” The most relevant content is as follows:

“As part of an individual performance review, individual training plans will be developed for all employees. This will provide the basis of wages determination and progression as matched against job competency-pay linkage.

A. Purpose

- i) It is recognised by the parties that in order to achieve a commercially viable operation the parties to this agreement must commit themselves to continuously improve ENERGEX’s productivity to ensure it delivers competitive services to its clients.
- (ii) ENERGEX commits to make available appropriate technical advances and to apply the necessary expertise and training skills. In return the employees commit to a high level of co-operation to enable work to flow freely and efficiently with an ability to accommodate changes in its work plans and varying market opportunities so as to ensure ENERGEX is competitive.
- (iii) Employees agree to undertake training as may be directed by ENERGEX so as to assist in the achievement of objectives. ENERGEX will consider each employee’s aspirations, capabilities and job requirements in determining employee training.
- (iv)

B. General Conditions

- (i)
- (ii) The necessary training to achieve higher skill levels will be provided by ENERGEX through both classroom and on-the-job training, or other appropriate methods.
- (iii) Subject to the provisions contained in clause 31 A (c),² employees shall undertake any training that is reasonably within their ability.

² This appears to be an incorrect reference – it appears to be accepted that the correct reference is clause 31 A. (iii).

- (iv)
- (v)
- (vi) ENERGETX may use the resources of educational providers (eg Polytechnics, outside agencies,) whenever appropriate for conducting employer approved Training Programs.
- (vii)

C. Progression

All employees shall have a reasonable opportunity of progressing to a higher skill level. Advancement to a higher level will result from the employee satisfactorily progressing through the approved individual training plan having regard to ENERGETX's immediate and future needs to utilise such acquired skills, and the competency – pay linkage.”

- [10] Effectively, the position of the Union is that under the terms of the CEA, Energex is contractually obligated to provide training to enable appropriate employees to progress to higher skill levels and consequent rewards, and that such training must be provided without employees having to accept such conditions as bonding.
- [11] The Union also submits that by accepting the conditions applying to the provision of live line training, employees are effectively agreeing to additional terms and conditions of employment that are inconsistent with the terms and conditions of the CEA, pursuant to section 61 of the Employment Relations Act 2000 (“the Act”).

Analysis and Conclusions

(a) Is the bonding arrangement in breach of clause 31 of the CEA?

- [12] Having closely perused the provisions of clause 31 of the CEA, I am unable to accept the Union's view that the bonding arrangement is in breach of any of those provisions. Under the terms of clause 31 of the CEA, Energex has entered into a substantial commitment to provide ongoing opportunities for employees and to “make available appropriate technical advances and to apply the necessary expertise and training skills.” [Introduction.]
In return for that commitment by Energex; “Employees agree to undertake training as may be directed by ENERGETX so as to assist in the achievement of objectives.” [A. (iii).]
- [13] In regard to the live wire training, it seems to me that both the employer and the employees concerned are both honouring their commitments to the terms of clause 31.³ While there is no reference in clause 31 to any bonding requirement, given the expense incurred by Energex, and the “poaching” of labour that appears to exist in this competitive industry due to a shortage of skilled staff, I conclude that it is entirely reasonable for Energex to make some attempt to protect the not insubstantial investment made in the specialised training of employees.⁴
- [14] It appears to me that employees have willingly entered into the bonding agreements and I have found no evidence of any employee being unduly influenced into accepting such. Indeed, it seems to me that there is a substantial incentive for employees to undertake the live wire training, as the immediate benefit, after seven weeks of successful training, is an increase in wages of at least \$80 per week, and then ongoing increases of \$20 per week every six months

³ See also clause 31 B (ii) and (iii).

⁴ There is evidence that even this has not been entirely successful as one employee departed to and had his bond paid by, a competing employer.

for the next two years with the full cost of the training being met by the employer - consistent with the undertaking provided under clause 31 of the CEA.

- [15] While some employees may be unhappy about repaying a portion of the training costs if they choose to leave the employment of Energex, during the two year bonding period, that does not make the bonding arrangement unreasonable.

(b) Is the bonding agreement inconsistent with the provisions of the CEA?

- [16] I find that the bonding agreement is not inconsistent with the provisions of clause 31 of the CEA pursuant to s. 61 of the Act. Indeed, if anything, it is consistent with the provisions of the CEA in that it is supplementary to the training commitments and obligations of the employer and employees respectively. While acceptance of the bonding agreement could be said to impose a further commitment upon employees, that commitment is not inconsistent with the provisions of clause 31.

(c) Does the requirement to accept the conditions of the live wire training create a breach of other employment terms and conditions?

- [17] *Annual leave*

Section 18 (1) of the Holidays Act 2003 provides that:

“An employer must allow an employee to take annual holidays within 12 months after the date on which the employee’s entitlement to the holidays arose.”

And then, at s.18 (4) it is provided that:

“An employer must not unreasonably withhold consent to an employee’s request to take annual holidays”

- [18] While the Authority was not provided with any example of an employee not having their leave approved during a live wire training period, I conclude that it is not unreasonable for Energex to withhold the approval of annual leave for participating employees for the seven week period that the training occupies, and that the requirements of the Holidays Act are being observed.

- [19] *Overtime*

Clause 12 of the CEA sets out the circumstances pertaining to overtime and payment for such. These provisions refer to the “service obligations” of Energex and relate to the usual operational requirements of the company. Of course, the training environment is quite different. The Authority has not been provided with any example of an employee being deprived of an overtime benefit but it seems to me that having provided a signed acceptance of the terms pertaining to live wire training, an employee can be taken to have accepted that the overtime provisions of the CEA are not applicable to the circumstances pertaining to the training course.

- [20] I also note that clause 14 of the CEA pertains to “Out Of Area Work” that necessitates an employee staying away from home, and that under such circumstances, employees are not entitled to more than their ordinary 8 hours of pay irrespective of the course hours. While I am uncertain as to the overall accommodation arrangements pertaining to the live wire training, it

does appear that at least in principle, it has been accepted that usual overtime terms and conditions do not apply in certain circumstances.

[21] *Staying Away and Meal Allowances*

Clause 41 of the CEA provides a schedule of various allowances including an incidental overnight allowance for: “Employees engaged on incidental out of area work as specified in Clause 11 [sic].”

It is clause 14 that provides for “Out Of Area Work” (not clause 11). This is; [“work, or attendance at courses specifically approved by ENERGEX which necessitates lodging elsewhere than at the employee’s usual place of residence.”

[22] I understand the Union’s submission to be, that the provision in the live wire training agreement, preventing payment of the staying away allowance, is inconsistent with clause 14 of the CEA and hence in breach of s.61 (1) of the Employment Relations Act. At first glance that submission appears to have some validity. However, upon closer consideration, I conclude that to accept that view would be to arrive at an interpretation of s.61 (1) that is too broad.

[23] Section 61 (1) provides that:

“The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are-

- (a) mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement; and
- (b) not inconsistent with the terms and conditions in the collective agreement.”

[24] I conclude that the agreement entered into by those employees undertaking live wire training cannot be viewed as “additional terms and conditions” of employment. Rather, it seems to me that during the seven week training period, it has been mutually accepted that certain conditions of the CEA will not have application, or to put it another way, those conditions are suspended for the period that the training takes place over. Upon the completion of the training, all the terms and conditions of the CEA continue to have application and with the exception of the bonding undertaking and the agreement to increase the rates of pay, the training agreement no longer has any relevance and the CEA once again prevails.

[25] In regard to the meal allowance, it is provided at clause 16 of the CEA, that the payment of a meal allowance only has application where “unplanned work” (along with certain other conditions) arises. Apart from what I have concluded above, in regard to the staying away allowance, there would be no entitlement to a meal allowance, as it is patently clear that participating in the live wire training is not unplanned work.

Determination

For the reasons given above, I find that Energex Limited has not breached any of the terms and conditions of the *Energex Limited Auckland Area Collective Employment Agreement* by requiring appropriate employees to accept the terms pertaining to the provision of Glove and Barrier Live Line Mechanic training. I also find that the terms pertaining to the provision of the training are not inconsistent with the terms and conditions of the CEA pursuant to section 61 (1) of the Employment Relations Act 2000.

Costs

Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 28 days of the date of this determination.

Ken Anderson
Member
Employment Relations Authority