Determination Number: WA 178/05
File Number: WEA 232/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	NZ Amalgamated Engineering Printing & Manufacturing Union (First Applicant)
AND	George Marks (Second Applicant)
AND	Assa Abloy New Zealand Limited (Respondent)
REPRESENTATIVES	Tony Wilton (for Applicants) Rosalind Webby (for Respondent)
MEMBER OF AUTHORITY	G J Wood
INVESTIGATION MEETING	By way of submissions received by 18 October 2005
DATE OF DETERMINATION	21 November 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. The facts in this matter can be easily set out and are basically agreed between the parties.

> *The first applicant ("the EPMU") and the respondent ("Assa Abloy") are the parties to a collective employment agreement, the Assa Abloy Collective Employment Agreement, which has a term running from 1 July 2004 to 31 January 2006 ("the agreement").*
>
> *The second applicant ("Mr Marks") was employed by Assa Abloy as at 1 July 2004 on work specified in the coverage clause of the agreement, and continued to be so employed until his employment was terminated by reason of redundancy on 31 October 2004. He was a member of the EPMU at all material times.*
>
> *Bargaining for the agreement was commenced in about May 2004. However, agreement between the parties was not reached until 4 February 2005, when they signed a terms of settlement document.*
>
> *The terms of settlement included the following provisions:*
>
> > *"The term of the agreement is 1 July 2004 – 31 January 2006. CA to be updated to reflect this.*

All printed and paid wage rates and all allowances, apart from those arising from variations, to be increased by 3.75%. The CA to be updated to reflect this."

The terms of settlement were ratified, and the agreement signed by the parties, in the days following settlement.

The agreement includes the following provision:

*"**4. Term of Agreement***

This Agreement shall come into force on the 1st July 2004 and shall continue until to 31st January 2006."

Mr Marks' employment with Assa Abloy was terminated by reason of redundancy prior to ratification of the terms of settlement agreed between the EPMU and Assa Abloy. The redundancy was a result of the sale of part of Assa Abloy's business to a third party purchaser. As a result of the sale, Mr Marks was paid all redundancy-related entitlements in full by Assa Abloy and obtained on-going employment with the third party purchaser as part of the terms agreed for the sale and purchase of the business.

Other employees whose employment terminated after 1 July 2004 and prior to ratification of the terms of settlement agreed between the EPMU and Assa Abloy, left employment on a variety of dates and in a variety of circumstances. Many were members of the EPMU.

The rates of wages and allowances in the collective employment agreement were increased by 3.75% as a result of collective negotiations between the EPMU and the respondent. Employees who were employed at the time of ratification and execution of the terms of settlement, who were union members and whose work fell within the document's coverage were back-paid the increased rates to 1 July 2004. All back-dated pay increases were paid to these employees on Friday 11 February 2005.

2. The issue between the parties is whether or not those employees, who were employed as at 1 July 2004, but left before 4 February 2005, should be entitled to the increased rates provided for by the new agreement. The answer to that question depends on the application of the statutory regime and the intentions of the parties.

The Law

3. Part V of the Act deals with collective bargaining. Of particular importance are the provisions relating to collective agreements, including their enforceability.

4. During the period in issue, the relevant provisions in the Act were as follows:

*52. **When collective agreement comes into force and expires***

(1) A collective agreement comes into force on –

(a) the date specified in the agreement as the date on which it comes into force; or

(b) if no such date is specified, the date on which the last party to the agreement, or its duly authorised representative, signed the agreement.

(2) A collective agreement may provide that 1 or more of its provisions have effect from 1 or more dates before or after the date on which the agreement comes into force.

(3) A collective agreement expires on the close of the earliest of the following dates:

(a) the date specified in the agreement as the date on which the agreement expires:

(b) the date on which an event occurs, being an event that is specified by the agreement as an event on the occurrence of which the agreement expires:

(c) the date that is the third anniversary of the agreement coming into force.

54. ***Form and content of collective agreement***

(1) A collective agreement has no effect unless –

(a) it is in writing; and

(b) it is signed by each union and employer that is a party to the agreement.

(2) A collective agreement may contain such provisions as the parties to the agreement mutually agree on.

(3) However, a collective agreement –

(a) must contain –

(i) a coverage clause; and

(ii) with a view to protecting employees bound by the agreement from being disadvantaged, a clause dealing with the rights and obligations of the employees and employer if the work of any of the employees were to be contracted out or the business or part of the business of the employer concerned were to be transferred or sold; and

(iii) a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 which a personal grievance must be raised; and

(iv) a clause providing how the agreement can be varied; and

(v) the date on which the agreement expires or an event on the occurrence of which the agreement is to expire; and

(b) must not contain anything –

(i) contrary to the law; or

(ii) inconsistent with this Act.

56. ***Application of collective agreement***

(1) A collective agreement that is in force binds and is enforceable by -

(a) the union and the employer that are the parties to the agreement; and

(b) employees –

(i) who are employed by an employer that is a party to the agreement; and

(ii) who are or become members of a union that is a party to the agreement; and

(iii) whose work comes within the coverage clause in the agreement.

Determination

5. There is little purpose in comparison with previous statutory regimes I find, although a lot of submissions were made on this basis. The Act is a unique amalgam of many of the principles which underpinned previous legislation, with the overriding principle of good faith superimposed. None of the judgements based on the provisions of previous Acts can therefore be applied with any consistency to this regime.

6. It is arguable that s.52(1) means that a collective agreement can only come into force on the date the last party signed the agreement unless the parties agree that the commencement date is a prospective date. Otherwise, it could be argued that there would be no point in s.52(2), which provides that one or more provisions can have effect from one or more dates before or after the date on which the agreement comes into force. Furthermore, it would in effect be a legal fiction for an agreement to commence when it had only been agreed at a later date.

7. While it may be a legal fiction, I consider that it is consistent with the scheme of the Act for parties to be able to agree, if they so choose, to have their collective agreement come into force on a date before the date the last party signed it, because otherwise the extent of its enforceability might be limited by one party delaying signing the agreement. That can not have been the intention of the legislature. For instance, in

this case, Assa Abloy could effectively reduce its liability under the increased wages clause by delaying the signing of the agreement and thus end up not having to pay increased wages for all the staff that left between the date set in the agreement for the commencement of its term and the date Assa Abloy signed it.

8. Furthermore, the Act gives primacy to the date agreed by the parties – the date of last signature is clearly a default provision. This is quite consistent with s.54, which allows any provision agreed upon, unless contrary to law or inconsistent with the Act. As the Act envisages collective agreements coming into force on dates before the agreement is finally reached, the provisions here are not inconsistent with the Act and therefore s.54(3) is not breached.

9. Section 52(2) simply provides the parties with more options, such as making some provisions backdated and/or some prospective, depending on the class of employees affected for instance. Therefore I find that the effect of s.52(2) is to allow the parties to set dates to vary the implementation of one or more provisions according to their choice. Thus this provision also simply underscores s.54(2), which provides that a collective agreement may contain such provisions as the parties to the agreement mutually agree.

10. Furthermore, if Assa Abloy is correct in its assertion that the workers in question could not claim the increase because, pursuant to s.56, they were not employees of it at the date of agreement being reached, then no former employee could enforce any of their rights under a collective agreement. This is clearly not consistent with the thrust of the legislation.

11. In the alternative, I determine that the wages clause, which was itemised in a separate paragraph to the term clause within the terms of settlement, constitutes a provision under s.52(2) which is capable of enforcement from 1 July 2004, as that is the date the parties clearly intended it to have effect from.

12. The next key issue here is whether or not the parties intended, by their agreement that the term of the collective agreement would commence on 1 July 2004 and that all wage rates and allowances would be increased by 3.75% from that date, that this provision

would apply to former workers who had left after 1 July 2004. The parties could have excluded or included them explicitly, but chose not to do so.

13. The provision agreed to here is similar to that considered by the Employment Court in *Marc Butler & Ors v. Carter Holt Harvey Ltd* (unreported, Couch J, 14 October 2005, AC57/05). In that case the parties provided that a scheme was to operate from no later than 1 July 2004. The agreement was not reached until after that date. Judge Couch found, however, that the only possible construction was that the parties intended the application of this scheme to be backdated to 1 July 2004. He held that any other construction would be inconsistent with the plain words of the agreement.

14. In this case, the plain words of the agreement were that the new collective agreement was to come into force on 1 July 2004 and that wages and allowances were to be increased by 3.75%. It was implicit that the wage increase would apply from 1 July 2004 and Assa Abloy does not dispute that. In the absence of statutory prohibition, there is nothing to exclude workers in Mr Marks' position from the benefits of the parties' agreement. Back-dating was clearly contemplated. The collective agreement could easily have provided for the back-dating only to apply to existing and current employees or for a lump sum equivalent to the back-pay to be paid at a time after 1 July 2004, such as 4 February 2005, which equated to the outstanding allowances. The parties, however, took a broad brush approach, with the attendant broad brush consequences. No exceptions were made by the parties and the agreement should be interpreted on its face accordingly.

15. Given that the collective agreement was in force from 1 July 2004, it would be inconsistent with s.56 for workers in Mr Marks' position not to be able to enforce the new wages provisions, even though they have since left Assa Abloy's employment. Mr Marks was employed by Assa Abloy during the period that the parties agreed the agreement was to come into force and the new wages clause was to take effect from, he was an EPMU member and his work came within the coverage clause of the agreement.

16. The effect of the parties' agreement may be that certain provisions are in fact incapable of being complied with. For instance, pursuant to the terms of settlement, Assa Abloy

undertook "*to treat temps the same as other workers in regard to term/site celebration activities and occasions*". Ms Webby submits, entirely appropriately, that this would be incapable of compliance. That is true, but that is not to the point here. Compliance is a discretionary remedy in any event, and compliance is never ordered where it would be impossible. Problems with compliance are, however, the reason for the concerns that Courts have stated many times over back-dating provisions. The issue in this case, however, is clearly capable of enforcement and therefore submissions on the impossibility of compliance are not relevant.

17. I therefore determine this dispute in favour of the applicants.

Costs

18. By the agreement of the parties, costs are to lie where they fall.

G J Wood
Member of Employment Relations Authority