

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Firestone Employees Society Inc (First Applicant)
AND others (as listed in Appendix A)

AND Bridgestone New Zealand Limited (Respondent)

REPRESENTATIVES Scott G Wilson, Counsel for the Applicants
Glenn Jones, Counsel for Respondent

MEMBER OF AUTHORITY Paul Montgomery

INVESTIGATION MEETING 17 May 2005

DATE OF DETERMINATION 21 October 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicants and the respondent are signatories to a Collective Employment Agreement (CEA) which operates from 15 February 2003 until 14 February 2006.

[2] A problem has arisen between the parties regarding a letter issued to the twenty-three individual applicants in early June 2004. The applicants claim that these letters constitute unjustifiable disadvantage to the recipients and further allege the Company's actions breached the expressed or implied terms of the CEA and also constituted a breach of the duty of good faith.

[3] The applicants seek a determination from the Authority that the respondent has acted unfairly, unreasonably and unjustifiably in issuing the letters to the applicants and placing the letters on the applicants' personal files and/or records. They also seek a determination that the respondent's actions are in breach of the Collective Agreement and also that the respondent's actions are in breach of the statutory duty of good faith. Further, they seek an order that the letters be removed from the employees' personal files and records and that the respondent not refer and/or rely on the letters in any further action against the employees. The applicants seek compensation for costs incurred in bringing this matter before the Authority.

[4] The respondent accepts the letters were written and given to the individuals concerned. It accepts that the letters were placed on the employees' personnel files however, it denies that any worker has been disadvantaged unjustifiably and further denies that it has breached neither the duty of good faith or any expressed or implied term of the CEA.

The Facts

[5] The respondent operates a '*gainshare plan*' at its Christchurch plant. Essentially the Company sets targets relating to a particular aspect or aspects of its manufacturing operation and

offers an annual bonus to each employee if these targets are met. A key aspect of the gainshare plan is the requirement that employees who have taken special leave (sick, domestic or bereavement) are required to make up the hours taken by working on rostered days off to maintain their eligibility for the bonus which is paid out in mid-December each year.

[6] In 2003 the plan's target was the monthly warehouse budget and the annual bonus offered was \$5,000.00 gross. In 2004 the target was stated;

*'For this 2004 year, there will be **one target only** – your **individual attendance** – full attendance except for authorised approved leave.'*

[7] In May/June 2004 the respondent's management says it became concerned that a number of employees had on a regular basis over the previous two years, had an attendance record indicating that for every year he or she had been consistently absent for three or more days. It says there was a pattern of absenteeism above the norm at the plant and indicated that such employees were likely to consistently miss out on gainshare payments. It therefore decided to give such employees a 'friendly reminder' that unless their attendance record improved, they may find themselves liable for disciplinary action, job transfer or non-payment for such absent times.

[8] In June 2004 the respondent, through its Shift Managers and Quality Assurance Manager. I issued each of the respondents with a letter on this subject. The letters were essentially the same except for the absences specified in the letter to each individual employee. I set out one of the letters in full:

Date: 2.6.04

*Mr T Gallon
Dept 132
c/- "A" Shift Manager (P. Brooking)
Bridgestone NZ Ltd*

Dear Tim,

**UNACCEPTABLE PATTERN –
WORK ATTENDNACE [sic]**

Today I met with you and advised of your unacceptable pattern of work attendance.

I am fully aware of your legal and Employment Agreement Special Leave entitlements.

My concern is that for at least the last two calendar years, and this year-to-date, your overall pattern of absenteeism (for either claimed personal or family member sick reasons) can only be classified as unacceptable.

2004	1 sick, 1 domestic
2003	2 sick, 1 domestic
2002	3 sick, 2 domestic

This pattern of poor work attendance is not the norm on your shift.

I am now placing on record Managements need for you to bring about an immediate and ongoing improvement to your record of attendance.

Please be advised that failure on your part to bring about an immediate and ongoing improvement to your record of attendance could result in the implementation of further management initiatives such as disciplinary action, permanent job transfer and non-payment for such absent time.

Yours sincerely,

P. BROOKING
“A” SHIFT MANAGER

c.c. File

[9] The affected employees and the Society took umbrage at the letters and their content, the Society’s secretary writing to the respondent insisting that the letters be withdrawn. The long and short of the matter is that the company declined to withdraw the letters and also declined to remove them from the individual personnel files of the employees concerned.

The Issues

[10] The Authority is tasked with determining the following issues;

- was the employer entitled to issue the letters; and
- were the letters ‘friendly reminders’ to the employees in the context of the gainshare plan; and
- did the letters actually give rise to unjustified disadvantage; and
- did they breach any express or implied term of the CEA; and
- did the action of the employer breach the duty of good faith; and
- what, if any, remedies are appropriate in these particular circumstances should the Authority find for the applicants.

The Investigation Meeting

[11] At the investigation meeting I was assisted by Mr Dillan, Mr Keenan and Mr Gallon for the applicants and by Mr O’Connor the Company’s Employment Relations Manager. I found all to be open and straight forward in their evidence to the Authority and I thank them for that.

[12] I have also been materially assisted in the investigation by the concise and on-point submissions from both Mr Wilson and Mr Jones.

Discussion and Analysis

[13] Section 6.1 of the CEA states ‘*We have embraced and adopted the following principles and policies:*

- *the success of our business requires team work with people working together in the spirit of partnership;*
- *we are committed to promoting harmony through consultation and cooperation;...*

[14] It is apparent from the evidence that the office holders of the Society were not consulted by the respondent’s management before the letters were written or issued. That omission is significant in the light of the commitment of both parties to undertake consultation.

[15] Turning to the letter itself I think there are two things wrong with it. Firstly it does not make it clear that the letter is written in the context of the gainshare programme. It therefore ran the very high risk of being interpreted in an unconfined context. Upon reading it the employee would be entitled to see this communication in the full context of his or her statutory special leave entitlements.

[16] The language employed is stern and direct and the tone created takes the letter out of the context of a '*friendly reminder*' or '*counselling*' and into the threat of potential disciplinary actions.

[17] Balancing this, at least some extent is the focus, under the 2004 gainshare plan which states there is for that year '*one target only*'. This is set out in the memo to all Christchurch New Tyre Factory Employees dated 26 January 2004 '*For this 2004 year, there will be **one target** only – your **Individual Attendance** – full attendance except for authorised approved leave.*'

Determination

[18] Returning to the issues as outlined above I find that the employer was entitled to issue letters bringing to the attention of the affected employees that their bonus under the gainshare plan was at risk. The respondent would have been wiser to have discussed the matter with the office holders of the Society.

[19] I find that the letters were not '*friendly reminders*' in spite of the stated intention of the respondent to make them so.

[20] I find that the letters while causing some consternation, largely because of the language and lack of specificity in respect to the gainshare plan, falls short of the threshold which would enable me to find that each employee had been unjustifiably disadvantaged. I also find that the respondent has not acted on any of these letters.

[21] I find that the respondent breached the express term set out in Section 6.1 of the CEA, however, I find that the actions of the employer falls short of a breach of the duty to act in good faith towards it's employees.

Remedies

[22] I believe justice in this case can best be served, given the ongoing nature of the employment relationships, to award a modest penalty against the Company. That remedy I fix at \$1,000.00 which is to be paid to the Crown.

[23] Further, I order that the letters attached to the file of each of the applicants be removed and are to play no part in any possible future action against any of the applicants

Costs

[24] Costs are reserved. Counsel are urged to attempt to resolve this issue between them and if this is not possible Mr Wilson is to file his memorandum and Mr Jones his memorandum in reply 14-days after the receipt of the applicant's documents.

Appendix A**Applicants:**

Firestone Employees Society Inc and others (First Applicant)

AND David Holloway (Second Applicant)

AND Timothy Gallon (Third Applicant)

AND Joseph Davis (Fourth Applicant)

AND Paul McGurk (Fifth Applicant)

AND Kent Roper (Sixth Applicant)

AND Trevor Hooper (Seventh Applicant)

AND Brent Day (Eighth Applicant)

AND Gerrard Crawford (Ninth Applicant)

AND Jim Keenan (Tenth Applicant)

AND Timothy McKay (11 Applicant)

AND Brent Piebenga (12 Applicant)

AND Dean Wilmshurt (13 Applicant)

AND Gary Franks (14 Applicant)

AND David Brook (15 Applicant)

AND Michael Gadsby (16 Applicant)

AND Andrew Moake (17 Applicant)

AND Paul Bush (18 Applicant)

AND Nick Jewell (19 Applicant)

AND Jason McNally (20 Applicant)

AND Daniel Nicol (21 Applicant)

AND Glenn Peters (22 Applicant)

AND Nathan Adams (23 Applicant)

AND Ricky Brett (24 Applicant)