Determination Number: CA 50/06
File Number: CEA 270/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	New Zealand Engineering Printing and Manufacturing Union Inc (First Applicant) **AND** Wayne Ross, Kevin Leen, Neil McLeod, David Stuart, Neil Halkett, Charles Walsh, Rodger Meikle, Kenneth Hedges and Michael Banks (Second Applicant)
AND	Alliance Group Limited (Respondent)
REPRESENTATIVES	Tony Wilton, Counsel for Applicants Ken Smith, Advocate for Respondent
MEMBER OF AUTHORITY	Helen Doyle
INVESTIGATION MEETING	20 December 2005
DATE OF DETERMINATION	5 April 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The second applicants are employees of the respondent, Alliance Group Limited ('Alliance"), and members of the first applicant, NZ Amalgamated Engineering Printing & Manufacturing Union ("the Union").

[2] This case involves a dispute requiring interpretation of a provision of the collective employment agreement about whether the second applicants have the right to be paid some of their wages in cash rather than all their wages being paid in accordance with the industry practice of direct crediting.

The background to the dispute

[3] The parties provided an agreed statement of facts. The first part of the agreed statement set out the background with respect to the place of employment and the collective agreement that bound the second applicants.

[4] The respondent ("Alliance") operates a meat processing plant at Pukeuri, near Oamaru. The second applicants are employed by Alliance at the Pukeuri plant.

[5] Alliance and the union are parties to, and the employees are bound by, a collective agreement known as the Alliance Group Limited Trades Group Collective Agreement.

[6] There are two other union parties to the collective agreement. They are the NZ Building Trades Union Inc and Amalgamated Workers Union NZ Inc (Southern). They have been advised of the dispute and they do not wish to make any submissions.

[7] The collective agreement includes the following provision:

> **15 PAYMENT OF WAGES**
>
> *15.1 All wages shall be paid in accordance with the practice existing in the industry, including direct crediting with the consent of the worker concerned and during working hours. Wages shall be available no later than Thursday during the workers normal working hours, except that when a holiday falls on Friday, wages shall be available not later than Wednesday.*

[8] Clause 15 first appeared in its present form in the 1989 New Zealand Meat Industry Trades Group Employees Composite Award which was the relevant award covering the employees at the time. The industry referred to in clause 15.1 is the meat industry.

[9] The agreed statement of facts goes on to describe the change for each of the second applicants, from receiving part of their wages in cash with the balance direct credited, to having all their wages direct credited to their respective bank accounts. I have not included references to letters which are attached to either the statement of problem or statement in reply.

[10] Despite Alliance paying most wages by direct credit, the second applicants continued to receive part of their wages in cash in the amounts set out below:

Wayne Ross	$145
Kevin Leen	$150
Neil McLeod	$150
David Stuart	$250
Neil Halkett	$ 50
Charles Walsh	$ 50
Rodger Meikle	$ 20
Kenneth Hedges	$ 90
Michael Banks	$ 70

[11] The plant manager at the Pukeuri plant became aware that some workers were receiving part of their wages in cash in late 2004.

[12] On 31 January 2005 Alliance wrote to each of the employees setting out its view that payment in cash was causing it administrative inconvenience and security concerns, and inviting them to discuss an alternative arrangement. The employees did not respond to this approach.

[13] On 3 March 2005 Alliance again wrote to each of the employees reiterating the invitation to discuss alternatives to cash payment. The employees did not respond to this approach.

[14] On 10 August 2005 Alliance wrote to each of the employees giving them notice that from the following week their total wages would be paid by direct credit.

[15] On 11 August 2005 the union wrote to Alliance disputing its entitlement to pay wages by direct credit without the consent of the employees, and requesting it to continue with the existing arrangement.

[16] On 16 August 2005 Alliance told the union that it intended to proceed with the change.

[17] On 18 August 2005 the employees were paid their entire wages by direct credit. They have been paid entirely by direct credit ever since.

The Submissions

[18] I received comprehensive and helpful submissions from Mr Wilton and Mr Smith.

Applicants' submissions

[19] Mr Wilton referred to the statutory right of employees to be paid in money that has existed in New Zealand since at least 1908.

[20] He submits that given the historical statutory right for employees to be paid in money a collective agreement requires clear and unambiguous language if that right is to be removed.

[21] Mr Wilton relies on a Labour Court decision in *Auckland Local Authorities Officers IUOW v Gisborne City Council* [1988] NZILR 962 at 964 on an appeal from a determination of the disputes committee. The chairperson of the committee had found the clause below gave the employer the right to decide without agreement with the workers that time off in lieu would be taken instead of monetary payments:

> 8(f) *At the discretion of the employer, time off in lieu of payment for authorised overtime, may be taken at times mutually agreed between the officer and the employer, in which case the hours off shall be granted in accordance with the percentage used to establish the overtime rates as specified in subclause (a) hereof.*

[22] Nicholson J in that case accepted the appellant's submission that the employer did not have the right as found by the chairperson of the committee and, stating that he was dealing with payment for overtime rather than regular wages, said:

> *…I am satisfied that the history of wage protection legislation in New Zealand reveals a philosophy of payment for all wages in money without deduction unless there is agreement to the contrary, whether for regular work or overtime. Clear and unambiguous language in the award would be needed to remove that basic protection for a worker. I do not consider the language employed here reaches that standard.*

[23] Mr Wilton submits that the language used in subclause 15.1 is not so clear and unambiguous to remove the right for the second applicants to choose to be paid in money. He submits that by adding to the words industry practice, *including direct crediting with the consent of the worker concerned,* the parties have accepted that whatever other practices the meat industry may have regarding the payment of wages, direct crediting requires the consent of the workers.

[24] Mr Wilton also relies on other subclauses of clause 15 to indicate that the parties contemplated a continuing right to be paid in cash and says that it followed that Alliance does not have the right to force direct crediting of wages on employees without their consent.

Respondent's submissions

[25] Mr Smith submits that Alliance relies on subclause 15.1 to pay all wages for its employees by direct credit into a nominated bank account because that is the practice in the meat industry for approximately 24,000 meat workers. He submits that Alliance relied on the clause to bring payment of wages to the second applicants in line with industry practice.

[26] Mr Smith having submitted that there is no dispute about the industry practice being direct crediting then considers in his submissions the wording in subclause 15.1 itself. He submits that there are two parts to subclause 15.1. The first part of the clause he submits is expressed in mandatory terms, *All wages shall be paid in accordance with the practice existing in the industry,*. He submits that there is no right for union members to insist on payment in another way and further that the clause does not provided a *half way* position for some workers where they get paid partly in cash and partly by direct credit. Mr Smith submits that a possibility of some workers being paid other than in accordance with industry practice could not have been intended as it would be an *administrative nightmare for it given the size of the workforce.*

[27] Mr Smith submits that subclause 15.1 provides that all workers are paid the same way. He submits that wages must be paid in accordance with industry practice and that the second part of subclause 15.1 cannot be interpreted as if it modified or qualified the first part. Rather he submits the second part of subclause 15.1 illuminates the preceding phrase and does not depart from it.

[28] Mr Smith submits that once the nature of the industry practice is established, there is no need to go any further and argue about issues of consent. He submits that the second part of subclause 15.1 simply serves to provide an example of a possible existing practice which in this case largely coincides with the current existing practice. The consent he submits was obtained collectively through ratification of the agreement reached between the union and Alliance.

Principles of interpretation of employment agreements under the Employment Relations Act 2000

[29] I have summarised the principles of interpretation from the Employment Court judgment in *Association of Staff in Tertiary Education Inc: Aste Te Hau Takitini O Aotearoa v Hampton, Chief Executive of the Bay of Plenty Polytechnic* [2002] 1 ERNZ 491.

- The law of interpretation of employment agreements is unchanged by the Employment Relations Act 2000.
- Agreements should be interpreted with reference to their factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question.
- One looks first at the words used, they must obviously be the starting point, and then at the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words.
- The Court is required to adopt an objective approach to interpretation and this has always been so. What matters is not what the parties say they actually intended the words to mean, but what a reasonable person in the field, knowing all the background, would take them to mean.
- Evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier drafts.
- The interpretation of an agreement should not be narrowly literal but should be in accord with business common sense.

- The interpretation, rather than being based simply on dictionary meanings and grammar, should fulfil the purpose of the contract. Even if the drafting is inept, the Court should be able to give effect to the underlying intent. Moreover, if a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find a more liberal interpretation which satisfies business common sense and fulfils the parties' purpose.
- If the words are clear and can only have one possible meaning, that should generally determine the matter. The Court will need to be very sure of what business common sense requires before so interpreting a contract if that does not accord with the clear words. Sometimes there can be two views and care must be taken not to stretch the meaning of words in a way which one of the parties regards as eminently sensible but which the other finds entirely unreasonable.
- It is necessary to be careful not to treat as the commercial purpose of the agreement what seems to the Court to be the decent thing to do. It is not the Court's task to rewrite an agreement.

Analysis and discussion

[30] Section 16 of the Wages Protection Act 1983 provides in terms of provisions of collective agreements that:

> *Subject to section 6(2), nothing in this Act derogates from or make it unlawful to comply with-*
>
> *(a) Any provision of any collective agreement within the meaning of the Employment Relations Act 2000*

[31] Section 6(2) is concerned with overpayments and is not relevant for the purposes of this dispute. That section aside the other provisions in the Wages Protection Act 1983, including section 7 with respect to wages being payable in money and section 9 with agreement as to the manner of payment of wages, do not derogate from or make compliance with subclause 15.1 unlawful.

[32] The eight subclauses in clause 15 are concerned about and accordingly headed up Payment of Wages.

[33] At the heart of the dispute about subclause 15.1 is the effect of the second part of the first sentence on the first part.

[34] The first part of the sentence provides *All wages shall be paid in accordance with the practice existing in the industry*. Alliance are required to pay wages for those covered by the collective agreement in accordance with the practice in the industry which is direct crediting.

[35] There is then a comma before the second part of the clause, *including direct crediting with the consent of the worker concerned and during working hours.* The difficulty is with respect to those words.

[36] I should say at the outset that I do not agree with Mr Smith that the workers consent in terms of the subclause was obtained collectively from workers by virtue of ratification of the collective agreement. I find that the words are clear enough to support an individual approach to consent and I shall address that in more detail further on in this determination .

[37] One possible meaning is that the words, *including direct crediting with the consent of the worker concerned and during working hours,* provides an example of industry practice for payment of wages.

[38] Another possible meaning is the words following *including* qualify or modify the first part of the sentence in subclause 15.1 about payment of wages in accordance with industry practice.

[39] The words *and during working hours* refer back to the first part of the sentence about payment of wages and do not relate to the part of the clause which follows the word *including*.

[40] In terms of the word *including* I agree with Mr Smith's submission that if the second part of the sentence was to modify or qualify the first part of the subclause that all wages shall be paid in accordance with the practice existing in the industry it is more likely the words *however* or *provided* would have been used.

[41] There is some useful guidance from Statute Law In New Zealand (3rd edition) JF Burrows chapter 3 in terms of the definition of *includes* recognising though that this is an interpretation of words in an employment agreement.

[42] Professor Burrows states at page 285 of the book when comparing *means* and *includes*:

> *"Includes", however, introduces an incomplete definition: the definition "includes" some of the things the word can cover but admits the possibility that it may cover other things as well.*

Professor Burrows refers to the most common use of "includes" in an extensive definition, as in the Arms Act 1983 *where the word retains its normal meaning; however, it includes in addition the less usual commutations listed by the section.*

[43] Some of the words used in other subclauses under clause 15 do not sit easily with direct crediting. There is also the second part of the first sentence in clause 15.1 about wages being paid during working hours when direct crediting takes place the evening before the wages become available to the employee.

[44] I do not reach the same conclusion as Mr Wilton that these are an indication that the parties contemplated a continuing right to be paid in cash. When subclause 15.1 first appeared in 1989 direct crediting was not the usual or prevalent method of payment of wages in the meat industry. On that basis the words which followed *including* were about a less usual method at that time for payment of wages.

[45] The words do not qualify or modify the first part of the sentence except to the extent that the words *with the consent of the worker concerned* recognise the industry practice of direct crediting requires something from the worker for wages to be paid.

[46] Unlike other methods of payment of wages each worker needs to provide details of their financial accounts in order to enable their wages to be direct credited into their accounts. The worker consents to payment by direct credit when it is the industry practice when he or she provides their financial account details to Alliance.

[47] In the knowledge that direct crediting is the industry practice it seems most if not all workers have given their financial account details to Alliance to enable payments to be made in this manner.

[48] There is nothing though in subclause 15.1 to the effect that such consent by the worker, if given, can be conditional, withdrawn or varied at any time. There is nothing in the subclause to the effect that a worker can insist on a mixture of payment by direct credit and cash and/or can fall back to the position in the Wages Protection Act 1983 for payment of wages. There is no mention in the subclause of the amount of notice the employee would have to give if consent was to be withdrawn.

[49] Such an interpretation would be inconsistent with the emphasis in subclause 15.1 on the requirement that all wages shall be paid in accordance with the industry practice of direct crediting and the wider purpose of clause 15 which is about payment of wages. It would effectively make the first part of the first sentence of subclause 15.1 meaningless and eliminate any certainty about how wages are to be paid. The workers could at any time insist on alternative methods of payment.

[50] When the agreement was negotiated in 2004 it was done so in the knowledge that there was an industry practice of payment of wages by direct crediting.

[51] I find that the situation in *Auckland Provincial District Local Authorities IUOW* is distinguishable. That was a case which concerned payment for overtime rather than the method of payment of regular wages. In this case both parties have clearly agreed that all wages shall be paid in accordance with industry practice.

[52] I conclude that the correct interpretation of subclause 15.1 is that all wages shall be paid in accordance with the industry practice of direct crediting and that workers consent to the manner of such payment when they provide their financial account details. There is no provision for such consent to be conditional, withdrawn or varied.

[53] The second applicants have consented to the industry practice of direct crediting by providing Alliance with details of their financial accounts. They are not entitled to insist on part of their wages being paid in cash and part by direct credit.

[54] Quite properly Alliance did not simply stop the partial payment of the second applicants' wages in cash immediately. The second applicants were invited on several occasions to discuss the matter with management. The second applicants did not take up the opportunity and eventually Alliance moved to direct credit the whole of the second applicants' wages.

Determination

[55] The dispute is resolved in favour of the respondent. Alliance was entitled to pay all the wages of the second applicants by direct credit in accordance with subclause 15.1 of the collective agreement.

Costs

[56] I reserve the issue of costs.

Helen Doyle
Member of Employment Relations Authority