

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN ABB Limited (Applicant)

AND The Eastern Bay Independent Industrial Workers Union (First Respondent)
AND The Northern Boilermakers Industrial Council of the Manufacturing and Construction Workers Union. (Second Respondent)

REPRESENTATIVES Richard McIlraith, Advocate for Applicant
Lou Yukich, Advocate for First Respondent
Ray Mavor, Advocate for Second Respondent

MEMBER OF AUTHORITY Marija Urlich

INVESTIGATION MEETING 30 June 2006

DATE OF DETERMINATION 21 September 2006

DETERMINATION OF THE AUTHORITY

[1] ABB Limited, the Eastern Bay Independent Industrial Workers Union and the Northern Boilermakers Industrial Council of the Manufacturing and Construction Workers Union are party to a collective employment agreement the term of which is 8 September 2004 until 30 August 2006 ("the 2004 CEA"). The 2004 CEA has now expired but there is a live issue between the parties because this document forms the basis for the employees' employment agreements.

[2] Clause 20.4 of the 2004 CEA provides:

***Payment for working** – Public holidays shall be allowed in accordance with the Holidays Act 2003 and its amendments.*

Where an employee is required to work on a Public holiday, in addition to the normal salary, payment will be at time and a half for all hours worked (to a minimum of 8 hours) plus a day off in lieu on ordinary pay, at a mutually agreed time and within 12 months.

For the purpose of this provision the time and a half hourly rate shall be calculated as follows:

Gross Earnings/2080 x 1.5

[3] ABB has applied to the Authority for the following remedies:

- (i) a declaration that clause 20.4 of the CEA entitles employees to payment of a time and a half for time worked on a public holiday and not two and a half times their normal hourly rate for each hour worked;
- (ii) in the alternative, rectification of the CEA so that it records what it says was the agreement between the parties, that is that time and a half would be paid for time worked on a public holiday; or
- (iii) in the alternative, damages from the EBIIWU for loss suffered as a result of its actions, that loss being the difference between payment of two and a half times

the normal hourly rate and time and a half for work performed on a public holiday for the duration of the CEA.

[4] The unions say that there are no grounds for rectification of the 2004 CEA.

Background

[5] The 2004 CEA was executed on 11 February 2005. Prior to this the parties had been engaged in bargaining for a collective employment agreement for some months. Penal payments for work performed on a public holiday was an issue between the parties. In a proposal entitled "*Union Proposal 13A 9/12/2004*" the unions sought the inclusion of "*and in addition to their normal salary*" to clause 20.4. This claim was rejected by ABB. By early February 2005 the bargaining had reached a point where ABB's final offer could be taken out to the union members for a ratification vote. This offer is set out in a document entitled "*Employer Offer 02/02/05 Collective Employment Agreement*" ("the employer's offer"). The employer's offer was initialled by Grant Fraser, ABB's advocate. Clause 20.4 of the employer's offer provides:

Payment for working – *Public holidays shall be allowed in accordance with the Holidays Act 2003 and its amendments.*

Where an employee is required to work on a Public holiday payment will be at time and a half for all hours worked (to a minimum of 8 hours) plus a day off in lieu on ordinary pay, at a mutually agreed time and within 12 months.

For the purpose of this provision the time and a half hourly rate shall be calculated as follows:

Gross Earnings/2080 x 1.5

[6] On 9 February Marc Butler, EBIIWU delegate, held a ratification meeting with union members. The employer's offer was rejected. Following the meeting Mr Butler meet with Tommi Kajasoja, the ABB Site Manager, to discuss a union proposal to settle the CEA. Mr Butler and Mr Kajasoja's discussion was recorded in a file note and the following agreement signed by Mr Butler and Mr Kajasoja:

Union Response

The Union will give the company until 6:00am Thursday 10th February 2005 to accept the Union proposal, if not accepted the union will withdraw their labour as of 6:01am Thursday 10th of February 2005.

The EBIIWU proposal is as follows,

- *The company accept the current document* plus the following:*
 1. *10 days additional leave for day workers.*
 2. *15 days additional leave for shift workers.*

This leave is over and above any other entitled leave and is due from 8th September 2004. Members may elect to replace days taken as "leave without pay" with these additional leave days. The members are reminded of their obligation to schedule this leave before 8th September 2005 or they shall have their leave scheduled for them by the company.

As discussed the current document will need technical corrections to minor errors but will not include any technical corrections that contain a monetary value like for example: the rounding up of shift workers salaries to the nearest \$10.

**Document means ABB's offer on 3rd February 2005.*

This is accepted in front of the people mentioned in file note dated 9th February 2005.

In Kawerau

*[signed]
Tommi Kajasoja
Site Manager
ABB Ltd*

*[signed]
Marc Butler
EBIIWU Delegate*

[7] Mr Butler said at the investigation meeting that he raised the wording of clause 20.4 with Mr Kajasoja during their 9 February meeting because it had been raised by members during the ratification meeting. He referred to a document signed by himself and Mr Kajasoja to support this contention. Mr Kajasoja said he did not recall the issue of payment for public holidays being raised. The documents Mr Butler sought to rely on were produced following the investigation meeting. They do not support Mr Butler's recollection that the public holiday pay issue was discussed. The union response agreement does not refer to payments for working public holidays. The file note of the discussion, which was signed by Mr Butler and Mr Kajasoja, does not mention payments for working public holidays. I am satisfied that Mr Butler is mistaken in his belief that he raised payments for public holidays with Mr Kajasoja as part of the 9 February union proposal to settle the 2004 CEA.

[8] Mr Butler told me at the investigation meeting that he went back to the members on the morning of 10 February to advise them that Mr Kajasoja had agreed to the additional special leave and that they "signed off" the employer's offer. Mr Butler said he could not recall if there was any discussion about payments for public holidays. I find that the employer's offer, along with additional special leave as set out in the union response document, was ratified by the union members on 10 February 2005.

[9] On 11 February Mr Yukich, the unions' advocate, Mr Butler and Mr Fraser meet at ABB's Rotorua offices to finalise the CEA for execution. They worked on Mr Yukich's laptop and produced three copies of the CEA.

[10] Mr Yukich and Mr Butler say they raised the members' concern about the meaning of clause 20.4 with Mr Fraser and that agreement was reached that the phrase "*in addition to the normal salary*" would be inserted into clause 20.4. They said this was necessary in order to provide the members with the clarification they needed that the penal payments were not a substitution but in addition to what they would normally receive. Mr Yukich and Mr Butler say that it was always their understanding that the public holiday penal payments were in addition to normal salary payment. Mr Yukich says that there was no discussion with Mr Fraser as to the effect of this addition ie, that employees working on public holidays would receive two and half times their usual rate.

[11] Mr Fraser says that the addition to clause 20.4 was not discussed with him. He says he and Mr Yukich drafted a terms of settlement to deal with the additional special leave to form an appendix to the CEA, that he flicked through a hardcopy of the document Mr Yukich handed him and checked only the most important clauses, such as salary levels. Mr Fraser said he understood the hardcopy document was based on the employer's offer and that the only changes that had been made were minor formatting and numbering changes.

[12] Mr Yukich then took two copies of the document to Mr Kajasoja to sign in Kawerau. Mr Fraser telephoned Mr Kajasoja and advised that Mr Yukich was on his way with the documents for execution, that the terms of settlement had been drafted and minor formatting and numbering changes had been made to the document. Mr Kajasoja asked Mr Yukich if any changes had been made and Mr Yukich confirmed they had not. He said he made this reply because he assumed Mr Kajasoja had been fully briefed by Mr Fraser.

Clear on its face?

[13] The meaning of clause 20.4 provides for the payment of normal time plus time and a half for work performed on a public holiday. The last phrase of the clause provides an equation for the calculation for the penal payment. This does not create a contradiction within the clause because the penal payment is to be made in addition to the normal payment.

Rectification

[14] The evidence establishes that the document executed by Mr Yukich and Mr Kajasoja on 11 February 2005 does not accurately reflect the employer offer which was ratified by the union members on 10 February. The unions say that the ratification vote on 10 February was

conditional on the payment for public holidays being clarified and that is why the addition to clause 20.4 was necessary. The evidence does not support this claim. The 9 February file notes and union proposal are silent on the issue of public holiday payment and this issue did not form part of the augmented offer Mr Butler put to the members on 10 February. Mr Butler's evidence was clear that the payment for public holiday issue was not raised again at the 10 February meeting and that the members "signed off" the employer's offer.

[15] Ratification is required to form a collective employment agreement¹. The document executed by the parties on 11 February 2005 did not accurately reflect the agreement ratified by the union members because it contained the clause 20.4 addition which did not form part the ratified agreement. Once an offer has been ratified the contract between the parties is complete, it is binding on those parties and expresses their mutual intention². It follows that any significant change to the ratified agreement must be subject to a further ratification by the effected members of the union.

[16] There is no convincing evidence that there was a change in the common intention of the parties regarding clause 20.4 after ratification. There is no evidence that the 10 February ratification was conditional on the addition to clause 20.4. Given the extent to which the 9 February union proposal counter-offer was documented I find it is unlikely that such a significant change to the employer's offer, as that represented by the addition to clause 20.4, would not be similarly documented. The respondent's witnesses say there was no discussion of the impact on penal rates of the addition to clause 20.4 because it represented no change to current entitlement and the purpose was to clarify the relationship between clause 20.4 and clause 20.8, which provides that shift rosters shall operate on all days of the year. Again, I find this is an unlikely scenario given the employer's earlier rejection of this claim, the significant increase to public holiday payments that would flow from the addition to clause 20.4 and the lack of evidence that ratification was conditional on the addition to clause 20.4.

[17] Mr Yukich produced the draft agreement and I find it likely that the change to clause 20.4 is attributable to a mistake on Mr Yukich's part during that process.

[18] I am satisfied that it is appropriate that an order for rectification should be made³. The mutual intention of the parties was clear following ratification, an error has occurred in the rendering of that contract to writing and it is appropriate that the written word of the 2004 CEA is corrected to record what was agreed between the parties⁴. Accordingly, I order that the second sentence of clause 20.4 of the 2004 CEA should read:

Where an employee is required to work on a Public holiday payment will be at time and a half for all hours worked (to a minimum of 8 hours) plus a day off in lieu on ordinary pay, at a mutually agreed time and within 12 months.

Union Counterclaim

[19] The unions have filed an application seeking a compliance order with clause 20.4 of the 2004 CEA, the payment of T2 1/5 for work performed on public holidays and a penalty for failure to pay. The 2004 CEA has been rectified for the reasons set out above. No compliance order can be issued because the term with which compliance is sought does not exist.

¹ Section 51 Employment Relations Act 2000

² *NZ Engineering etc Union Inc v Babcock NZ Limited* ERNZ [1997] 82, 96

³ Section 162 Employment Relations Act 2000

⁴ Section 163 Employment Relations Act 2000

Costs

[20] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to do so they have leave to request the Authority determine costs.

Marija Urlich
Member of Employment Relations Authority