

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Clothing, Laundry & Allied Workers' Union Inc (First Applicant)
AND Lui Andrews (Second Applicant)

AND Layton's Linen Hire Limited (Respondent)

REPRESENTATIVES Robert Reid for Applicants (9 February 2006)
Peter Cranney for Applicants with Submissions
Paul McBride for Respondent

MEMBER OF AUTHORITY P R Stapp

INVESTIGATION MEETING Wellington, 9 February 2006

FURTHER INFORMATION 15 February 2006 from the Respondent copied to the Applicants' Representative.

SUBMISSIONS 2, 8, 20 March 2006

DATE OF DETERMINATION 10 May 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. The employment relationship problem is about Lui Andrews' classification under the terms of the relevant collective employment agreement. Associated with the problem is a secondary issue about any wages and statutory holiday pay that he might be owed.

The facts

2. Lui Andrews was employed by Layton's Linen Hire Limited ("Layton's") on 31 March 2001 as an hourly casual worker under the terms of an individual employment agreement because the applicable collective employment agreement – the Layton's Operations Employment Agreement (the first agreement) - had expired.
3. Mr Andrews says that from the end of September 2001 he was asked to work on a regular basis weekly – to classify him as a permanent full time employee - and says that he regularly worked in the washroom to be entitled to an extra payment. He says that he became a

permanent employee because he started to work more regular 40 hour weekly periods. The Union says that from about 1 June 2002, Mr Andrews became a washroom operator. This claim has been made on the basis of Mr Andrews' requesting his Union to take up on his behalf the work that he says he was carrying out in the washroom. Mr Andrews says that the work he commenced in the washroom entitled him to the washroom operator's rate of pay. The company denied the claims.

4. The first agreement was signed off on 27 August 2001. The term was from 1 February 2001 to 30 September 2002.
5. The agreement has two relevant clauses. They are:

"18. Wages

18.1 The ordinary hourly rate set for each employee shall not be less than the applicable rates shown below:

	<i>1 February 2001</i>	<i>1 December 2001</i>
<i>Casuals employed prior to 1 August 2001</i>	<i>\$ 9.51</i>	<i>\$ 9.51</i>
<i>Casuals employed from 1 August 2001</i>	<i>9.30</i>	<i>9.51</i>
<i>New permanent employees employed from 1 August 2001</i>	<i>9.30</i>	<i>9.51</i>
<i>All other permanent employees with six months' service</i>	<i>9.51</i>	<i>9.75</i>
<i>Washroom operator with six months' service</i>	<i>10.16</i>	<i>10.41</i>

...

20. Employment Status

20.1 Permanent full-time employees

Employees who are engaged or change their employment status by agreement to work 40 ordinary hours per week are permanent full-time employees.

20.2 Permanent part-time employees

- a) Employees who are engaged or change their employment status by agreement to work less than a full period of 40 ordinary hours per week are permanent part-time employees and should be paid pro-rata the appropriate rate of payment prescribed in this Agreement.*
- b) When the employer engages an employee to work part-time or an employee agrees to change to part-time work, the facts shall be recorded in the personnel file at the time of engagement or changed and shall be signed by the employee.*
- c) These provisions shall not be used for the purpose of reducing hours of work or the earnings of any full-time employee without their approval.*

20.3 Casual employees

For the purpose of this Agreement, a casual employee is defined as an employee employed on single engagements for periods of less than one week.

20.4 Temporary employees/fixed term employees

Employees whose terms of employment is fixed in writing by agreement prior to commencement, normally to cover specific situations which are temporary in nature, e.g. Parental leave, etc.

20.5 Pool employees

A pool worker is a permanent part time worker who is employed on an as and when basis and for which there are no guaranteed hours of work.

Note: All terms of engagement shall be recorded in writing and a copy given to the employee at the time of engagement.”

6. Upon his commencement of employment, Mr Andrews was paid as a casual hourly worker at the rate of \$9.30. Upon the commencement of the collective employment agreement above, Mr Andrews was paid by the company under the classification “***casuals employed prior to 1 August 2001***” at the rate of \$9.51 because Mr Daley told me in his evidence that Mr Andrews was a casual prior to 1 August 2001. His pay increase was backdated to 1 February 2001 under this classification. By the time the first agreement was signed off Mr Andrews had not worked more than six months.
7. The company maintains that as a *pool employee*, Mr Andrews was paid the correct rate under the classification “***casuals employed prior to 1 August 2001***” because prior to that date he was employed as a casual hourly worker (under the terms of his casual hourly engagement on an individual employment agreement) and there had been no written record of any agreement for a change [evidence from Brian Daley, operations manager]. Further, the company says that as a “*pool employee*” he was employed “*on an as and when basis and for which there were no guaranteed hours of work*”. In the company’s opinion, this distinguishes him from being a part-time employee or a permanent part-time worker and using the “*permanent part time employees*” classification.
8. On 13 November 2002, the Union and Layton’s signed off the Layton’s Wellington Operations Collective Employment Agreement – (the second agreement). The term of this second agreement was from 1 October 2002 to 30 September 2004. The wages clause at clause 18 involved the following changes to the wage rates:

“18. Wages

18.1 *The ordinary hour rate set for each employee shall be not less than the applicable rates shown below:*

	<i>1 October 2002</i>	<i>1 October 2003</i>
<i>Casuals employed prior to 1 August 2001</i>	<i>\$ 9.76</i>	<i>\$ 9.99</i>
<i>Casuals employed from 1 August 2001</i>	<i>9.76</i>	<i>9.99</i>
<i>New permanent employees employed from 1 August 2001</i>	<i>9.76</i>	<i>9.99</i>
<i>All other permanent employees with six months' service</i>	<i>10.00</i>	<i>10.24</i>
<i>Washroom operator with six months' service</i>	<i>10.68</i>	<i>10.94”</i>

9. The employment status involves the same definitions - “*permanent full-time employees*”, “*permanent part-time employees*”, “*casual employees*”, “*temporary employees – fixed term employees*” and “*pool employees*” - as the first agreement. Clause 20 also continued with the same *Note*: “*All terms of employment shall be recorded in writing and a copy given to the employee at the time of engagement*”.
10. It is common ground that from 1 October 2002 the company continued to pay Mr Andrews as a “*casual employee prior to 1 August 2001*”, his rate of pay was increased to \$9.76 and backdated. The Union and Mr Andrews say that Mr Andrews is entitled to the *washroom operator with six months' service* rate and, in the alternative, at least the “*all other permanent employees with six months' service*” classification since he was a pool employee being a worker defined as “*a pool worker is a permanent part-time worker who is employed on an as and when basis and for which there are no guaranteed hours of work*” and regards himself as a permanent full time employee.
11. The primary issue in this problem is determining what a *pool employee* means under the agreements when the respondent has referred to Mr Andrews being a casual employee and paid on a casual employee's rate of pay. As this matter has developed in the Employment Relations Authority, the Union has undertaken an analysis of the amounts of money that Mr Andrews was paid, what it thinks he should have been paid, and made a calculation on the basis of any changes in his classification as to what he would be entitled to as holiday pay.
12. I have reserved the right of the respondent to reply to the details of the calculations made by the Union on Mr Andrew's behalf. I have reserved the issue of any recovery of wages and

statutory holiday pay for reply and further determination if it is required. The focus of this determination will be on what classification should have properly applied to Mr Andrews.

13. I find that the respondent had reasoning to classify Mr Andrews under the *Casuals employed prior to 1 August 2001* classification from 27 August 2001 since he had previously been employed as a casual and there was no record of any other change and he had not been employed for more than six months. I find that Mr Andrews should have been classified on “*all other permanent employees with six months’ service*” at the rate of \$9.75 on 1 December 2001. This is because he was a pool employee from October 2001 even though his hours were variable on a need as required basis and because Pool employee is defined as a permanent part time employee. My reasons are as follows:
14. Pursuant to the first employment agreement each employee had an “employment status” (clause 20). The three classifications are namely permanent full time (clause 20.1), permanent part time (clause 20.2) and pool employees (clause 20.3). There is no provision for a full time pool employee and any pool employee could only be part time. A “*permanent full time employee*” has permanent on going employment but a pool worker is only engaged when the employer has work available. A casual has no on going employment. Since there was no classification for a ‘permanent pool employee’ and Mr Andrews had more than six month’s service, given his hours and status he should have been classified as a “*permanent part time employee*” although his hours were variable. He was therefore entitled to the rate of 49.75 on 1 December 2001, and \$10 on 1 October 2002 and \$10.24 on 1 October 2003 under the classification of “*All other permanent employees with six months’ service*”. He was a pool worker and as such fits in the definition: “A pool worker is a permanent part time worker who is employed on an as and when basis and for which there are no guaranteed hours of work. (Emphasis added). I was not convinced by Mr Daley’s evidence on maintaining Mr Andrews as a casual.
15. Furthermore Mr Andrews was not a “new” employee for the “*New permanent employees employed from 1 August 2001*” classification. So he must be excluded from this in translation.
16. The evidence falls short of establishing that Mr Andrews was a full time employee in October 2001. He was not engaged as such. Any change in agreement has not been established because it was not put in writing and Mr Andrews did not work 40 hours every week. There were weeks when he did not work the required hours, and was not asked to work and a

number of weeks where he worked 40 hours that is not inconsistent with a permanent part time employee.

17. I now turn to the question of whether Mr Andrews was a wash room operator. The plain meaning of the words of the employment agreement provide for an additional payment for a person who is a washroom operator being someone who is “operating” the “wash room”. The classification does not apply to all staff given the other existing classifications. The classification for the wash room operator envisages an additional reward for some special service different from those other employees. Given the serious differences between Mr Andrews and the Respondent in regard to Mr Andrews meeting the requirements the applicant has not been able to establish that he was a “wash room operator” within the meaning of the collective employment agreement.
18. Mr Andrews has been partially successful in regard to the classification of his status. His success entitles him to further payments that I leave to the parties to reconcile. Leave is also granted in regard to any holidays pay entitlement issue.
19. Costs are reserved.

P R Stapp
Member of Employment Relations Authority