

Determination Number: WA 14/06

File Number: WEA 437/05

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	Marian Denbee (first applicant)
<b>AND</b>	Rail & Maritime Transport Union (second applicant)
<b>AND</b>	United Group Rail (NZ) Ltd (formerly Alstom Transport New Zealand Ltd) (respondent)
<b>REPRESENTATIVES</b>	Geoff Davenport for the applicants Andrew Scott-Howman for the respondent
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION</b>	Wellington, 16 January 2006
<b>DATE OF DETERMINATION</b>	7 February 2006

**DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. Ms Denbee seeks a finding from the Authority that she is covered by the terms of the Alston/RMTU, Alstom Transport New Zealand Ltd 2004-2006 Collective Employment

Agreement – statement of problem received on 18 November 2005. The Company's refusal to apply the CEA is, she claims, a breach of ss 56 & 62(2) of the Act. A compliance order is sought. In the alternative, the applicant says she is being unlawfully discriminated against on the basis of union membership. Compensation and benefits are sought, as are penalties (to be paid to the applicant) for breaches of the Act, and costs.

2. The Company says the problem is an issue of interpretation of a CEA: whereas Ms Denbee says her employment should be covered by the terms of the CEA the Company says her role is excluded. It also says the issue was raised and resolved in its favour during collective bargaining.
3. Mediation did not settle the parties' employment relationship problem. They subsequently agreed to a one-day investigation in Wellington commencing on Monday 16 January 2006. Witness statements and documentary evidence were usefully provided in advance. Efforts during and after the investigation to settle the problem – including further mediation – were also unsuccessful.

### **Key Facts**

4. From the evidence presented at the investigation, I am satisfied the key facts can be readily summarised as follows.
5. The Company is involved in repairing, overhauling and maintaining railway rolling stock, including locomotives and freight wagons. It currently employs some 530 employees in this part of its business.
6. Ms Denbee commenced employment with the Company on 19 July 2004 in the position of "*Contract Support*" at the Hutt Workshops under an individual employment agreement (IEA) signed off by the parties on the same day.
7. The second applicant, the Union, and the Company are parties to a current CEA.
8. The CEA provides at clause 4.2 the following coverage provisions:

*This Collective Agreement applies to all employees of ALSTOM who are members of the RMTU except for the following:*

- *Managerial positions ... responsible for recommending and/or approving appointments and dismissals which would otherwise come under the provisions of Scale One; and*
- *Sales, policy or **executive support functions**.*

(emphasis added; attachment to statement of problem)

9. The applicant applied to join the second respondent, the Union, on 23 December 2004. Union membership deductions from her wages started shortly afterward.
10. On 29 July 2005, and by way of a letter to the Company, Ms Denbee asked that her contract with the Company “... *be reviewed, as I wish to change from and IEA to a CEA ...*” (above).
11. By letter dated 1 August 2005 the Company refused Ms Denbee’s request saying,

*For reasons of confidentiality and the inherent nature of the support provided to management (executive support), contract support positions are not covered by the CEA (see 4.2 second bullet point). You will recall this matter was debated and agreed at the last collective negotiations.*

(above)

12. By letter dated 23 August an urgent advice of a dispute was conveyed to the Company on the applicants’ behalf.
13. In a reply dated 29 August the Company confirmed its view that Ms Denbee’s employment was outside the coverage of the CEA.
14. The parties subsequently undertook mediation on 14 October 2005 and again on 30 January 2006 in an unsuccessful attempt to resolve this employment relationship problem.

## Parties' Positions

### Applicant's Position

15. On behalf of the applicant the following key issues are identified:
  - Is Ms Denbee covered by the CEA? In other words, what do the words “*executive support*” mean and is the applicant’s position one of executive support such that she is excluded from coverage?
  - If Ms Denbee is covered by the CEA does coverage date from the day she joined the Union, on 15 January 2005?
  - If Ms Denbee has been wrongfully excluded from CEA coverage, what remedies, penalty and costs is she entitled to?
16. Ms Denbee’s administrative functions can readily be seen by having regard to her reporting to the business performance accountant from the time she started her employment, and from her actual work content as it has unfolded from the same time.
17. It is denied that the applicant provides executive support except on rare occasions. Her work is said to be almost entirely administrative (refer to document E attached to the statement of problem).
18. The executive support work Ms Denbee does undertake is to a local manager who cannot fairly and reasonably be regarded as an executive. That person has a support person working to him on a daily basis anyway. The most recent organisational chart for the Company identifies management in Australia as executives but not local managers – including the one to whom the applicant does occasional support work.
19. The Union does not accept that agreement was reached in collective negotiations in respect of this dispute.

**Respondent's Position**

20. The respondent accepts that the issue for determination is, in her Contract Support role, does Ms Denbee perform "*executive support functions*"? If she does she is excluded from coverage of the CEA, if not it is accepted that she is a member of the Union and will therefore be covered by the CEA.
21. The CEA has historically excluded certain job types. Coverage has been limited to those employees who are Union members and who perform non-managerial roles (above team leader level). Exceptions are staff engaged in policy, sales or executive support roles. The Company says this is because of an agreed philosophy that employees who perform or support managerial roles are required to deal at arm's length with the Union. This is because the performance of their ordinary work could bring them into contact with information not intended for the Union or which might conflict with the latter's interests. In order to,

*... eliminate any potential conflict of interest, these support employees have historically been excluded from coverage.*

(par 8, Mike Yeoman's witness statement).

22. The exclusion in the CEA applies to the nature of the function performed by Ms Denbee. The tasks required of her role are recorded in her position profile (attachment to the statement in reply): they include three separate references to "*executive support functions*" required of the applicant. The role performed by Ms Denbee is consistent with her position profile.
23. The term "*executive support functions*" is descriptive of the tasks performed, in this case by Ms Denbee, not of the person to whom that employee reports: the term is therefore not limited to employees who perform services for the chief executive.
24. There is no foundation to Ms Denbee's alternative claim that she should be treated as having been covered by the CEA from the date of her employment. There is no issue of discrimination against the applicant on account of her union membership or any

other basis. Nor does the Company raise any issue about Ms Denbee's integrity or loyalty. The only issue is that of interpretation.

25. If the matter is raised in Ms Denbee's favour a separate process would be appropriate to determine the extent of any monetary compensation payable on a backdated basis.

## **Discussion and Findings**

### ***Is Ms Denbee entitled to CEA coverage?***

26. The issue for the Authority is whether Ms Denbee's position is excluded from the coverage of the CEA on the ground that she performs "*executive support functions*".
27. The CEA does not provide a definition of that term.
28. I am satisfied that any agreement between the Company and the Union is properly recorded in the CEA itself, rather than by way of (disputed) claims as to the outcome of those negotiations. I reach this conclusion because the meaning of the words at issue are, I am satisfied, sufficiently clear: *ASTE v Hampton* [2002] 1ERNZ 491 applied.
29. Ms Denbee's evidence is that, notwithstanding her position profile, she does not – and has never been asked to undertake – executive support functions, but instead, and exclusively, performs office work. Ms Denbee says her present workload is such she could not undertake executive support without current work being taken from her.
30. The applicant has listed the work she performs (refer to document E, statement of problem).
31. During the investigation the applicant's previous manager, Mike Yeoman, the respondent's then chief executive at all relevant times, properly and frankly accepted that he did not know what Ms Denbee did and that he was in no position to challenge the applicant's list or her claims she did not, and had never been asked to, undertake executive support functions. Similarly, Mr Yeoman could not tell the Authority what

percentage of Ms Denbee's work consisted of executive support functions. He said the Company was not in the business of relying on sham position profiles to exclude employees from CEA coverage. It relies on the applicant's professionally drafted position profile to exclude her from CEA coverage. The profile includes references to "*providing executive support as directed ...*" (document C, statement of problem).

32. Mr Yeoman explained that a factor behind the respondent's coverage policy was its wish not to put employees in "*invidious positions*" where they might experience conflicts of interest (by becoming privy to potential redundancies, or the Company's intended position in collective negotiations, etc). He also properly accepted the right of employees to join a union and that employees excluded from coverage who were union members could anyway be privy to confidential information.
33. To repeat, the respondent does not challenge Ms Denbee's claim she does not, and has never been asked to, perform executive support functions. The Company is instead relying on the position profile to keep Ms Denbee on the reserves' bench, on a just in case basis, in the event it might require her to perform that work. I do not accept that is a fair and reasonable position. I also do not accept that that was what the parties intended when they reached agreement to exclude some undefined positions from CEA coverage. It is not good faith for the Company to rely on a potentiality, ie that some day it might require Ms Denbee to undertake executive support functions. That is unfairly elastic, particularly as the applicant has now been with the Company for some time without being required to undertake executive support functions.
34. I do not accept that such an outcome is consistent with Mr Yeoman's assurance that the respondent does not use sham position profiles to deny CEA coverage. The Company's blank cheque approach is, I find, neither fair nor reasonable nor consistent with its good faith requirements.
35. An objective measure is required, particularly as the parties are entitled to have certainty as to Ms Denbee's coverage situation. I find that an objective measure is quickly, and properly, arrived at in this instance when it is appreciated that the applicant clearly does not, and never has provided, executive support functions: it follows that Ms Denbee is entitled to CEA coverage.

**When was Ms Denbee entitled to CEA coverage?**

36. Section 56 of the Act provides that 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*
  - 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.*

37. However, s. 62 sets out an employer’s obligation in respect of new employees who are not members of a union:

- (1) This section-*
  - (a) applies to a new employee who-*
    - (i) is not a member of a union that is a party to a collective agreement that covers the work to be done by the employer; and*
    - (ii) enters into an individual employment agreement with an employer that is a party to a collective agreement that covers the work to be done by the employee*
  - (2) At the time when the employee enters into the individual employment agreement with an employer, the employer must-*
    - (a) inform the employee-*
      - (i) that the collective agreement exists and covers work to be done by the employee; and*
      - (ii) that the employee may join the union that is a party to the collective agreement; and*
      - (iii) about how to contact the union; and*
      - (iv) that, if the employee joins the union, the employee will be bound by the collective agreement; and*
      - (v) that, during the first 30 days of the employee’s employment, the employee’s terms and conditions of employment comprise-*
        - (A) the terms and conditions in the collective agreement ...*

38. The provisions set out above are reiterated by s. 63: for the first 30 days after the employee enters into an individual employment agreement, that person's terms and conditions comprise the terms and conditions of the collective, as well as any additional terms mutually agreement that are not inconsistent with the collective's.
39. In light of my finding it can be seen that Ms Denbee was, from the commencement of her employment with the Company, denied the statutory benefits of ss 62 & 63. In his submissions on his client's behalf, Mr Davenport properly concedes the difficulty of rewriting history. Instead, the applicant seeks the application of the CEA from 15 January 2005, the date when she joined the Union. I accept that submission as fair and reasonable, on the basis of Ms Denbee's statutory entitlement to the benefits of the CEA dating from the time she commenced employment with the Company.

### ***Discrimination?***

40. While finding in favour of the applicant's primary claim I am also satisfied there is no evidence of any discrimination against Ms Denbee by the Company and that its assurances they value her contribution and performance are genuine.

### ***Remedies***

41. I accept the request of counsel for the respondent, Mr Scott-Howman, that the Authority reserve to the parties in the first instance the opportunity to address and resolve what damages should accrue to Ms Denbee. I urge the parties to take a global approach to this exercise. By way of assisting this exercise, I record here a preliminary view that a penalty is not appropriate in this instance and would anyway be paid to the Crown on the ground, amongst others, that other remedies will meet Ms Denbee's legitimate damages.
42. Reference has been made by the respondent to clause 4.5 of the CEA. I make the following observation: the parties may reach agreement on an inclusive salary. Then again, they may not. Good faith will characterise any negotiations by the parties in respect of this matter. Agreement can be reasonably withheld, in which case terms and conditions would default to those prescribed by the CEA.

**Determination**

43. I find in favour of the applicant, Ms Marian Denbee's, claim that she is entitled to coverage of the CEA and order the respondent, United Group Rail (NZ) Limited, to apply to the applicant the full terms of that agreement from 15 January 2005.
44. Leave is reserved for the matter of damages to be returned to the Authority if the parties are unable to reach agreement on the same.

**Costs**

45. As requested by the parties, costs are also reserved.

**Denis Asher**  
**Member of Employment Relations Authority**