Determination Number: AA 322/06
File Number: 5045583

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE

BETWEEN	Eastern Bay Independent Industrial Workers Union Incorporated
AND	Carter Holt Harvey Limited (Tasman Mill)
REPRESENTATIVES	Lou Yukich for the Applicant Rob Towner for the Respondent
MEMBER OF AUTHORITY	Vicki Campbell
INVESTIGATION MEETING	16 October 2006
DATE OF DETERMINATION	18 October 2006

DETERMINATION OF THE AUTHORITY

[1] Carter Holt Harvey Limited (CHH) owns and operates the Tasman pulp mill at Kawerau. Members of the Eastern Bay Independent Industrial Workers Union (EBIIW) were employed by CHH at the mill doing maintenance work. That work was contracted out to ABB and employees were either made redundant on 7 September 2004 or placed in a "pool" for three months until December 2004.

[2] In 2004 Mr Marc Butler and 38 others filed an employment relationship problem in the Employment Relations Authority seeking compliance with a mediation settlement reached between EBIIW, the Manufacturing and Construction Workers' Union and CHH (AEA 958/04). The settlement agreement required CHH to set up a working party to discuss and agree on recommendations to be made regarding a new performance recognition scheme. The working party was never established.

[3] In a determination dated 26 October 2004 (AA344/04) I declined to order compliance with the settlement agreement (dated 27 August 2004) on the basis that the settlement contemplated a review of ongoing performance and that from 8 September 2004 no staff had been engaged in any work in the Maintenance Division. On that basis I found there was no performance to recognise and as a result any performance recognition scheme would have no practical application.

[4] That determination was challenged in the Employment Court. The challenge was limited in scope to the very narrow point of whether or not there was "*…no performance to recognise*."

[5] In a decision dated 14 October 2005 (AC57/05), Judge Couch held that there was work done from 1 July 2004 until at least 7 September 2004 by the applicants in ARC95/04 to which a performance recognition scheme could apply.

[6] On 20 July 2006, EBIIW filed a statement of problem claiming penalties for various breaches of the settlement agreement and collective employment agreements. In an amended statement of problem filed on 16 August 2006, in addition to the penalties, the union sought an order for compliance with the mediated settlement agreement.

[7] In a second amended statement of problem the Union sought a re-opening of the original matter filed in 2004 seeking an order for compliance with the mediated settlement agreement.

Application for re-opening

[8] Clause 4 of Schedule 2 to the Employment Relations Act 2000 provides the Authority with a discretionary power to re open an investigation.

[9] An important consideration in determining such applications was succinctly stated in *Ports of Auckland Limited v NZ Waterfront Workers Union* [1995] 2 ERNZ 85, 88.

> … in general the Court must look toward the possibility of a miscarriage of justice, but should not look for proof of that possibility to a high standard. For balance, it must give equal weight to the importance of certainty in litigation and the right normally enjoyed by a successful litigant, … to enjoy the fruits of a judgment in its favour.

[10] Mr Towner submitted that in this case no miscarriage of justice occurred in relation to my earlier investigation. Mr Yukich made no submissions in respect of this and I have taken that to indicate he also does not view the previous investigation as giving rise to a miscarriage of justice.

[11] Mr Towner submitted that there has been an inordinate delay in bringing the application for reopening and that this is a reason not to grant a reopening. The earlier determination was issued in October 2004, the Courts decision on challenge was issued in October 2005. At best there has been a delay of nine months during which time Mr Yukich could have filed his application for reopening. While there are no timeframes specified for applications of this type it is reasonable to expect such applications to be timely and if not, some explanation should be provided. EBIIW has provided no explanation as to the reasons for the delay.

[12] CHH is entitled to certainty and finality in the proceedings. The employment court decision was based on a very narrow point and the members of the unions represented by

EBIIW were successful. The applicants at the employment court did not seek to challenge the refusal to order a compliance order.

[13] Mr Towner submitted further that the application for reopening "*…flies in the face of the principle of res judicata and issue estoppel*." Res Judicata expresses the principle that:

> ...it is contrary to public policy to allow any person to be repeatedly pursued in Court on account of the same transaction, except so far as is allowed under express rules of Court providing for rights of appeal, review and rehearing (see *Reid v New Zealand Fire Service Commission (No 2)* [1998] 3 ERNZ 1237).

[14] In *Reid v New Zealand Fire Service Commission (No 2)* Goddard CJ referred to Spencer Bower and Turner, *The Doctrine of Res Judicata* (2nd ed), London, Butterworths 1969, para 10 where the following statement of the House of Lords was cited:

> The doctrine … is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issues to be litigated afresh between the same parties.

[15] The Chief Judge then set out the elementary proposition that:

- where a final decision has been pronounced
- by a court or tribunal of competent jurisdiction
- over the parties to
- and the subject-matter of
- litigation

each party is estopped or precluded from disputing or questioning such decision on the merits as against the other party in subsequent litigation.

[16] A final determination was published in October 2004 in relation to AEA 958/04. The applicants had the opportunity at that point to challenge the determination de novo. Instead they chose specifically to challenge one finding of fact.

[17] The cited parties to this employment relationship problem are different to the parties subject to the determination of AA334/04 and the Employment Court's decision in AC57/05. In AEA 958/04 the applicant parties were named and were members of one of the two unions' party to the settlement agreement. In this case, the applicant party is one of the unions, EBIIW.

[18] During the course of the investigation meeting it became clear to me that EBIIW was in fact seeking a determination on behalf of its members, which are those applicants cited in 958/04. The subject matter is materially the same and arises from the same facts. The union was seeking a compliance order with the settlement agreement.

[19] EBIIW has treated this application as an application for reopening AEA 958/04. It is described that way in the statement of problem. It is my opinion that the union are seeking to relitigate the same subject matter and for the same outcome as that dealt with in AEA 958/04.

[20] I find that there has been no miscarriage of justice, no unfairness, no material evidence discovered after the decision and the applicant does not complain about the way in which the investigation was undertaken. The applicants in ARC 95/04 exercised their right of appeal in the manner they chose. It is now not open to EBIIW to relitigate the same claim or point.

[21] Given my reasons above, together with the issue of the delay of nine months, since the Employment Court decision, which remains unexplained, the application for reopening is dismissed.

Comments

[22] The Settlement Agreement gave rise to an obligation for the parties to establish to a working party to identify key performance indicators relating to, among other things, business areas or the mill against which performance of employees could be assessed and recognised. The working party was able to make "…*recommendations*…" only. The targeted figure for the performance recognition scheme was 5% and was an incentive to "…*encourage a performance culture which will enable the mill to reach international best practice."*

[23] The maintenance division, in which the EBIIW members who were to be the beneficiaries of the performance recognition scheme worked, closed down one week after the settlement agreement was signed.

[24] Evidence produced at the investigation meeting demonstrates that during the period July 2004 to September 2004 and even up to and including December 2004, CHH did not achieve key targets. The documents confirm the evidence of the respondent witnesses that the performance of the mill was poor.

[25] Evidence was also produced to indicate that even though no working party had been established, in September 2004, CHH made an offer to resolve the issue of recognition of performance for the period 1 July 2004 to 7 September 2004 based on the 5% target set out in the settlement agreement, and the known salaries of the members of EBIIW. The offer did not take into account the fact that the Mill had not met its production targets. Instead the offer was based on a 100% achievement of targets.

[26] In March 2006 the company revised its offer upwards and this offer was repeated in August 2006 after the first statement of problem was filed in the Authority in July 2006.

[27] Given the efforts by the company to resolve this problem, against the background of uncertainty about what recommendations may have been accepted by the company if a working party had been set up, and whether there would have been any payment at all, given the poor performance of the Mill, it seems unfathomable that the parties to this employment relationship problem have been unable to resolve their issues outside of the Authority.

Costs

[28] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell
Member of Employment Relations Authority