Determination Number: CA 17/06
File Number: CEA 192/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Deborah Langford, Rachael Jenkins, Susan Nicol and Clare Webster (Applicant)
AND	Otago District Health Board (Respondent)
REPRESENTATIVES	Tony Corrigan, Advocate for the Applicants Barry Dorking, Counsel for the Respondent
MEMBER OF AUTHORITY	James Crichton
INVESTIGATION MEETING	9 September 2005
DATE OF DETERMINATION	7 February 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In an interim determination issued on 27 September 2005, I gave a provisional conclusion to the question that the Authority was asked, namely whether Deborah Langford, Rachael Jenkins, Susan Nicol and Clare Webster (the applicants) were successful in their claim that the respondent (the Board) had failed to pay a shoe allowance which the applicants said was due and owing to them pursuant to the relevant clause in the applicable Collective Employment Agreement.

[2] My provisional conclusion was that the applicants' claim failed in its entirety because I did not consider that the Board had required the applicants to *wear a particular type of shoe*, as the relevant clause in the applicable Collective Employment Agreement required.

[3] That provisional conclusion was advanced on the footing that the parties would have 28 days from the date of the interim determination to put further argument or seek to have the Authority hear further evidence.

[4] Were that option to be exercised, the interim determination would not become a final determination and its conclusion, therefore, would remain provisional only and there would be further argument or the taking of evidence which would result in a substantive determination subsequently.

[5] The parties have in fact exercised that option and furnished further submissions.

[6] In accordance with the earlier intimation that the Authority gave, I have convened a further telephone conference with the parties' representatives and this conference was held on 24 January 2006.

[7] At that conference, the parties confirmed that they were happy to rest on the basis of the submissions they had already filed and therefore this determination becomes the Authority's final conclusion on this particular issue.

[8] If follows that if one or other of the parties wishes to, they may challenge this determination in the usual way or, of course, seek to have the matter re-opened by the Authority according to law.

The submissions

[9] The applicants' view is that my interim determination construed the meaning of the words in the relevant clause too narrowly, and in particular erred in drawing a distinction between the word *shoe*, which is referred to in the relevant clause and the word *footwear*.

[10] The applicants say that the intention of the negotiating parties in reaching agreement on the applicable clause was to provide for circumstances where those workers would receive some reimbursement in the event that their employer sought to restrict, in some way, the footwear that they might otherwise reasonably wear to work.

[11] In particular, the applicants say that:

> *It is the applicants' position that the respondent's requirement that the laboratory workers must wear 'closed footwear' meets the terms of clause 26.2.* [clause 26.2 is the relevant provision]

[12] It is clear on the facts that the respondent Board does require the applicants to wear *closed footwear*. The question is whether the expression *closed footwear* constitutes an example of *a particular type of shoe*.

[13] The ordinary dictionary definition of the word *shoe* seems to contemplate an item which is a particular kind of footwear. The Concise Oxford Dictionary definition of the word *shoe* has the elements of a protective foot covering, having a sturdy sole, and not reaching above the ankle.

[14] By contrast, a *boot* is described in exactly similar terms in its definition except that it reaches above the ankle and in the Concise Oxford Dictionary *often to the knee*.

[15] Clearly, both a shoe and a boot are examples of different kinds of footwear. In its instruction to staff, the Board said that the applicants were only to wear closed footwear.

[16] Closed footwear presumably includes most boots and shoes but no jandals, sandals or other footwear of that kind.

[17] In their 18 October submission, the applicants again advanced the proposition that the word *shoe* in the relevant provision should not be interpreted too narrowly, as they say the Authority did in its Interim Determination of 27 September 2005. However, as I said in my Interim Determination, if the parties had meant to use the word *footwear* in the relevant clause, it was available to them to do so.

[18] Finally, the applicants advance an argument about the intention of the parties in the creation of the relevant clause. The applicants' submission on this point has this to say:

> *… it is clear that the parties intended that if laboratory workers were restricted in some way as to the clothing they could wear to work, then they should be reimbursed for some of the cost of that clothing. This was consistent with the term which, in effect, requires the respondent to provide the laboratory worker with protective clothing (lab coat) …*

> *Under the Authority's interpretation of the clause in the collective as contained in the Interim Determination, if the respondent were to require that the laboratory workers should wear boots, they would receive no reimbursement for the cost of those items. This cannot have been the intention of the parties to the collective. The parties must have intended that if laboratory workers were to be restricted in some way, by their employer, from wearing footwear, which they might otherwise reasonably have worn to work, then they should receive some reimbursement.*

[19] In effect, what this argument says is that if a worker is effectively restricted in the footwear that he or she might wear to the workplace, by reason of a directive of the employer, then that is precisely the circumstance which is intended to be caught by the provisions of the clause in question, and the fact that the clause in question refers to *a particular type of shoe* rather than *a particular type of footwear* says more about the drafting of the parties than it does about their intent.

[20] For its part, the Board argues that its policies are directed to ensuring that the footwear worn by laboratory workers is reasonable for such workers and that apart from that requirement, there is no restriction on what laboratory workers can wear.

Determination

[21] The Authority is most grateful for the time and trouble the parties have taken in their careful and thorough submissions.

[22] Having given the matter detailed consideration, it is my view that nothing the parties have told me encourages me to reach a different conclusion from that in my Interim Determination of 27 September 2005.

[23] I construe my task as discerning the ordinary meaning of the relevant clause as it was written, not attempting to divine the parties' intentions when they negotiated the clause. Nor do I think I should replace the word *shoe* with the word *footwear* and then seek to apply meaning. The word the parties' used was *shoe* and it is to that word's meaning, in its context the Authority should direct itself.

[24] It follows that the applicants' application fails.

Costs

[25] Costs are reserved.

James Crichton
Member of Employment Relations Authority