

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** APN (New Zealand) Limited trading as Wairarapa Times Age  
(Applicant)  
**AND** New Zealand Amalgamated Engineering, Printing & Manufacturing  
Union Inc (Respondent)

**REPRESENTATIVES** John Rooney for the Applicant  
Tony Wilton for the Respondent

**MEMBER OF AUTHORITY** P R Stapp

**INVESTIGATION MEETING** Masterton, 7 June 2006  
**DATE OF DETERMINATION** 5 July 2006

**DETERMINATION OF THE AUTHORITY**

*Employment relationship problem*

1. This is a problem about the employer's request to change its employees' hours and days of work. It has required certain employees (Messrs Barlow, Ball, Trotman and Baker, and Ms Christine Dornan) to work certain hours and on Sundays not previously worked.
2. APN (New Zealand) Limited trading as the *Wairarapa Times Age* ("the newspaper/employer") has applied to the Authority for declarations that:
  - (a) The applicant is entitled to change employees' hours and/or days of work on reasonable notice to them; and
  - (b) The applicant can require the employees listed above to work the changed hours and days of work proposed from them by the applicant.

The Union opposes the application.

**The facts**

3. APN made a decision to print its newspaper *The Wairarapa Times Age* in Wanganui. In making this decision it now requires its employees to work on a Sunday, evenings and with different start and finish times.

4. APN relies upon the terms and conditions of employment it says applies to the affected employees by applying the collective employment agreement (2003-2005). The relevant terms are found in clauses 3 and 4 as follows:

**"3.0 SCHEDULES**

- 3.1 *It is the intention of the parties that neither the employer nor the employees of the Company shall be disadvantaged in any way as a result of this collective employment agreement coming into effect.*
- 3.2 *The parties to this agreement acknowledge that employees covered by this agreement at the date of its ratification have prior to this agreement been employed on individual employment contracts or individual employment agreements.*
- 3.3 *Furthermore many of these individual employment contracts for individual agreements as per 3.2 above, may contain:*
- 3.3.1 *Terms and conditions of employment which the employee considers to be to their own advantage, and which are not contained in this collective employment agreement.*
- 3.3.2 *Different wording, which the employee considers to be to their own advantage, and which is not contained in this collective employment agreement, in respect of certain terms and conditions of employment which appear in both the individual employment contract and this collective employment agreement (some examples of which may include hours of work, public holidays, annual leave).*
- 3.4 *If an employee is an employee as per 3.2 and had in their individual employment agreement either 3.3.1 and/or 3.3.2, then 3.3.1 and/or 3.3.2 shall be deemed by the parties to this collective employment agreement to be additional terms and conditions of employment consistent with this collective employment agreement as per clause 61(1) of the Employment Relations Act 2000.*
- 3.5 *In the event of a conflict or difference between the:*
- 3.5.1 *Collective employment agreement; and*
- 3.5.2 *An employee's additional terms and conditions of employment consistent with this collective employment agreement as per 3.4 above;*
- then 3.5.2 above will apply and take precedence over 3.5.1 above, unless the employee requests otherwise in writing.*
- 3.6 *If an employee whose position falls within the coverage of this collective employment agreement joins the Union following the date of ratification of this collective employment agreement, and prior to joining the Union was employed on an individual employment contract or individual employment agreement then that employee shall be deemed to be an employee as per 3.2 above.*
- 3.7 *In the event that the collective employment agreement contains a term or condition which is not contained within the individual employment contract or individual employment agreement, that term or condition will apply provided it is not contra to any term or condition contained in the individual employment contract or individual employment agreement.*
- 3.8 *It is not intended that an employee previously employed on an individual contract or agreement who becomes covered by this collective agreement shall retain or enjoy a double benefit in relation to any particular provision. As an example, an employee who is entitled to three weeks' annual leave under the individual employment contract and three weeks' annual leave*

*under the collective agreement shall be entitled to three weeks' annual leave, and shall not be entitled to six weeks' annual leave.*

- 3.9 *It is the intention of the parties that any additional terms and conditions of employment arising out of the individual employment agreement or contract as per 3.4 above be recorded in individual schedules attached to this collective agreement. Following ratification of the collective agreement, each employee will receive from the employer a draft individual schedule. Each such draft individual schedule will require agreement between the employer and employee prior to being attached to this collective agreement. The parties to this agreement recognise that the employee shall have the right to consult and take advice from the Union as part of this process.*

#### **4.0 Types of Employees**

*Full time employee is an employee engaged for the period of 40 hours per week, to be worked on five days, Monday through Sunday inclusive, except where otherwise the employer and employee have agreed in writing to a variation, in accordance with clause 36 of this agreement."*

5. The employees concerned have opposed the changes and rely on the savings provision of the CEA (clause 3) that protects what they say are their more advantageous terms and conditions, which the employees' say relate to the arrangements entered into when they were appointed to establish their understanding of their employment arrangements; in particular to work Monday to Friday and occasionally on Saturdays (Dornan), which did not include any requirement to work on Sunday (Barlow).
6. The affected employees are Messrs Hugh Barlow (Sub-Editor), Paul Baker (Sub-Editor), Christine Dornan (Sub-Editor), Steve Trotman (Sub-Editor), and Kevin Ball (Sub-Editor).
7. Their individual circumstances are as follows.

#### **Hugh Barlow**

8. Mr Barlow is employed by the company in the Editorial Department as a Sub-Editor. He has been with the company since 2000 and he has regularly started work at 7.30am on Monday through to Friday. The company wishes to change this for him to work the night shift from 4pm to midnight. The company says that when Mr Barlow was first employed as a journalist in 2000 he was employed under an individual employment agreement and that this agreement provided his hours of work would not exceed 40 hours per week to be worked on five days, Monday through to Sunday. That agreement also provided that his actual hours of work would be set by the company in consultation with him, and that where a change in the ordinary work were to occur, that reasonable notice of the change would be given to him. He did not sign the agreement because he says there were terms he did not agree to. There is no individual schedule to the collective employment agreement under clause 3.9 of the collective employment agreement for Mr Barlow, and the company says, that the terms of the collective represented the full terms and conditions of employment for him.

**Paul Baker**

9. Mr Baker is employed by the company in the Editorial Department as a Sub-Editor. Mr Baker has been with the company since 1990 and a Sub-Editor since 1991. He currently varies his start time but the company says it now wishes to set his start time at 8am and also wishes to change his days off from Saturday/Sunday to Friday/Saturday. The company says he was previously employed under an individual employment agreement dated 30 September 1992 which was intended to cover his role as a journalist and it was signed off. It is acknowledged that Mr Baker retains a number of his individual terms and conditions of employment in a schedule to the collective employment agreement but that this schedule makes no reference to his hours and days of work and remains unsigned. It says the terms of the schedule have been applied and complied with since July 2002. It acknowledges that the schedule provides that overtime is payable on Sundays but says that this is only in relation to any time worked in excess of 40 hours per week.

**Christine Dornan**

10. Christine Dornan is currently employed by the company in the Editorial Department as a Sub-Editor. She has held this role since 1997. As at December 2004, her days and hours of work are Monday to Friday from 7am to 3pm. The company says it is now necessary for her to have a start time of 6am. The company says she was employed under an individual employment agreement which provided that her ordinary hours of work would not be more than eight hours per day or 40 hours per week to be worked as directed. She did not sign the agreement. The agreement says that this clause, like clause 4 of the collective employment agreement, permits it to set her hours of work with the flexibility it requires.

**Steve Trotman**

11. Mr Trotman is employed by the company in the Editorial Department as a Sub-Editor. He has been in this role since 1998 but has worked for the paper in a number of other capacities since August 1995. As at December 2004, Mr Trotman's start time was 7am. The company says that it is now necessary for him to start at 8am daily. The company says that prior to July 2002 he was employed under an individual employment agreement that intended to cover him in his previous role of proof reader. The agreement was not signed. The individual employment agreement provided that his ordinary hours of work would not exceed 40 per week to be worked on five days, Monday through to Sunday. It is an identical clause to clause 4 of the collective employment agreement.

## **Kevin Ball**

12. Mr Ball is employed by the company in the Editorial Department as a Chief Sub-Editor. He has been with the company since 1978 in various roles which have had various hours of work. His current start time is 6am. However, the company wishes to change it now to 8am and work to 4pm. It also considers that it is necessary for him to be rostered every three weeks to one 6am start (this 6am start is to cover Ms Dornan's day off).
13. Mr Ball was employed under an individual employment agreement dated 19 November 1991 and signed off. That agreement was intended to cover Mr Ball in his previous role as a journalist. At the time of the collective negotiations, Mr Ball retained a number of additional individual terms and conditions of employment in a schedule to the collective employment agreement. The company says that this schedule makes no reference to Mr Ball's specific hours and days of work and also remains unsigned. It says it has been applied and complied with since July 2002. It also says that overtime is payable for all work done on a Sunday and says that such overtime is only payable for hours worked in excess of 40 hours per week.

## **The issues**

14. In hearing the evidence and submissions from John Rooney (for the applicant) and Tony Wilton (for the respondent – the EPMU), I have defined the issue as a question as to what terms and conditions of employment apply, considering the existence of the collective employment agreement, individual employment contracts and schedules, and what the affected employees say are their unwritten terms and conditions of employment that relate to the arrangements they understood to apply when they started work at the Wairarapa Times Age.
15. It is common ground that the plain meaning of the words permits the company to require employees to work on Sundays, evenings and different start and finish times – in the collective employment agreement and individual employment agreements where there is a similar clause, and the schedules prepared under clause 3.9 of the collective and applying clauses 3.1 and 3.2).
16. It is also accepted that for these employees the changes are significant, particularly for Hugh Barlow.

## **Determination of employment relationship problem**

17. I have decided that it would not be appropriate to make the declarations sought because, whilst the plain meaning of clause 4 of the collective employment agreement permits the company to make changes to employees' terms and conditions to require them to work on Sundays, evenings and different start and finishing times, the following factors

influence the situation and impact on the employment relationship of the affected employees. These factors are:

- The existence of the savings clause in the collective employment agreement (clause 3.1 and 3.2 applied) that protected any individual terms.
- The existence of individual employment agreements (signed by Paul Baker and Kevin Ball) that provided them with penal rates for working weekends.
- Two individual employment agreements were signed by Paul Baker and Kevin Ball that provide for penal rates to be paid. This is now accepted by APN. It is enough for APN to rely upon the clauses in Messrs Baker's and Ball's individual employment agreements (that have been saved) to require them to work changed days and hours and where they are paid extra for doing so.
- The schedules that were required to be completed by the company under clauses 3.9 of the collective employment agreement with the more advantageous provisions that continue to apply. There is no certainty where the schedules, which have been provided, have come from, and how they were prepared, as required under the collective employment agreement. The reliability of the schedules is doubtful enough to give the benefit to the employees. In other words in the absence of them being properly completed any individual terms that were more advantageous need to be agreed.
- Mr Barlow understands that he would not be required to work on Sundays when he started and did not sign an individual employment agreement. He seldom worked outside his normal hours and they did not include working on a Sunday.
- Hugh Barlow, Mr Trotman and Christine Dornan did not sign individual employment agreements. Mr Barlow did not agree to all of the terms and conditions presented at the time. Mr Trotman and Christine Dornan could not recall the circumstances but did not sign the contracts.
- The collective employment agreement says that a variation needs to be *agreed in writing* (see clause 36 of the collective). A variation in terms of applying clause 4 is not an issue. Because the individual employment agreements for Messrs Barlow and Trotman and Christine Dornan have not been signed and APN has not met the requirements of clause 3.9 to produce schedules for these employees in regard to their more beneficial terms and conditions, APN therefore cannot rely upon clause 4 on its own. It has to get agreement from the affected employees.

18. In addition the law requires that an employee bound by a collective employment agreement may include any additional terms and conditions that are *not inconsistent with*

*the terms and conditions in the collective agreement* (see s 61 (1) of the Act). The arrangements the affected employees say apply are not inconsistent because of the savings provisions of clause 3 and that they apply within the application of clause 4 of the collective employment agreement.

19. Therefore, I must agree with Mr Wilton that it would not be appropriate to make the declaration sought by the applicant, save to say that in the circumstances the employer will need to get agreement with the affected employees on any changes required to their terms because of the above factors. Finally the collective is no longer enforceable involving the EPMU since the collective employment agreement expired on 31 May 2005 and the one year enforcement period under s53 of the Act has expired (31 May 2006). Proceedings could only relate to the individuals by virtue of their terms and conditions subject to agreement.
20. The applicant's claim for declarations is dismissed.
21. Costs are reserved.

Paul Stapp  
Member of Employment Relations Authority