

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 88/08  
5094862

BETWEEN EASTERN BAY INDEPENDENT  
INDUSTRIAL WORKERS  
UNION,  
Applicant

AND PEDERSEN INDUSTRIES LTD  
Respondent

Member of Authority: James Wilson

Representatives: Lou Yukich for the applicant  
Russell Drake for the respondent

Investigation Meeting: 19 December 2007 at Rotorua

Determination: 12 March 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, the Eastern Bay Independent Industrial Workers Union Inc (The Union) has asked the Authority to order the respondent, Pedersen Industries Ltd (Pedersen's) to comply with the terms of a Collective Employment Agreement (the CEA). Specifically the Union says that Pedersen's have declined to reimburse some of the Union's members for the purchase of tools, in accordance with the *tool account* provisions of the CEA.

[2] For its part Pedersen's say that it is complying with the CEA and that the tools for which the Union members are seeking reimbursement are not work related and are therefore not covered by the provisions of the CEA.

## Background

[3] The coverage clause of the CEA says that the agreement covers any employee employed by Pederson Industries Ltd at the Tasman chip mill, who is a member of one of the union parties to the agreement and employed to perform the work within one of the job functions described in the *work scope* of the agreement. In general terms the employees concerned are *trades people* and *operators* employed by Pedersen's to carry out contracted manufacturing and labour at the Tasman site. Pedersen's took over this operation in 2004 at which time employees of the previous operator were employed by Pedersen's on individual employment agreements (IEA's). At the time these IEA's were established the hourly rates were set, according to the company's witnesses, to be all inclusive of all allowances previously paid..

[4] Pedersen's say that, at the time it took over the Tasman operation, the company operated a *company policies and procedures manual* across all of its businesses, including the Tasman site. The company says that each of the new employees, at the time of their employment, signed an employee statement acknowledging the receipt and acceptance of the employee handbook.

[5] In late 2005 the Union initiated bargaining for a CEA to cover its members at the Tasman site. The company's managing director, Mr Paul Pedersen, says that at the commencement of the negotiations he instructed his negotiation team that the application of all the company's policies and procedures (as contained within the policies and procedures manual) should continue to apply to all employees irrespective of whether these employees were employed under a CEA or an IEA.

[6] At the commencement of the negotiation the Union tabled a claim for a non-taxable allowance payable in addition to the agreed hourly rate, to cover travel, meals, laundry and tools. The company rejected this claim and during the course of negotiations provided the union with a copy of the company's *tool account* policy as contained within the policies and procedures manual, and, they say, confirmed that the policy would apply to those employees who were required to use their own tools at work.

[7] Following the completion of the negotiations a clause headed *tool account* was included in the completed CEA. This clause was apparently drafted by Mr Yukich, the Unions advocate at the negotiations. The company says that they understood this wording to be an abbreviated version of the *tool account* policy as contained in the policies and procedures manual. This clause says:

***Tool account***

*Each fortnight the employer shall, in respect of each employee party to this agreement, deposit the sum of \$1.00 per worked hour to an account to be used for the purpose of reimbursement of employee tool costs, (Tool Allowance).*

*Each employee shall be entitled to claim against the tool allowance for reimbursement of the cost of tools for which orders are placed through the employer.*

*A signed company purchase order must be completed for all purchases.*

*The employee shall not be entitled to make any claims for unused portion of the tool allowance during any annual period or on termination of the employee's employment.*

[8] Following the completion of the negotiations the company set up the tool accounts for all of its employees. The first applications for payment from this account were rejected, apparently on the basis that the individuals had not completed the appropriate form. Subsequently some applications were approved but a number were rejected on the basis that either the employee was supplied with all tools required for their work or the tools purchased were not work related. In its evidence the company listed several examples of tool allowance requests which had been declined including:

- several employees whose applications for payment included the statement "as per CEA" but no specific tools were listed on the request forms. These applications were rejected on the basis that no specific tools aligned to the employee's role were requested.

- An employee whose role was that of stacker loader operator who claimed reimbursement for purchase of a circular saw and a yard broom. This claim was rejected because the employee had no need to use a circular saw as part of his work and yard brooms were provided by the employer.
- Another stacker loader operator who claimed payment for a spanner set, a socket set, an angle grinder and various pliers and wrenches, none of which related to his role with the company.
- A chip kiosk operator who claimed a spanner set, a screwdriver set, a tool chest and various crescents, none of which were required for his work with the company.

### **The Union's interpretation.**

[9] The Union argues that the collective agreement is clear and unambiguous. They say that the wording in the current CEA while substantially similar to the companies tool account policy has one significant difference i.e. that the tools purchased by the employee are not specified as being required by the employee in the workplace to qualify.

### **Pedersen's interpretation**

[10] The company says that the wording in the collective agreement must be read in conjunction with the policy upon which it is based. They pointed to the procedures set out in the policy and procedure manual under the heading tool allowance procedure, the procedure says in part

*The group has a tool allowance policy which is applicable to those employees who require "job specific tools" to carry out the day-to-day tasks as per their job description. This means that the tools are purchased to use at work and are left at work but are able to be taken home on days off. The tool will have to be used at work for more than it would ever be used at home (80/20 rule).*

[11] The company argue that the wording used in the CEA was an attempt to simplify the tool account provisions as contained in the company's policy manual. They say that the allowance is a reimbursing allowance and thereby non-taxable, and should it be used to reimburse employees for non-work-related expenses would clearly be illegal tax avoidance.

### **Legal principles**

[12] The determination of this matter lies in the interpretation of the wording of the CEA. In *ASTE Te Hau Takitini O Aotearoa Inc v. Hampton, Chief Executive Bay of Plenty Polytechnic* [2002] 1 ERNZ 491, at paragraphs 20 and 24 the Court said

*The Court is required to adopt an objective approach to interpretation...a final written agreement supersedes the negotiations...*

*... if the words are clear and can only have one possible meaning, that should generally determine the matter. The Court will need to be very sure of what business common sense requires before so interpreting a contract if that does not accord with the clear words...It is necessary to be careful not to treat as the commercial purpose of the agreement what seems to the Court to be the decent thing to do. It is not the Court's task to re-write an agreement.*

The employment agreement must be construed objectively but that does not confine the Court to looking only at the contract itself. In *Quainoo v NZ Breweries Limited* [1991] 1 NZLR 161, 165 (CA). Hardie Boys J said:

*But where the words are susceptible of more than one meaning, even if one of them be an unusual meaning, the Court is entitled to look, indeed it must look, at the surrounding circumstances in order to ascertain from them, if it can, what the true intention was. This is quite different from listening to the parties' version of what they each meant. A contract must be construed objectively, but not in disregard of its factual context and its purpose.*

## Discussion

[13] As a matter of fact I find that the Union was aware of the company's policy in respect to the operation of the tool account and that it was this policy that formed the basis of Pedersen's offer at the CEA negotiations. It is somewhat disingenuous for the Union to suggest that they believe that the company had agreed to reimburse employees for non-work-related tools.

[14] As set out in *Quainoo* (see above) it is appropriate to look at the surrounding circumstances. The tool account clause is contained within an employment agreement and, certainly in the minds of the employer, was an attempt to précis the company's policy in respect to the reimbursement to employees for the purchase of work-related tools. Such reimbursing allowances, and particular tool allowance, are a long established practice in employment agreements and both parties are, I am sure, familiar with such arrangements. Pedersen's quite rightly point out that the payment is either non-taxable (as reimbursement of a work-related expense) or subject to the payment of a fringe benefit tax (if reimbursement for non-work-related items). Despite comments at the investigation meeting by Mr Yukich that the question of tax was a matter between Pedersen's and the Inland Revenue Department, there is absolutely no doubt that both parties at the negotiations assumed that the payment was non-taxable.

[15] The meaning of the wording of the CEA is, I find, clear. The clause provides for a tool account to be established for each employee *to be used for the purpose of reimbursement of employee tool costs*. I accept that the clause does not specifically say that the tools purchased must relate to the employees work. However to suggest that employees should be entitled to reimbursement for purchase of non-work-related tools would impose an interpretation on the wording which would be both extraordinary and, arguably, illegal.

**Determination**

[16] **The Union's request for a compliance order is declined.** Pedersen's is correct in its interpretation of the *tool account* provision in the CEA in requiring that employees are only entitled to be reimbursed for the purchase of work-related tools. The requirement that the test to be used, to determine whether or not such tools are work-related, should be that required by the Inland Revenue Department (i.e. the 80/20 rule) is both appropriate and sensible.

**Costs**

[17] Costs are reserved. The parties are requested to attempt to resolve this issue between themselves in the first instance. If they are unable to do so Pedersen's, should they wish to seek a contribution towards their costs, should file and serve submissions within 28 days of the date of this determination. The Union will then have 14 days in which to file and survey response.

James Wilson

Member of the Employment Relations Authority