**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

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| BETWEEN | | CENTRAL AMALGAMATED WORKERS UNION AND OTHERS<br>Applicants |
| AND | | BRIDGEMAN CONCRETE (HAWKES BAY) LIMITED<br>Respondent |

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| Member of Authority: | G J Wood |
| Representatives: | Peter Cranney for Applicants<br>Gary Tayler for Respondent |
| Investigation Meeting: | 17 April 2008 at Napier |
| Further Submissions Received: | By 3 July 2008 |
| Determination: | 4 July 2008 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicants consider that the union's members were wrongly denied a Christmas bonus paid to all other members of staff by the respondent (Bridgeman) and have personal grievances as a result. At the commencement of the investigation meeting it was made clear that the only parties to this employment relationship problem other than the union were those workers who are covered in the attached schedule. The parties have usefully provided an agreed set of facts in relation to its problem, as follows.

[2] The first applicant is the union party to a collective agreement that covers the work carried out on the respondent's Napier and Hastings work site.

[3] There is no express contractual provision for the payment of a Christmas bonus within the collective agreement.

[4] The bonus is a discretionary payment outside of any express contractual entitlement.

[5] John Bridgeman (the principal of the respondent company) decides who receives a bonus, who does not, and how much the bonus will be.

[6] As a result of personal offence taken in regards to statements made to the press by the union during a lock-out period, Mr Bridgeman elected not to hand out a Christmas bonus to the employees represented by the union.

[7] In addition to the agreed facts, it is relevant to record that during bargaining for the collective agreement the applicant employees of Bridgeman took part in lawful strike action, which immediately preceded the subsequent lock-out referred to in the agreed statement.

**The Law**

[8] Sections 104-107 of the Employment Relations Act deal with discrimination. They provide that an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of that employee's activities of a union refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances.

[9] Section 107 defines what constitutes involvement in activities of a union for these purposes. It provides that involvement in the activities of the union means that within twelve months before the action complained of, the employee had, amongst other criteria, participated in a strike lawfully.

[10] In *Transrail v. Rail and Maritime Transport Union (Inc)* [1999] 1ERNZ 640 the Court of Appeal considered the words "terms of employment", "conditions of work" and "fringe benefits" in the context of alleged discrimination. It held that each set of words reflects a broad facet or focus of the prescription under the general umbrella of discrimination in employment and that the boundary limits between each are not easy to draw and may indeed overlap. The Court held at page 467:

> *"Read together, they are clearly intended to cover a broad and comprehensive field. Similarly,* offer *and* afford *are not confined to entitlements under the formal employment contract. It is what the employer actually offers or affords employees, not what the employer was bound by contract to provide. And that conclusion from the earlier expressions is reinforced by the reference to the same*

opportunities for training, promotion and transfer *which is clearly not confined to contractual entitlements.*

*The breadth of the various expressions in the context of discrimination in employment calls for an expansive interpretative approach reflecting, too, the statutory purpose of proscribing discrimination in employment whatever its actual form so long as, and this is the second issue, it is on one or more of the prohibitive grounds.*

***Fringe benefits***

*A bonus paid retrospectively to recognise past performance and as a by-product, to encourage future performance is clearly within the ordinary broad meaning of fringe benefits. In its ordinary usage, fringe benefit refers to benefits passed by an employer to an employee other than payment of ordinary wages and salary. The expression is defined in the Oxford English Dictionary, Oxford, Oxford University Press as a perquisite or benefit of some kind provided by an employer to supplement a money wage or salary; in Webster's 3rd International Dictionary, Merriam-Webster Inc, 1993 as an employment benefit (as a pension or paid holiday or health insurance), granted by an employer that involves a money cost without affecting basic wage rates; and in Black's Law Dictionary (5th ed), St Paul, West Publishing Co, 1979 as side benefits which accompany or are in addition to a person's employment such as paid insurance, recreational facilities, highlighted profit sharing plans, paid holidays and vacations etc. Gifts made to employees in recognition of personal qualities and not employment-related do not come within the description of fringe benefit but there is no suggestion that the present payments were other than employment based.*

[11] In that case, the Court of Appeal held that the bonus plan had created a legitimate expectation in the workers that it would be honoured and that indeed it seemed to have contractual force, but that the payments were also fringe benefits. It held that there is much force in the view that even an entirely spontaneous voluntary payment cannot be made to some employees and withheld from others on the basis of the others' involvement in the activities of an employee's organisation or on any other prohibited ground, as indeed the Chief Judge of the Employment Court appeared to consider.

[12] In *New Zealand Airline Pilots' Association v. Air New Zealand Ltd* [1992] 2 NZLR 656, the Court of Appeal considered whether statements made by union members which were part of a campaign to force Air New Zealand to reconsider its position in award negotiations constituted a strike. In relation to the Labour Relations Act, the Court of Appeal held at 662:

> *There is no doubt that the legislature had primarily in mind strikes in the traditional sense, which do not involve the withdrawal of labour, but the net has been cast wider in recognition, as Chief Judge Goddard put it, 'of the almost infinite capacity for ingenuity that has been exhibited by those engaging in strikes and lockouts'. The difficulty in applying some of the associated provisions in the Act does not appear to amount to impossibility, and in any event only limits the practical availability of those provisions in some cases. It need not be held to restrict the scope of the definition of strike.*
>
> *The context of s.231(1)(b) and the purpose of the whole Act may well justify some reading down. For example we do not consider that a conspiracy among a group of workers to steal from their employer would normally amount to a strike. But the conspiracy alleged here is to break contracts by a media campaign as a weapon in industrial bargaining. Air New Zealand alleges that the purpose was to damage its*

> *trade, business and other interests and to force it to change its stance in award negotiations. Collective breaches of contract to those ends seems to us within the purview of the statute. Mere ventilation in the media of the issues of an industrial dispute may not involve any breach of the duty of fidelity or constitute a strike within the meaning of the Act, but the plaintiffs allegations here go further.*

**Determination**

[13] Clearly the union can not be party to the claims for personal grievances, as the union is not an employee of Bridgeman, and only employees may bring personal grievances, as the name implies. The union therefore has no claim against Bridgeman.

[14] Mr Cranney submits that the employees have claims for personal grievances for discrimination or unjustifiable actions to their disadvantage. He submitted that the employees' criticism of Bridgeman voiced by the union's organiser was a collective breach of their employment agreements to place pressure on Bridgeman and that such a breach constituted a strike. Mr Cranney relies on the protections for lawful strike action against any later discriminatory treatment.

[15] On behalf of Bridgeman, Mr Tayler noted that the statements of concern occurred when the employees were locked out, not the previous week when the workers had been on strike. It was therefore submitted that the decision in question related to comments by the union organiser about the decision to lock out, not the fact that the workers had been on strike. As the lockout was not an activity of the union, but rather the activity of the employer, the requirements of discrimination had not been met. In response, Mr Cranney submitted that the collective breach of the duty of fidelity evidenced by the statement of the union organiser still constituted strike action, even though a lockout was in place.

[16] I conclude that because the bonus was non-contractual and not a general condition of employment, then there can be no personal grievances unless the union members were discriminated in their employment. This is because the bonus was not a condition of their employment but rather, as seems accepted by the parties, a fringe benefit. Clearly, the bonus, as it was entirely discretionary, was a fringe benefit as it was taxable income in the hands of those who received it and it was not contractual in nature.

[17] The sole issue for determination therefore is whether failure to pay the union members was by reason directly or indirectly of their involvement in the activities of a union. Section 107 is exhaustive in setting out the categories of what constitutes involvement in the activities of a union. The only category that could apply is that they had participated in a strike lawfully.

[18] Section 81 defines, for the purposes of this case, that a strike means an act that is the act of a number of employees in breaking their employment agreements due to a combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by the employees - and that to strike means to become a party to a strike.

[19] In this case, the strike alleged by Mr Cranney is in having a common understanding that the union and its members would break their employment agreements by breaching their duty of fidelity by publicly criticising the employer, Bridgeman, for locking them out, which they publicly labelled appalling and bully-boy tactics intimidating them into submission. It is said that the purpose of these comments was to attempt to humiliate Bridgeman into changing its tactics in relation to bargaining for a collective agreement.

[20] I do not accept that the public statements of the union organiser (which were not publicly repeated by any applicant in this case) constituted a strike by the applicant workers. Mr Cranney might have pause to reflect on other potentialities if every comment made by a union organiser (when the union organiser was acting according to her or his duty to support the interests of his members) criticising an employer was held to constitute a strike. If that were the case there would be a multitude of examples whereby union officials criticising employers with the concurrence of union member employees during the currency of a collective agreement would mean that the employees would be held to be unlawfully on strike and subject to significant penalties. In any event, there was no evidence here that the applicant workers had an agreed or implied common understanding with the organiser that he would publicly criticise Bridgeman in the way that he did.

[21] I prefer to analyse matters in this way. The union members went on strike, Bridgeman retaliated the next working day with a lockout, and then the union retaliated back with trenchant public criticism of Bridgeman's decision to lock the workers out. Although I accept that Mr Bridgeman's focus was on the comments about the bully-boy tactics of his company, in terms of discrimination under the Employment Relations Act 2000 it is appropriate to look wider than that, by virtue of the words *by reason …indirectly*. The issues that gave rise to the non-payment of the bonus followed a strike and a lockout in very short order. Because of that, the failure to provide the union members with the bonus was by reason indirectly of their involvement in the activities of the union which involved, amongst other things, them participating lawfully in strike action. If the strike had not occurred, the lockout would not have occurred, the union's public comments would not have occurred and the decision to not award the union members a Christmas bonus would similarly not have occurred.

[22] For an employer to be able to simply point to one part of an ongoing series of industrial negotiations as a reason for lawfully excluding them from a bonus would be wrong in principle, particularly given that the workers in question had participated in a strike lawfully. The case may have been different if the bonus was withdrawn from the union members if the union had simply criticised Bridgeman for its behaviour for some reason not associated (directly or indirectly) with lawful strike action. That was not the case here.

[23] The Act's provisions have, as the Court of Appeal has noted, been deliberately widely drawn so as to protect union members from discriminatory treatment and should be so interpreted, including the words *by reason ... indirectly.* Thus the reason for the failure to pay the bonus was indirectly, albeit not directly, by reason of the applicants' involvement in lawful strike action.

[24] Responsibly, the union has not sought any compensation for humiliation, loss of dignity and/or injury to their feelings as a result of this discrimination. Rather it has simply sought to have the union members paid the bonus that other workers in the same jobs as them received. I accept that they are entitled to be paid the same bonus as other drivers for Bridgeman in Napier/Hastings.

[25] I therefore determine that the applicants named in the attached schedule have been discriminated in their employment and are entitled to be paid a bonus by the respondent, Bridgeman Concrete Limited, in the sum of the average of the bonus paid at Christmas 2006 to other drivers in Napier and Hastings. Leave is reserved to revert to the Authority should the parties be unable to agree on the amount owing.

**Costs**

[26] Costs are reserved.

**G J Wood**
**Member of the Employment Relations Authority**

Schedule

Blumsdon, Allan

Bowman, David

Crawford, Shane

Dawes, Ray

Goldsack, Philip

Maaka, Phil

Mercer, Ken

Meyrich, David

Parkes, Leslie

Peters, Wayne

Ripohau, Hoera

Rowe, Simon

Salmon, Graeme

Watts, Keith