IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 49/08
5110760

BETWEEN	NATIONAL DISTRIBUTION UNION INC Applicants
AND	LANE WALKER RUDKIN MANUFACTURING LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Greg Lloyd, Counsel for Applicants Kerry Smith, Counsel for Respondent
Investigation Meeting:	30 January 2008 at Christchurch
Determination:	30 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Union (the Union) comes to the Authority with a dispute over the interpretation and application of the entitlement to annual leave in a Collective Employment Agreement (CEA) with the respondent employer (Lane Walker Rudkin). In addition, the Union allege that Lane Walker Rudkin has committed breaches of the Employment Relations Act 2000 by not bargaining through the Union.

[2] Lane Walker Rudkin accepts there is a dispute concerning the interpretation and application of the relevant provision but denies that it has breached the statute by bargaining directly or indirectly with members of the Union.

[3] The Union and Lane Walker Rudkin are parties to a collective employment agreement which for the purposes of this dispute expired on 31 August 2007 and was subsequently the subject of a bargaining initiation.

[4] Statutory amendments to the Holidays Act 2003 increasing the statutory minimum annual leave entitlement from three weeks to four weeks came into effect on 1 April 2007.

[5] Clause 4.4 of the expired CEA provides as follows:

> *4.4 Additional Holidays relating to service*
>
> *4.4.1 Annual Holiday – on completing six years continuous service with the company, an additional weeks annual holiday will be granted and paid for on the basis of the weekly ordinary taxable earnings or weekly average taxable earnings, which ever is the greater. This holiday is to be taken during the following twelve months. Employees are entitled to an additional weeks paid holiday as defined above for each subsequent completed years service.*
>
> *4.4.2 This holiday is normally to be taken at a time agreed between the employer and employee. If the time for taking this holiday cannot be fixed by agreement then the employer will give at least one months notice to the employee before leave has to be taken.*

[6] The issue for the Authority is the interpretation of clause 4.4 in the context of the statutory amendment to the Holidays Act 2003 increasing the statutory minimum entitlement for annual leave from three weeks to four weeks.

[7] The Union contends that a proper construction of clause 4.4 is to entitle its members to an additional weeks leave after the completion of six years continuous service **over and above** the statutory minimum of four weeks annual leave.

[8] The effect of the Union's interpretation would thus be to create a situation where any worker covered by the document and having completed six or more years of continuous service would be entitled to not four weeks annual leave but five weeks annual leave, four weeks as a consequence of the statutory minimum in the Holidays Act 2003 and one additional week by virtue of the *service entitlement* contained in clause 4.4.1 of the CEA.

[9] Conversely, Lane Walker Rudkin say that the intention was that its staff covered by the CEA *would not automatically gain an increase in annual leave from four weeks to five weeks merely because of the passage of the Holidays Act 2003 (and/or amendments to the Act).*

[10] The Union also contend that Lane Walker Rudkin's record keeping practices in relation to the issue support the Union's position. This is because the Union say that Lane Walker Rudkin have continued to accrue the additional weeks annual leave.

[11] Lane Walker Rudkin conversely say first that they have corrected any record keeping practices which might have given the wrong impression, second that their record keeping practices are not at issue, and third that whatever its record keeping policies and procedures, Lane Walker Rudkin is entitled to change them.

[12] The parties also dispute the extent to which they have sought to resolve the issue between themselves. Lane Walker Rudkin say that its position has been clear since *at least 2004* that it was not prepared to negotiate a fifth week of annual leave and therefore that the CEA provision in question would need to be addressed.

[13] During the last bargaining round, the parties discussed the issue of the offending provision, but could not reach agreement on any changes to clause 4.4 although plainly there was disagreement about what clause 4.4 meant.

[14] The Union then complained that Lane Walker Rudkin sent a notice to members of the Union on 14 November 2007 in which Lane Walker Rudkin set out material which it considered was appropriate and available for Lane Walker Rudkin to communicate directly to its staff, and which the Union maintained was a breach of Lane Walker Rudkin's good faith obligation pursuant to s.4 and/or a breach of s.32(1)(d)(ii) of the Employment Relations Act 2000.

[15] Section 32(1)(d)(ii) specifically imposes a duty on parties not to bargain except through a credited representative and a failure to behave in that way is a breach of good faith by that party.

[16] Lane Walker Rudkin say that first the contention that they were in fact *bargaining* with their employees is denied, but even if it is found that they were bargaining, the issue has already been dealt with because the Union required Lane Walker Rudkin to remedy its alleged default by the giving of an undertaking that the conduct would not be repeated and that undertaking was forthwith provided.

[17] Accordingly, Lane Walker Rudkin say that it would offend public policy if the Authority made a declaration in relation to this matter because this issue has already been dealt with.

Issues

[18] It is convenient to deal first with the second issue brought to the Authority by the Union, namely the question whether by its behaviour, Lane Walker Rudkin have breached their good faith obligations.

[19] Two matters arise for determination here. The first is whether in fact the notice sent out by Lane Walker Rudkin on 14 November 2007 constituted *bargaining* in terms of s.32(1)(d)(i) and (ii) of the Act or not, and second whether the undertaking provided by Lane Walker Rudkin at the request of the Union after the notice was issued, disposes of the matter in any event.

[20] The second and more significant issue for the Authority to decide is the meaning of clause 4.4 of the CEA in the context of the parties' conduct and the statutory enactment of an additional weeks annual leave with effect from 1 April 2007.

The good faith issue

[21] As I indicated above, the good faith issue can be effectively distilled into two questions, the first whether the notice the Union complains about from Lane Walker Rudkin was in fact *bargaining* and the second whether by giving the Union the undertaking it sought after the notice issued, Lane Walker Rudkin has effectively disposed of the matter permanently.

[22] Because the nature of the notice is in question it is appropriate to set it out in full:

> *To all employees*
> *14 November 2007*
>
> ***Additional Holidays Related to Service***
>
> *For employees with employment agreements entitling them to an additional weeks holiday after six years continuous service, this notice is to advise that the company has of this week ceased accruing this leave as a separate additional entitlement.*
>
> *We have taken this action to ensure such employees are not over-allocated their proper leave entitlement in the lead up to the Christmas/New Year holiday break.*
>
> *The reason for this action is the law change the Government introduced on 1st April this year increasing annual leave to a*

> *minimum of four weeks for all employees. The company has acted to avoid this minimum increase creating an automatic flow on to become five weeks annual leave for those with six years continuous service.*
>
> *Some employees may have been hoping that, based on the wording conflict in their employment agreements, the law change would give them an unforeseen windfall benefit of a fifth weeks additional leave. However, the Courts have insisted a proper approach be adopted where existing wording has been overtaken by events outside the parties control. Any benefits above the minimum legal entitlement must be mutually agreed beforehand and the parties express intention clearly reflected in a written employment agreement.*
>
> *The company's position is very clear: It has not nor will not agree to a fifth weeks annual leave. However, the wording conflict does not reflect this so from 1 April, in the knowledge the law supports its position, the company has continued to accrue the additional weeks holiday in anticipation the conflict would be resolved before the law change took effect. Unfortunately this has not occurred due to the matter becoming a major issue in the wage negotiations currently underway with the National Distribution Union. The parties are soon to enter into mediation in an attempt to resolve this matter so it is not appropriate for the company to go into the details in this notice. Union members concerned about this issue should contact their Union delegate. Other employees should approach their immediate manager if they wish to discuss the matter.*
>
> *In the meantime, the company will re-calculate leave balances where appropriate back to a maximum of four weeks annual holidays per year. Where employees have already utilised more annual leave than a four week allocation, arrangements will be made to grant any forthcoming annual holidays as authorised leave in advance.*
>
> *Signed on behalf of Lane Walker Rudkin Manufacturing Limited*

[23] I am satisfied on the balance of probabilities that the notice just set out above does not concern itself with *bargaining*. I reach this conclusion principally because of the definition of *bargaining* in s.5 of the Act which contains the primary definition of the word as ... *all the interactions between the parties to the bargaining that relate to the bargaining*. I accept Mr Smith's submission on behalf of Lane Walker Rudkin that the only sensible meaning which can be derived from these words is that the prohibition is about any *attempt to negotiate*. I think that encapsulates the sense of the definition in a helpful and practical way and really identifies the nature of the mischief that the statute is seeking to address by the prohibition.

[24] Conversely, Mr Lloyd for the Union sought to interest me in the proposition that in effect any communication between the parties while bargaining was ongoing would breach the statutory prohibition. I have reflected on Mr Lloyd's view but I do

not think that can be the position at all. It must be possible for an employer party to, in some circumstances, convey information to its employees while bargaining is continuing, without having to communicate that material through the Union if the Union is the recognised bargaining representative of the employee. There must be some ability for employers to have some communication with their employees while bargaining is being undertaken.

[25] From that brief analysis then it follows that I am not persuaded that Lane Walker Rudkin have engaged in negotiating with their employees directly, therefore that there is no breach of good faith.

[26] I also accept Mr Smith's submissions on this point that the communication in question was not about the upcoming *new* CEA nor was it about the process of getting to such a new agreement. Further, I accept Mr Smith's submission that the communication contained matters of fact and opinion which Lane Walker Rudkin was entitled to relay. However, I do not think either of those submissions are determinative.

[27] What I think is most significant and most supportive of the conclusion I have reached is Mr Smith's third submission which is that the communication does not contain any offer, counter-offer or proposal in relation to bargaining. That seems to me a statement of fact having carefully studied the communication and it seems to me determinative of the character of the document as being not about negotiating and therefore not bargaining within the terms of the statute.

[28] It follows that my conclusion is that there is no breach of s.32(1)(d)(ii) of the Act or indeed of s.4 of the Act.

[29] However, I must say that I am also persuaded by Mr Smith's argument that, even if there had been a breach of the sections just referred to, the fact that the Union sought from Lane Walker Rudkin an undertaking which Lane Walker Rudkin promptly provided, is itself determinative of the position and ought to preclude the Authority from taking any further steps.

[30] The undertaking sought by the Union was to the effect that the conduct complained of would not be repeated; on general principles an undertaking is a binding promise. The Union can and ought to rely on that promise and in my opinion should not be able to seek further redress from the Authority on the grounds of public

policy, the matters having effectively already been dealt with by the parties themselves.

The meaning of clause 4.4

[31] It is common ground that the leading case on this factual matrix is the decision of the full bench of the Employment Court in *New Zealand Tramways and Public Transport Employees Union Inc and National Distribution Union Inc v. Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd* [2006] 1 ERNZ 1005.

[32] In addition, there are a number of Authority decisions on the point.

[33] The essence of the decision in the *Tramways* case relies on a distinction between an enhancement of a statutory minima and an additional benefit. The Court said that an enhancement applied to one of the four minimum entitlements of leave namely annual leave, statutory leave, sick leave and bereavement leave.

[34] An enhancement, the Court held, was a heightening or intensifying of an entitlement that already existed. It follows that increasing the statutory minimum of three weeks annual leave to four weeks would be an enhancement because it is a heightening or intensifying of that which already exists.

[35] Conversely, an addition the Court held was something that was added to constitute something extra or supplementary. Accordingly, the Court held that the words *additional entitlements* referred to categories of leave other than the four specified above to which enhancements were possible.

[36] At para.[24] of the decision, the Court considered the effect of the purpose section in the Holidays Act 2003 and reached the conclusion that a proper construction of the purpose section provided *the key to the interpretation of s.6 of the 2003 Act which deals with the relationship between the Act and employment agreements.*

[37] It is helpful at this point to set out s.6 in full because it is the relationship between s.6 and the relevant provisions in the CEA that is critical to an understanding of the issue before the Authority.

[38] Section 6 of the Holidays Act 2003 is as follows:

> *6. Relationship between Act and employment agreements*
>
> *(1) Each entitlement provided to an employee by this Act is a minimum entitlement.*
>
> *(2) This Act does not prevent an employer from providing an employee with enhanced or additional entitlements (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.*
>
> *(3) However an employment agreement that excludes, restricts, or reduces an employee's entitlement under this Act –*
>
> *(a) has no effect to the extend that it does so; but*
>
> *(b) is not an illegal contract under the Illegal Contracts Act 1970.*

[39] In order to discern the relationship between s.6(2) of the Holidays Act 2003 and clause 4.4 of the CEA, and applying the reasoning in *Tramways*, the question to be answered is whether the effect of clause 4.4 is to provide an enhancement of the statutory minima or an additional benefit beyond the four *basic* classes of leave specified in s.3 (the purpose section) of the Holidays Act 2003.

[40] If the answer to that question is that the effect of clause 4.4 is to create an additional benefit then an extra week's leave is due for those employees who qualify by reason of service; if conversely the effect of clause 4.4 is only to *enhance annual leave* then no additional weeks leave is due.

[41] Of course, both those propositions must be qualified by the context in which the parties came to reach their conclusion in respect to the provisions in the CEA and it is to that context that the Authority needs to now turn. The starting point must be a consideration of the actual words in the CEA and in that respect, the *Tramways* decision emphasises the need to look at the document as a whole. In particular, it is useful to look at the whole of the section of the CEA that refers to leave and especially at the two separate provisions which refer to annual leave.

[42] Clause 4.2 is the *ordinary* provision for annual leave, simply setting out the statutory minima entitlement. Clause 4.4 on the other hand refers, as we have already seen to the particular provision in dispute but again it is worth noting that clause 4.4 also specifically uses the expression *annual holiday* as the descriptor for the first sub-clause and again in the body of the first sub-clause.

[43] On the face of it then it is difficult to escape the conclusion that the parties intended that clause 4.4 was to be an enhancement of the entitlement to annual leave such that the statutory minima of three weeks (which then applied) would be enhanced by a further week to become four weeks. The essence of the judgment that has to be made, applying *Tramways*, is whether the benefit in dispute simply enhances one of the four core categories of leave (as defined by s.3 of the statute) or whether as the Union allege, the nature of the entitlement created by clause 4.4 is genuinely *additional* by reason of it relating to service.

[44] Indeed, in that regard, I accept the submission of Lane Walker Rudkin that the effect of the Union's position is to effectively assume that the nature of the leave in dispute is in fact service leave when that is the very nature of the inquiry we are concerned with.

[45] I do not derive great assistance from the *bargaining* context. There are however some issues from the factual matrix which are worth recording of which the most significant is my conclusion that no where does there seem to be any bargaining claim made by the Union for *a fifth week* nor is there any concession by Lane Walker Rudkin in that direction or even any acceptance or proposal that the parties had in their contemplation that the default position would be the statutory minima plus a week.

[46] Both parties to the *bargaining* seem to have acknowledged that the wording of clause 4.4 was problematical. I accept that the parties tried to negotiate their way through this difficulty but without success.

[47] My conclusion then is that clause 4.4 properly construed is an enhancement of the basic provision in respect to annual leave contained in clause 4.2 and thus, applying *Tramways*, the entitlement of employees covered by clause 4.4 is a total of four weeks leave, <u>not</u> a total of five weeks, four weeks of which is annual leave and one week of which is effectively service leave. I am satisfied this consequence is the only reading of the CEA that makes sense. I am supported in that conclusion by the clear words in the CEA and particularly the words of both clause 4.2 and 4.4 and by the evidence from the bargaining context, especially the fact that there is no evidence whatever that the *fifth* week was ever even bargained about.

Determination

[48] For reasons which I have already advanced in this determination, I am satisfied that the Union's application must fail on both counts. I am not persuaded that in communicating directly with its employees, Lane Walker Rudkin breached s.4 and s.32(1)(d)(ii) of the Employment Relations Act 2000. Further, in seeking and promptly obtaining an undertaking from Lane Walker Rudkin, the parties have dealt with the issue themselves. Accordingly I decline the relief which the Union seeks.

[49] In relation to the substantive issue, I hold that clause 4.4 of the CEA does not entitle workers with six years continuous service to four weeks annual leave **plus** an additional weeks service related leave for the reasons I have enunciated.

Costs

[50] Costs are reserved.

James Crichton
Member of the Employment Relations Authority