IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

5118072
CA 177/08

	BETWEEN	SERVICE & FOOD WORKERS UNION Applicant
	AND	SANFORD LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Tim Oldfield, Counsel for Applicant Maree Kirk, Counsel for Respondent
Investigation Meeting:	17 October 2008 at Nelson
Determination:	26 November 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (the Union) is a union registered under Part 4 of the Employment Relations Act 2000 and, amongst other things, has membership employed by the respondent (Sanfords) at Sanfords' mussel processing factory in Havelock.

[2] A collective employment agreement covering the period 10 April 2007 to 9 April 2009 (the CEA) provides the terms and conditions of work for the employees employed by Sanfords who are members of the Union.

[3] The CEA replaced an earlier document. Both the earlier collective employment agreement, which covered the period from 2006 through to 2007, and the CEA contained a wage scale in Appendix 1. The scales in the two documents are different.

[4] In the 2006/2007 agreement, there are five levels in the wage scale for hourly rate employees, and six levels for piece rate employees. Conversely, in the CEA,

there are only four levels for hourly rate employees and just five levels for piece rate employees.

[5] Both the predecessor agreement and the CEA contain a mechanism for moving between grades, but the real issue in dispute between the parties is the placement of continuing employees on the new wage matrix in the CEA relative to their placement in the old predecessor document.

[6] The Union alleges that Sanfords is, rather than paying each employee according to their wage rate in the matrix in the CEA, simply applying a 3.25% pay increase to employees across the board.

[7] By way of example, the Union's expectation is that an employee who was at Grade 2 Level 2 on the predecessor agreement, would move to Grade 2 Level 2 in the CEA matrix and receive the rate of pay appropriate to that grade. Instead, the Union says that Sanfords is simply leaving the example employee effectively on the matrix in the old predecessor agreement but applying a percentage increase which the Union says was never agreed for this particular group of employees.

[8] Sanfords says that the Union has overlooked the process of transiting from the wage matrix in the predecessor agreement to the wage matrix in the CEA. Indeed, Sanfords contends that it was never the intention of the negotiating parties to reposition employees in exactly the same grade and level on the CEA to the one that employee had come from in the old agreement because the matrixes are different.

[9] Indeed, it is Sanfords' position that during the negotiations between the parties, Sanfords prepared and made available to the Union three documents variously described as a chart and two tables, the purport of which was to disclose how employees transited from the old matrix in the predecessor agreement to the new matrix in the CEA.

[10] Having discovered the way in which Sanfords was applying the CEA rates, the Union brought its application to the Authority and seeks a determination from the Authority that requires Sanfords to pay its employees in accordance with the Union's interpretation of the meaning of the CEA together with a finding that arrears of wages should also be payable reflecting the Union's interpretation of the CEA.

[11] Sanfords resists the application on the footing that it is in fact correctly applying the CEA. Furthermore, Sanfords alleges, by way of counterclaim, that the Union has breached its duty of good faith and engaged in misleading or deceiving conduct. Sanfords is drawn to that conclusion because it says it was completely unaware of the interpretation the Union was putting on the CEA until after the deal had been done and ratified. What Sanfords say, in effect, is that the Union allowed it to believe there was agreement on the interpretation when there was not, facilitated a conclusion of the bargaining and then brought the present claim seeking an interpretation from the Authority which would never have been agreed to by Sanfords in the negotiations.

[12] I dealt with the counterclaim orally. I confess I was completely unmoved by Sanfords' argument in support of the counterclaim and I said so during the investigation meeting. I am satisfied, on the balance of probabilities, that the confusion which so self-evidently exists, is innocent rather than malevolent and I intend to deal with it on that footing. The counterclaim is accordingly struck out.

The context

[13] As has already been made clear, there was an existing collective agreement in place before the CEA. Negotiations commenced for the CEA in April 2007 and were concluded in August 2007.

[14] Mr Neville Donaldson, the Assistant National Secretary of the Union, gave evidence about the Union's strategy in the lead up to those negotiations. In particular, he indicated that the Union sought parity between the proposed Sanfords CEA and a competitor business of Sanfords where the Union also had members. The Union's strategy was to both increase the rates of remuneration for the employees covered by the CEA and change the structure of the matrix. A claim to that effect was tabled which was designed to bring the Sanfords document into parity with its competitor.

[15] Furthermore, Mr Donaldson indicated that the very bottom rates of pay in the old collective agreement for Sanfords no longer complied with the minimum wage legislation and this was apparently drawn to the attention of Sanfords during the commencement of the negotiations. It is common ground that Sanfords dealt with that issue before the negotiations proper got started by simply increasing the bottom

three grades such that they complied with the law. This meant for employees paid at those bottom three grades, there would be an increase of between 6% and 7%.

[16] The Union's claim for both a percentage increase and a change to the structure of the wage matrix was resisted by Sanfords in the negotiations.

[17] In an effort to meet the Union's claim partway, Sanfords developed a proposal to change the wage matrix and to apply an across the board wage increase. In fact, it is clear that the parties considered a number of options, including a number of options generated by Sanfords.

[18] As part of the negotiations, and to assist in dealing with the situation where there was a different wage matrix applying in the predecessor agreement and in the proposed CEA, Sanfords produced three documents which were designed to illustrate how employees would transit from the old predecessor agreement to the CEA.

[19] It is clear from the evidence before the Authority that those documents generated by Sanfords were never affirmatively agreed to by the Union, but it seems equally clear that they were never affirmatively disagreed with either. The nub of the difficulty between the parties, in the Authority's view, is that, having presented these documents for consideration, Sanfords took the Union's silence as consent whereas the Union took the view that, having not assented to the three documents in question, those documents were not part of the equation.

[20] It is plain that the critical documents were not included in the CEA when it was put up for ratification by the Union and it is equally plain that they are not part of the CEA that has now been ratified.

[21] That leaves the question of how employees were to transit from one matrix in the predecessor agreement to the second matrix in the CEA, when those matrixes are different. Sanfords thought the Union had agreed to its proposal contained in the documents to which I have referred, whereas the Union's expectation was that, having not affirmatively consented to Sanfords' proposal, employees would simply move directly from one matrix to the other.

[22] It is plain there are a number of difficulties with both parties' position, and for the sake of completeness I need to refer briefly to those. First, in relation to the Union's position, the fundamental difficulty with its position, as it seems to me, is that

its understanding of how the document would work seems to ignore the reality that the matrixes are different from the old document to the CEA. If they were exactly the same (that is, the structure of the grades was exactly similar), then there would be no difficulty at all with the Union's argument. Employees would simply remain in the position that they previously were in and the wage increase (if any) would be applied and any movements as between grades would happen in accordance with the terms of the collective agreement.

[23] Conversely, the single difficulty with Sanfords' position is that it has to rely, for its interpretation of matters, on the somewhat doubtful principle that *silence gives consent*. It is not suggested anywhere in the evidence that the Union ever agreed to the Sanfords proposal contained in the three documents, but equally it seems plain from the evidence that the Union never affirmatively distanced itself from those documents either. What is true is that the documents were plainly not part of the agreement which was ratified and nor were they appended to or in any way made part of the CEA after ratification.

[24] It is important to dwell briefly on the ratification process because that also gives some insight into how the parties managed to get themselves into this position. There was a point in the negotiation process where it became clear to the Union that Sanfords had gone as far as it could in moving to try to meet the Union's claims. A number of options had been advanced and in the end Sanfords' evidence is that the Union picked one of the options that Sanfords advanced, persuaded Sanfords to increase the percentage movement by a modest amount, but then reluctantly agreed to allow that proposal to go forward for ratification. A document generating the proposal was prepared by Sanfords and there is email traffic before the Authority which shows the Union writing to Sanfords and seeking to be reassured that the proposal being advanced to the Union for ratification in fact constituted Sanfords' best offer; the response from Sanfords confirms that that is indeed the position.

[25] Sanfords made no effort to include the additional documentation that I have referred to explaining how employees transit from one matrix to the other because it understood it had been agreed to, or at least that is Sanfords' evidence. Of course, had Sanfords included reference to that transition process, that would have alerted the Union to the fact that the parties were not at one. This is because the Union's position is that there was, in fact, no agreement on that transiting process.

[26] The Union's evidence is that, because it was less than impressed with the final result of the negotiations, although it agreed for the offer to be put to the Union members, it declined to recommend settlement on that proposal. Mr Donaldson told me in his evidence that, in those circumstances, he followed his invariable process of inviting the employer to come to meetings of employees who are members of the Union and covered by the document-to-be, and have the employer explain the agreement, or the proposal.

[27] That is in fact precisely what happened in the present case and Mr McDonald, the Branch Manager of Sanfords at Havelock, spoke to a number of meetings and, in effect, advocated the employer's offer. Mr McDonald told me that he was satisfied that the Union members to whom he spoke were *well aware of how the proposal was to work*. He went on to say that he was surprised by the Union's complaints as he had not received complaints personally and he rather left me with the impression that he thought the Union's members understood the deal perfectly well and it was only the Union's negotiating team that were confused about it.

[28] Mr McDonald also told me that the Union negotiators' interpretation of how the agreement was supposed to work was completely unknown to him until a week after the deal was signed.

[29] Lest it be thought the argument is an arid, hypothetical argument, it is important that I add for the sake of completeness the difference between the two interpretations is around 3% on the wage bill. The Sanfords interpretation, leaving aside the bottom three grades of workers who were paid 6% to 7% increase because of being out of step with the new minimum hourly rate legislation, was 3.25% whereas the effect of the Union's proposal, according to Sanfords, was an average of about 6.5%. Sanfords' evidence is that it would never have agreed to that sort of figure in negotiation because it was simply more than the business would stand.

The documents

[30] The first and obviously primary document is the CEA itself. However, in addition to a consideration of the CEA, I also need to consider the additional documentation prepared by Sanfords which it says was designed to explain how employees would transit from one wage matrix to the other.

[31] An examination of the CEA, and a comparison between the CEA and the predecessor document reveals that there is no provision in the CEA which identifies a particular percentage increase of wages and allowances. However, by looking at the matrix in the old agreement and comparing it with the matrix in the CEA, it is clear that the rates have moved upwards but not it seems, by a uniform amount.

[32] Equally clearly, there is no mechanism to allow employees to transit from the old document to the CEA. This of course is precisely the Union's position; they say that workers simply remain on their present grade but get the benefits of the new agreement.

[33] However, there are difficulties with this approach as well, because the CEA is expressed to be an exclusive code, as is common in collective agreements. Clause 1.3 of the CEA makes clear that there can be no reference to or reliance on any other document but, on the face of it, that is precisely what is required by the Union's approach. If employees are to derive their position on the salary structure from the matrix in the old document (which is what the Union is contending), then there has to be reliance on the matrix in the old document in order to place employees in the matrix of the new CEA.

[34] No doubt the Union would contend that because employees simply move seamlessly from one matrix to the new matrix, there is no need to place reliance on that document. But the reality is that some employees can not make that seamless transition in any event because the matrix structure is different.

[35] I am satisfied then that the CEA is silent on the way that employees are to be transited from the old document to the new document. I am further satisfied that there must be a process for that to happen. The Union's argument that employees simply maintain their present position (that is their position from the old matrix) is not a complete and intellectually satisfying solution. This is because there are differences between the two matrixes and there are some employees who would not be accommodated by an application of the Union's approach.

[36] The Union alleges that the provisions in Schedule 2 of the document apply to provide a method of transiting from the old document to the new. I am satisfied they do not. Those schedules relate to the ability of individual employees to move through the grades subject to achievement of appropriate performance and service standards.

It is perfectly clear from a careful analysis of those provisions that there is no intention for those provisions to be used to transfer employees into the document.

[37] That leads us neatly to a consideration of Sanfords' solution to that conundrum. Sanfords says that it was aware of this problem and that is why it put up the three documents (referred to throughout the investigation meeting as documents 1, 2 and 3), which documents were designed to explain how employees would transit from the old collective agreement to the new CEA. Sanfords accepts that the critical document (document 3) was not part of the ratified CEA. Moreover, Sanfords does not contend that the Union ever affirmatively accepted document 3 either. Sanfords relies on the Union having not vociferously objected to the document. As I indicated earlier, Sanfords effectively argue that *silence gives consent*.

[38] That argument is not intellectually satisfying either. The Union is perfectly clear that it did not consent to the inclusion of that document in the collective agreement because it never understood that that was part of the agreement. The Union thought that in refusing to agree to document 3, it was effectively rejecting it, although it seems to be acknowledged that there was never an explicit discussion in which the option traversed in document 3 was decisively rejected.

[39] So we have a situation where the Union thinks that by not consenting to the document it is seen to have rejected it and Sanfords says that in not vociferously objecting to the same document, the Union is deemed to have consented to it. Either way, document 3 is plainly not part of the CEA, nor was it part of the document that went to Union members for ratification.

The ratification process

[40] I have been particularly intrigued by the approach adopted by the parties during the ratification procedure. As I mentioned above, the Union refused to recommend the deal to its members and Mr Donaldson, the Assistant National Secretary of the Union, told me that his then practice in those circumstances was to invite the employer to speak at ratification meetings. Mr McDonald, the Factory Manager, told me that he had spoken to a number of meetings of employees and explained to them plainly what was involved. I was impressed with Mr McDonald's evidence; I thought him a straightforward and honourable witness. He satisfied me that the employees with whom he spoke in these various ratification meetings knew

perfectly well how the document was going to operate, and he was most surprised when he discovered, after ratification, that the Union's negotiating team had a different understanding.

[41] I am left with a uneasy conclusion that the members of the Union who are covered by this document and had the benefit of the guidance from Mr McDonald in the ratification meetings may well have a different understanding of the way the CEA works than their negotiating officials. I think it likely that the Union members who have ratified the agreement, ratified it on the basis of the understanding which Sanfords has about the way the CEA is to work and not on the way that the Union's negotiating team alleged that it worked.

[42] This is obviously a most unsatisfactory situation. However, from the Authority's perspective, there is nothing in the CEA which allows me to reach the conclusion that the Union seeks because I am satisfied that the provisions that the Union relies upon in order to reach its conclusion, do violence to logic and commonsense. Moreover, nothing in the CEA allows me to reach the decision Sanford seeks either.

[43] Looking then at the circumstances in which the agreement was negotiated, there is a clear disjunct between the negotiating parties with each having a quite distinct and different view of the way the negotiations concluded.

[44] For reasons which I have advanced earlier, I am not satisfied that the Union's negotiating team is necessarily at one with its own members. Further, the evidence tends to suggest that the members ratified the agreement on the basis of Sanfords' understanding of how it would work rather than on the basis of the Union's understanding of how it would work.

[45] I have reached this conclusion because the evidence is very clear that it was the employer who spoke to meetings of workers on ratification and not the Union so I think it more rather than less likely that Union members have ratified the agreement on the basis of what they were told by Mr McDonald who of course understood the way things would work on the basis of Sanfords' view of matters.

Determination

[46] I have reluctantly reached the conclusion that I am unable to interpret the CEA to support either Sanfords' position or the Union's position because I consider that the CEA is silent in respect of the meaning which either party seeks to derive from it. However, I think it more rather than less likely that the Union, in ratifying the agreement, ratified it on the understanding advanced by Mr McDonald so that the ratifying members in assenting to the proposed agreement were actually assenting to the Sanfords' view of it.

[47] That being the Authority's conclusion, the Unions application must be rejected.

Costs

[48] In the circumstances of this particular case, I think it proper that costs should lie where they fall.

James Crichton
Member of the Employment Relations Authority