IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 25/08
5086982

	BETWEEN	SERVICE & FOOD WORKERS' UNION Applicant
	AND	DOMINION SALT LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Peter Cranney, Counsel for Applicant Raewyn Gibson, Advocate for Respondent
Investigation Meeting:	26 November 2007 at Blenheim
Determination:	13 March 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Service & Food Workers' Union (the Union), seeks an order of the Authority for rectification of a collective employment agreement, the terms of which it contends have been recorded in error.

[2] The respondent employer, Dominion Salt Limited (Dominion Salt), denies that rectification is appropriate and contends that the collective employment agreement signed by the parties accurately reflects the bargain reached in negotiation.

[3] The Union represents workers employed by Dominion Salt at its premises at Lake Grassmere in Marlborough. Collective employment negotiations for the current collective employment agreement commenced on 29 June 2006 and concluded on 18 August 2006.

[4] The dispute between the parties concerns the provision pertaining to an extra week's annual leave after six years of continuous service and the relationship of that provision to the amendment to the Holidays Act with effect from 1 April 2007, the effect of which was to give all workers an additional week's annual leave, thus taking workers' statutory entitlement to four weeks rather than the previous statutory entitlement of three weeks.

[5] In essence, the Union says that it erroneously signed a record of the settlement of the collective employment negotiations which contained a sentence removing the workers' entitlement to an additional week's annual leave after the appropriate period of service, once the statutory enactment came into force on 1 April 2007.

[6] The Union says that the statutory enactment creates a minimum annual leave entitlement of four weeks but the disputed contractual provision confers an extra week (that is, an extra week on top of the statutory minimum of four weeks) for those workers who have completed six years continuous service. It follows that in respect of those workers, their annual leave entitlement would be four weeks from the statute and a further week as a consequence of the effect of the relevant clause, being a total of five weeks.

[7] Dominion Salt says that the additional sentence was agreed to, that it was designed to remove what, in Dominion Salt's view, is *double-jeopardy* for the final week of annual leave. Dominion Salt says it was never the intention of the negotiating parties to have the maximum annual leave entitlement at five weeks but rather it was always the intention that the maximum be four weeks, however that entitlement was derived.

[8] The Union contends that it would never have willingly given up a hard-won concession of an extra week's leave entitlement on the grounds of six years continuous service and that the wording of the relevant clause, which simply refers to *an extra week's holiday* rather than the total number of weeks of annual holiday that would thus be the entitlement, supports its views.

Issues

[9] It will be helpful first of all to set out the relevant provisions and then to look at the nature of the negotiations between the parties and finally to consider whether it

is appropriate for the Authority to grant the remedy of rectification, or indeed any other remedy.

The relevant provisions

[10] Clause 15.5 of the relevant collective employment agreement contains the following term:

> *15.5 An employee who has completed six years continuous service shall, for the sixth and subsequent years be entitled to an extra week's holiday. Payment for this week should be calculated as if it were annual holiday. However, payment may be made in lieu of the extra week's holiday by agreement between the employer and employee.*

[11] The additional sentence to which I referred previously, which was appended to clause 15.5, reads as follows: *This clause will cease to apply from 1 April 2007.*

[12] It will be apprehended that the meaning of clause 15.5 changes dramatically when the additional sentence just set out is appended to the end of the clause. On the face of it, clause 15.5, without the additional sentence, has as its plain meaning the creation of an additional week's leave for workers who have completed six continuous years of service. That additional week's leave is treated as if it were annual leave. There is no reference in the clause to the annual leave entitlement, either pursuant to statute or pursuant to the collective employment agreement. The clause simply says that the completion of the service qualification entitles the qualifying member of the Union to an additional week of leave.

[13] With the addition of the final sentence, however, the meaning plainly changes such that the clause has no force or effect **at all** after 1 April 2007. Again, this interpretation of the meaning of the additional sentence is derived from a consideration of the plain words of that sentence.

The nature of the negotiations

[14] Ms Tracey McKenzie, an organiser for the Union, gave evidence at the investigation meeting about the nature of the negotiations between the parties as did Mr John Bugler and Mr Roy Seaton, both of whom were at the relevant time managers employed by Dominion Salt and variously responsible for the employment negotiations.

[15] The essence of the Union's position is that the additional week was provided to reward service and that it would not willingly give up that entitlement simply because the statutory minimum changed.

[16] Dominion Salt, for its part, argued that the effect of the statutory change was to maintain the status quo and so if the issue was to be raised at all, Dominion Salt expected that it would be raised by the Union.

[17] Conversely, the Union view was that, for it, the status quo was the service-related provision in the existing document and so if the matter was to be changed, then it would have expected Dominion Salt to raise the issue.

[18] Mr Seaton indicated in his evidence that the company's *status quo* interpretation was based on its desire to achieve a *nil increase in cost* situation in relation to the annual leave provision.

[19] I was impressed with the candour of all the witnesses. It is clear that both parties expected the other to push the annual leave provision and each was surprised that the other did not. Both saw their position as the *status quo*, but each of them had a different meaning for the status quo to which they alluded. For the Union, the status quo was its existing service-based entitlement and for Dominion Salt the status quo was effectively a nil increase in the cost of the provisioning for annual leave.

[20] For Dominion Salt, status quo meant that there would be no increase in annual leave beyond the statutory minimum; for the Union, status quo meant that there was an entitlement to an additional week's leave on top of whatever the statutory minimum was for employees with qualifying service.

[21] The mechanics of the bargaining can be summarised briefly. On 17 May 2006, Dominion Salt sent a draft agreement to the Union. This contained Dominion Salt's proposal in relation to the subject annual leave clause. The Union responded on 1 June 2006 reinserting the original clause 15.5 and making it clear that that was what it had done.

[22] Bargaining was then initiated formally and there was an exchange of claims. Neither party referred to the annual leave issue in its log of claim.

[23] On 29 June 2006, there was a day's bargaining between the parties. The following day, 30 June 2006, Dominion Salt forwarded to the Union the proposed terms of settlement. It is accepted by both parties that that document, forwarded by Dominion Salt to the Union after the negotiations, did not modify clause 15.5 in any way and that it was that document which the Union took to its members and on which it obtained ratification.

[24] On 17 July 2006, after the Union had ratified the agreement without the additional sentence added to the end of clause 15.5, a further copy of the proposed collective employment agreement was generated by Dominion Salt, forwarded to the Union and this further agreement contained the additional sentence at the end of clause 15.5.

[25] The Union protested to Dominion Salt and there were a number of discussions around the point. In particular, the Union relies on a meeting between Ms McKenzie and a delegate, Ms Grey, with Mr Bugler on or about 8 August 2006 at which Mr Bugler is alleged to have said that the company had simply forgotten to put the provision in and in the face of the Union's vehement objection to the provision going in, he allegedly undertook to produce yet another draft of the collective employment agreement without the offending sentence.

[26] It is important to record that Mr Bugler's evidence was that he had no recollection of the specifics of the meeting referred to, although he acknowledges that there were meetings at around that time. Equally importantly, Mr Bugler has no idea how the *corrected* agreement, that is the agreement without the final sentence to clause 15.5, was produced by him and subsequently forwarded to the Union because he made clear that he was not particularly computer literate and only he and Mr Seaton had worked on the matter and Mr Seaton was very clear that he did not produce the *corrected* agreement.

[27] However, the Union did receive a copy of the *corrected* agreement, but ironically, when the document was finally signed, somehow or another the version that was signed was the version containing the offending sentence.

Determination

[28] I am absolutely satisfied that there was never an agreement between the parties for the effect of the original wording of clause 15.5 to be abrogated by the addition of

the extra sentence. No doubt the negotiations between the parties could have been clearer than they had been, but anybody who has been involved in employment negotiations will know that matters of detail are frequently overlooked in the pressure to get matters attended to in a timely way.

[29] There are a number of factors which encourage me to reach the conclusion that I have. The first is that, whoever's fault it was, neither party referred to the issue in their log of claims. When matters were first initiated, Dominion Salt raised the matter and promptly had the issue firmly rejected by the Union so it can have been in no doubt that the Union did not accede to its initial proposal.

[30] By all accounts, the matter having not been raised in either party's log of claims, the issue was not traversed across the table in bargaining on 29 June either. That suggests that the negotiating parties were negotiating on the basis of the status quo, which I hold was the clause in the document, not the quantum of cost of the annual leave provision, as Dominion Salt seeks to have me accept.

[31] That view is reinforced by Mr Seaton's quite proper concession that the Union ratified a draft of the agreement prepared by him which did not include the additional offending sentence. That being the position, there can be no suggestion in my judgment that the parties ever agreed to the bargain with Dominion Salt's additional sentence added to clause 15.5.

[32] It follows, and I now order, that clause 15.5 of the operative collective employment agreement between the parties to this determination is to be rectified by the deletion of the final sentence, such that the amended clause represents the bargain reached between the parties.

[33] Dominion Salt is directed to ensure that, during the term of the present collective employment agreement, no member of the Union covered by the document has suffered any detriment as a consequence of the inadvertent but, in my judgment, erroneous application of the relevant clause up to the date of the implementation of this determination.

[34] I have considered the power of the Authority to grant rectification. I am satisfied that it has that power. Rectification is an equitable remedy specifically preserved by the Contractual Mistakes Act 1977. The Contractual Mistakes Act is one of the enactments referred to in Section 162 of the Employment Relations Act

2000 which confers power on the Authority to make the orders the High Court or the District Court may make in relation to a list of *contractual* statutes, but only, of course, in relation to employment agreements.

[35] Rectification is available where an agreement has not been recorded so as to accurately reflect the intention of the parties. I am satisfied on the balance of probabilities that that is precisely the position here. For whatever reason, the document that was signed did not, in my judgement, represent the bargain between the parties and it is appropriate to rectify the contract so as to exclude the sentence which I hold was never part of the bargain between the parties: *Goodall v Chief Executive Officer of Department of Corrections* [2001] ERNZ 688 considered.

Costs

[36] Costs are reserved.

James Crichton
Member of the Employment Relations Authority