

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 367/08  
5105823

BETWEEN	NEW ZEALAND AMALGAMATED ENGINEERING, PRINTING AND MANUFACTURING UNION INC. Applicant
AND	CARTER HOLT HARVEY LIMITED Respondent

Member of Authority: Vicki Campbell

Representatives: Anne-Marie McInally for Applicant  
Rob Towner for Respondent

Investigation Meeting: 22 September 2008 at Rotorua

Determination: 23 October 2008

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**DETERMINATION OF THE AUTHORITY**

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[1] Carter Holt Harvey (CHH) provided a bus transport service for its employees to travel from Tokoroa to its Kinleith mill and return from the 1960's until it was removed in September 2007. The New Zealand Amalgamated Engineering, Printing and Manufacturing Union (EPMU) claims the decision to cease providing bus transport to and from the Kinleith site is a breach of the employment agreement.

[2] The EPMU say that although the requirement to provide the buses is not written into the collective employment agreement, it was always a contractual requirement that the transport be provided. The EPMU claims the absence of a statement requiring the provision of the transport in the current collective agreement is the result of a mistake which can be rectified by the Authority. The EPMU seeks rectification of the 2005 Collective Employment Agreement.

[3] The issue for the Authority is whether rectification should be ordered in the terms sought by the EPMU.

**Should the collective agreement be rectified in the terms sought by the EPMU?**

[4] The applicable 1985 Award expressly required CHH to provide transport for four or more employees, or, at CHH's discretion, it could elect to pay a transport allowance for travel to and from work. Employees working within 30 kilometres of Kinleith were not eligible to be paid the allowance.

[5] In 1992 the first collective employment contract was negotiated. The wording in the 1992 document altered the previous emphasis of providing transport with the discretion by CHH to negate that obligation by the payment of an allowance, to putting an emphasis on the payment of an allowance, with a corresponding discretion by CHH to negate that obligation by providing transport.

[6] That change made the payment of an allowance the priority, which could only be negated by the provision of transport. The wording of this clause was retained in subsequent collective employment contracts and agreements until it was removed during collective negotiations between 2001 and 2003.

*2003 negotiations*

[7] From 2001 until 2003 CHH embarked on a significant operational restructuring process including the outsourcing of Kinleith's maintenance operations. The period was fraught with difficulties for both the employees and CHH. At the same time CHH was engaged in collective employment negotiations with the EPMU. As tensions mounted during the negotiations, strike action was taken by the union employees and that action lasted for 90 days.

[8] The negotiations eventually resulted in a new concluded collective agreement. One significant change of that concluded agreement was a move from the payment of wages and allowances to an all inclusive annual salary. Notes provided to the Authority from the negotiations, record the offer of a percentage adjustment to be made to salaries, and included recognition of the deletion of the Transport clause from the collective agreement.

[9] While that agreement in 2003 removed the obligation on CHH to pay a transport allowance the terms of settlement from those negotiations record the intention of CHH and the union to discuss the configuration of the bus service appropriate to the new shift arrangements. The EPMU points to these terms of settlement to support its argument that the agreement to remove the transport allowance did not mean the union also agreed to the removal of the buses sometime later.

[10] Mr Ian White, Kinleith's Operations Manager, and someone who has been involved in collective negotiations since 1995 says that CHH continued to provide the bus service after the transport allowance provision had been removed from the 2003 collective agreement because the company did not want to deal with any possible fall-out from a decision to remove the buses at that particular time. Mr White maintains that following the agreement to remove the transport clause the provision of buses was entirely discretionary on the part of CHH.

#### *2005 Collective Agreement*

[11] During the 2005 negotiations, the topic of bus transport was discussed but was not a formal claim by either party. CHH advised the EPMU that it was looking to remove the buses, however, there was strong resistance from the EPMU and the topic was not pursued any further. The executed 2005 collective agreement is based on the 2003 agreement and, as with that document, does not contain a Transport clause.

#### *Removal of the buses*

[12] By early 2007 approximately 30 employees out of approximately 400 were utilising the bus service at a cost of approximately \$220,000 per annum. As a result of the poor usage, in February 2007 CHH embarked on a consultation process with its employees and the EPMU with a view to ending the bus service. Employees were provided with an opportunity to provide feedback with regard to any impact if the bus service was discontinued or alternatives for CHH to consider. Eighteen employee responses were received which included a number of proposals for alternatives. CHH also met with EPMU representatives to discuss the removal of the service.

[13] After consideration of the proposals provided by its employees and taking into account concerns raised by the EPMU, CHH announced its decision on 6 June 2007 to

cease the bus services with effect from 10 September 2007. At a meeting between CHH and the EPMU on 20 June it was agreed that the EPMU would get back to CHH regarding the removal of the buses.

[14] Two months later, on 20 August 2007 the EPMU raised a dispute over the removal of the buses. By that time CHH had taken steps to discontinue the contract with the bus company and consequently the buses ceased with effect from 9 September 2007.

[15] Rectification is a rarely used discretionary equitable remedy available to correct a written document to accord with the common intentions of the parties. In *NZ Engineering Union v Babcock NZ* [1997] ERNZ 82 at page 94, the Employment Court held that before rectification can be ordered there needs to be a concluded agreement and a common intention must be clearly established by convincing proof. The Court stated that the evidence must establish clearly and unambiguously:

- That a mistake had been made;
- That the instrument does not represent the parties' common intention;
- What the common intention was; and
- That common intention was present in the minds of the parties when the instrument was executed.

*Has a mistake been made?*

[16] The EPMU says the mistake is in not recording the obligation to continue providing buses to employees for travel to and from Kinleith in the 2003 and 2005 collective agreement. The EPMU says the words in the 2003 terms of settlement, which requires the parties to discuss the configuration of the bus service appropriate to the new shift arrangements, is indicative of the intention of both parties that the buses were to continue as a contractual obligation in the concluded agreement.

[17] CHH says there was no mistake and that the provision of an allowance and a discretion to provide buses instead were so inextricably linked that when the allowance was absorbed into the annual salaries as agreed in 2003, and the contractual entitlement deleted, the obligation to provide buses was also absorbed. In other

words, by taking away the obligation to pay the allowance, there was no longer an obligation to provide buses.

*What was the common intention?*

[18] EPMU says it was the common intention of the parties at the negotiations that even though the allowance was absorbed into the annual salaries, CHH would still be bound to provide buses. In support of its argument the Union points to the whiteboard notes from the meeting at which the buses were discussed during the negotiations and where CHH undertook to review the bus timetables to meet the new shift systems.

[19] In response CHH says it had no intention to continue to provide the buses and also referred me to the whiteboard notes which state “no buses” as evidence that the EPMU were fully aware that once the transport allowance had been absorbed into the annual salaries, the buses would be stopped.

[20] I am not satisfied the parties reached a common intention that the 2003 collective agreement was to include a contractual provision for CHH to provide an ongoing bus service. The power point presentation used to outline the settlement terms to employees included a power point slide which states:

**Transport**

- No remuneration for travel to work
- Company and Union to discuss bus service appropriate to usage

[21] Also, in the early stages of the negotiations (in 2002), in an email from Mr Paul Mackay of CHH, Mr Mackay relates a conversation he had had with Mr Mike Sweeny, EPMU Organiser and Mr Graham Holmes EPMU delegate. Mr Mackay records that Mr Sweeny and Mr Holmes told him they could possibly persuade the other delegates to make significant movement on the issues tabled by the company. Mr Mackay records that this included getting rid of the buses and running the Mill over Christmas.

[22] The EPMU believed there was to be an ongoing bus service following the agreed removal of the Transport clause from the 2003 collective agreement. In contrast with that CHH believed that the provision of the bus service was now a

discretionary and its continuation would be considered in light of its usage, therefore it was never a contractual provision which required negotiation and agreement.

[23] I find there was no common intention that CHH would be contractually obligated to continue to provide an ongoing bus service.

*Was this common intention present in the minds of the parties when the instrument was executed*

[24] As set out above neither CHH nor EPMU had a common intention with regard to the provision of buses at the time the 2003 collective agreement was executed. EPMU believed the buses would be altered to meet the differing shift patterns, while CHH believed it would eventually be removing the buses as a result of the removal of the Transport clause from the agreement.

*Does the instrument represent the parties' common intention?*

[25] As already set out, I am satisfied the concluded 2003 and 2005 collective agreements accurately record the intentions of the parties and the agreements reached during the collective negotiations.

*Other factors relevant to rectification*

[26] As set out in the submissions for the respondent, the presence of an entire agreement clause will militate against rectification (see *Snamprogetti Ltd v Phillips Petroleum Co UK Ltd* [2001] EWCA Civ 889. The 2003 and 2005 collective agreements each contained “completeness” clauses. This demonstrates that the parties, who were both represented by very experienced negotiators, have agreed to be bound to the executed document to the exclusion of any preceding contract or related document.

## **Conclusion**

[27] The burden of proof in this matter is with the EPMU. I am not satisfied that it has established its claim to rectify the 2005 agreement. As stated earlier in this determination there was no common intention that the provision of transport be included as a term of the 2003 or subsequent 2005 collective agreements between the parties. The application for rectification is declined.

**Costs**

[28] Costs are reserved. Given the nature of the application and the importance of it to both parties I am of a mind to let costs lie where they fall. However, I encourage the parties to attempt to resolve the issue of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell  
Member of Employment Relations Authority