

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA113/08
5092515

BETWEEN

DAVE BOYES
Applicant

AND

COCKRAM MOTORS
(CHCH) LIMITED trading as
COCKRAM NISSAM
Respondent

Member of Authority: Paul Montgomery

Representatives: Phil Yarrell, Advocate for Applicant
John Smith, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 11 June 2008

Determination: 5 August 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a matter involving a dispute over the interpretation of an Employment Agreement.

[2] The applicant claims to have been underpaid:

- From 19 November 2004 to 19 November 2005 - 43 weeks @ \$0.18 per hour;
- From 20 November 2005 to 19 November 2006 – 52 weeks @ \$0.35 per hour;
- From 20 November 2006 to current date - 89 weeks @ \$0.85 per hour.

[3] The applicant seeks a declaration that he is entitled, under various sequential Employment Agreements, to the sums claimed.

[4] The respondent's view is that no entitlements as claimed are payable to Mr Boyes and asks the Authority to dismiss the application.

Background

[5] The applicant commenced employment with the respondent on 19 November 2001. His terms and conditions were enshrined in an individual employment agreement which set his hourly rate at \$14 per hour.

[6] On 1 March 2004, the Manufacturing and Construction Workers Union (the Union) and the respondent settled a Collective Employment Agreement (First CEA). The minimum rate payable to Mr Boyes and set out in the First CEA was \$15.65 per hour. The applicant, however, negotiated a more favourable rate with the respondent of \$16.50 per hour.

[7] The respondent's view is that having been on an individual employment agreement up until he subscribed to the First CEA and as the applicant had not had a pay rise since 1 April 2002, the agreed variation was put in place. The respondent says the Additional Term was confidential to it and Mr Boyes.

[8] On 19 November 2004 the minimum rate applicable to Mr Boyes' experience rating increased to \$15.83 per hour. The respondent says that Additional Term was not renegotiated and thus the applicant remained on \$16.50 per hour.

[9] The First CEA expired on 28 February 2005 and on 1 March 2005 the Union and respondent settled a new CEA (the Second CEA) to which the applicant subscribed.

[10] Under the terms of the second CEA it was agreed between the Union and respondent that those being paid above the existing minimum would have their rates increased by 6% - that is from \$16.50 to \$17.50 per hour (the New Additional Term).

[11] On 19 November 2005 the minimum rate applicable to Mr Boyes' experience increased from \$16.83 per hour to \$17 per hour. The respondent says that as there was no renegotiation of the New Additional Term, Mr Boyes continued to be paid at \$17.50 per hour.

[12] On 19 November 2006 the minimum rate applicable to Mr Boyes' experience rating increased from \$17 to \$17.50 per hour. Again, the respondent says there was

no renegotiation of the New Additional Term and Mr Boyes continued to be paid at \$17.50 per hour.

[13] On 1 March 2007 the Third CEA was negotiated between the Union and the respondent and again Mr Boyes subscribed to it. This CEA set the applicable rate for the applicant's experience at \$19.50 per hour and the applicant was paid this rate during the currency of the Third CEA as no separate Additional Term was negotiated between the parties.

[14] On behalf of the respondent, Mr Smith submits that Mr Boyes' claim that he was operating under an individual employment agreement and that he was entitled to the incremental gross increases in the minimal rate set out in the various CEAs is unsustainable.

[15] For the applicant, Mr Yarrell contends that Mr Boyes and the respondent, having agreed to a variation in the applicant's rate during the currency of the First CEA, that rate being \$0.85 per hour above the minimum rate applicable to Mr Boyes, that this favourable margin was to be sustained during the course of his employment.

[16] While not going as far as submitting that this margin was an IEA, he is clearly of the view that his member right to this margin was intended to continue for the period of Mr Boyes' employment with the respondent.

Discussion and analysis

[17] At issue is not the consistency of the Additional Term with the First CEA, but rather the purpose of the higher rate agreed between Mr Boyes and the respondent at the time it was agreed. The second issue is whether the Additional Term is required to be renegotiated at the time that the CEA is renegotiated.

[18] It is clear from Mr Smith's submissions and from the evidence of Ms Logan, the Operations Manager, that the reason for the Additional Term being negotiated was that the applicant had not received an increase in rate since 1 April 2002. Mr Boyes joined the Union in June 2003 and the Union initiated bargaining in or about September 2003. Ms Logan says the CEA set the minimum rate for Mr Boyes' experience at \$15.65 per hour. She says that on realising the applicant had fallen behind, the respondent decided on *a pay rise to \$16.5 an hour effective from 31*

March 2004. The variation (or Additional Term) was recorded in Appendix 1 attached to the CEA and that Appendix is signed by Mr Boyes.

[19] The evidence of Ms Logan, Mr May, the Service Manager, and Mr Hazeldean, the Dealership Principal, all of whom were party to the CEA negotiations in 2004, 2005 and 2007, is consistent and unequivocal. That is that the variation (Additional Term) was to address a shortfall in Mr Boyes' rate at the time. Mr Hazeldean is quite emphatic on the issue of whether the so-called *premium* was to continue.

I do not recall any discussions about special pay rates for the applicant or any other employee. In particular, there was no discussion in 2005 or 2007 for carrying over any premium rate paid to the applicant over the printed minimum rates.

[20] It is somewhat trite to observe that a variation to a CEA forms part of that negotiated document and upon the expiry of the main document, the variation expires also unless renegotiated. The evidence in this case is clear that no renegotiation took place in relation to the variation (Additional Term) pertaining to Mr Boyes.

The determination

- I find the variation in favour of Mr Boyes at the ratification of the First CEA was to compensate him for his rate having fallen behind that of other employees.
- I find that as a variation to the First CEA, the Additional Term had the currency of the parent document and required re-negotiation if it was to form part of the second and subsequent CEAs.

[21] The application is dismissed.

Costs

[22] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority