

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 297/09
5276327**

BETWEEN DOWNER EDI ENGINEERING
 LIMITED
 Applicant

AND NEW ZEALAND AMALGAMATED
 ENGINEERING, PRINTING AND
 MANUFACTURING UNION
 INCORPORATED
 Respondent

Member of Authority: Leon Robinson

Representatives: Don McKinnon, Counsel for Applicant
 Greg Lloyd, Counsel for Respondent

Investigation Meeting: 21 August 2009

Determination: 24 August 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] These parties are in dispute about two provisions in their collective but principally this one:-

1.5 The parties agree that in the event that an employee previously employed on an individual employment agreement comes within the coverage of this agreement by becoming a member of the union party to this agreement, the provisions of any individual employment agreement shall cease to apply except as otherwise specifically agreed in writing with regards to remuneration, the intention being to not reduce the employee's total remuneration package.

[2] The live issue concerns the redundancy entitlements of a group of about 13-15 employees who were employed by the applicant Downer EDI Engineering Limited ("Downer")¹ before 1 July 2008² and subsequently became members of the respondent union the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Incorporated ("the Union") after the commencement of a

¹ I amend the intituling of the proceeding to correctly identify the applicant.

² The commencement of the collective.

collective employment agreement. I shall refer to such employees as "the Affected Employees".

[3] Downer says that the Affected Employees' redundancy entitlements are determined exclusively by the collective employment agreement and not those under prior individual employment agreements, meaning that the level of redundancy compensation payable is four weeks base salary³.

[4] Downer asks the Authority for this resolution:-

A determination that the effect of clause 1.5 for the Affected Employees is that each of these employees should receive notice and redundancy compensation consistent with the terms of the collective agreement and that any redundancy entitlements set out in any individual employment agreements which they may have previously entered into with Downer, have no application.

[5] By a joint memorandum of counsel signed on 11 August 2009, the parties sought urgency which was granted by the Authority. In the circumstances, I did not consider mediation would contribute constructively to the resolution of the problem between the parties.

[6] Union organiser Mr Kelvin Ellis and Mr Simon Cowles Transition Lead - People for Downer, give evidence to the Authority.

The facts

[7] Downer is a limited liability company incorporated on 13 December 1991. It is a provider of engineering and telecommunication services to large commercial clients. It employs approximately 1820 employees. About 400 of those employees are members of the Union.

[8] The Union is registered under Part 4 of the *Employment Relations Act 2000* ("the Act").

[9] Downer and the Union are parties to a now expired collective employment agreement known as the *Downer EDI Engineering Limited Collective Agreement* ("the collective").

³ In accordance with clause 22.7.

[10] The collective contains clause 1.5 above and these:-

1.4 This agreement supersedes any other agreement, either express or implied, for the employment of the employees whose terms and conditions of employment will now be covered under this agreement with effect from 1 July 2008 and any such agreements for those employees are cancelled as at the coming into force of this agreement, provided that coverage under this collective agreement for those employees does not reduce their current terms and conditions of employment not addressed in this collective agreement or superior to this collective agreement; and further provided that accrued annual leave, accrued long service leave and accrued sick leave shall remain as entitlements for employees who have qualified for such leave; and the employer shall recognise previous service with the employer in so far as it is consistent with the definition of current continuous services.

22.7⁴ Full-time or part-time employees whose employment is terminated, as the result of a staff surplus situation, shall receive not less than four weeks' notice or in lieu of such notice shall receive up to four weeks' base remuneration, as appropriate. In the event of severance, and subject to Clauses 21.8, 21.9 and 2.1.10 below, compensation shall be calculated on the basis of four weeks' base salary. Part-time employees receive a pro-rata calculation.

26. Term

26.1 This agreement shall come into force on 1 July 2008 and shall continue in force until 30 June 2009.

[11] Downer entered into a field service contract with Chorus, Telecom New Zealand Limited's network access business, to supply field technicians servicing Chorus's customers throughout New Zealand.

[12] This year Chorus has introduced a third contractor and the result is that Downer will cease providing service to Chorus in the Auckland and Northland regions on or about 30 September 2009. Downer says that consequently about 700 of its employees will be made redundant. Of those potential 700, 240 employees are members of the Union employed under the collective.

[13] Downer has been involved in a lengthy consultation process with its employees and the Union. Most redeployment options have been exhausted but the process is not yet complete for all staff.

[14] Downer has advised the Union that the first redundancies will commence on or around 24 August 2009 and will continue over a period up to 30 September 2009.

⁴ This is an error and should be clause 21.7

[15] Downer's employees understandably wish to be advised of their potential redundancy entitlements.

[16] Downer has advised the Union that the Affected Employees' redundancy entitlements specified in their previous individual employment agreements have no application. Downer says there are a number of other employees whose roles are not affected by the current restructure but to whom its interpretation of clause 1.5 applies.

The merits

[17] The Union disputes Downer's position. It says that the Affected Employees' redundancy entitlements, as set out in individual employment agreements entered into prior to the collective, continue to apply in full force and effect.

Principles of interpretation

[18] I determine the more meritorious position by applying certain legal principles which the courts have adopted as instructive.

[19] It has long been the case that evidence of pre-contractual negotiations are excluded⁵. The New Zealand courts have applied principles referred to in some judgments as *Boat Park* principles⁶ which are themselves adopted from another English judgment. These are helpful statements of the principles:-

Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

and:-

The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.

⁵ Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381.

⁶ *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA), adopting Lord Hoffman's formulation in *Investors Compensation Scheme Ltd v West Bromwich* [1998] 1 All ER 97 at 114-115

[20] The starting point must be the words used in the context of the agreement as a whole⁷. The full Employment Court in *NZ Tramways Public Transport Employees Union Inc & Others v Transportation Auckland Corporation Ltd & City Line (NZ) Ltd*⁸ confirmed that where the wording in a contract is clear and unambiguous, it is to be construed according to its ordinary meaning⁹:

The starting-point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of the entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectively, the aim of the transaction.

[21] The Employment Court in *Hansells (NZ) Ltd v MA*¹⁰, referred to a Privy Council decision in *Yoshimoto v Canterbury Golf International Ltd*¹¹ which affirmed Lord Wilberforce's authoritative statement in *Prenn*¹². The Employment Court had no regard for pre-contractual negotiations in considering the meaning of a clause of a collective employment agreement.

[22] It is my view that the wording of clauses 1.4 and 1.5 are clear and unambiguous, and they are to be construed according to their ordinary meaning. I therefore decline to enquire into pre-contractual negotiations or the subjective intentions of the parties.

[23] I accept that both clauses 1.4 and 1.5 are savings clauses. But I find that their plain ordinary meaning is that they save different things.

[24] Mr Ellis says clause 1.4 applies to all members of the Union irrespective of whether they were members at the commencement of the Collective or subsequent to commencement. He says there is nothing in the wording of the clause which makes such a distinction. Consequently, he says that the Affected Employees' superior redundancy compensation entitlements are preserved by clause 1.4.

⁷ *ASTE v Chief Executive BOP Polytechnic* [2002] 1 ERNZ 491 (EC).

⁸ [2006] 1 ERNZ 1005.

⁹ See also *Melanesian Mission Trust Board v AMP Soc* [1977] 1 NZLR 391, at pp 394-395 and *Lowe Walker Paeroa Ltd v Bennett* [2006] 1 ERNZ 361(CA).

¹⁰ unreported, Employment Court, Auckland, ARC21/07, 14 September 2007, Travis J

¹¹ [2004] 1 NZLR 1 (PC).

¹² At note 5

[25] I am unable to agree with Mr Ellis and I say the wording of the clause expressly makes such a distinction and secondly, because his interpretation would render clause 1.5 "superfluous" and that cannot be so.

[26] I find that clause 1.4 saves "*terms and conditions of employment*" for the class of employees who were employed at 1 July 2008 and were members of the Union. This distinct group is expressed by the ordinary words "*for ... the employees whose terms and conditions of employment will **now** be covered under this agreement with effect from 1 July 2008*". The emphasis is mine and underscores the distinct identification of this particular class. "Now" means those immediately employed at the time the collective commenced. The express inclusion of the date 1 July 2008 is deliberate and puts the matter beyond doubt. The effect of this clause is to preserve for those employees both employed and members of the Union immediately before the commencement of the collective, superior or other terms of employment to those in the collective.

[27] I find that clause 1.5 saves "total remuneration package(s)" for the class of employees **previously employed** on individual employment agreement(s) and who subsequently are covered by the collective by virtue of the fact that they **become** members of the Union, after the commencement of the collective. Again, the emphasis is mine and underscores the distinct identification of this particular class. This class of employees will have their "remuneration" saved where Downer agrees in writing for the same. The effect of this clause is to preserve for those employees employed immediately before the commencement of the collective and who become members of the Union after the commencement of the collective, their existing remuneration when Downer agrees in writing to the same.

[28] I find that the Affected Employees are the class contemplated by clause 1.5 and only clause 1.5 and not clause 1.4.

[29] I find that Downer, when it is aware that an employee previously employed on an individual employment agreement, becomes a member of the Union, writes to that employee and advises:-

In accordance with Clause 1.5 of the Collective Agreement we confirm that your current salary under your previous Individual Employment Agreement will remain unchanged under the Collective Agreement

[30] I immediately note that what is confirmed is salary. But clause 1.5 refers to an agreement to save "remuneration" which comprises more than base salary. The advice I find, effectively constitutes the written "agreement" contemplated by clause 1.5 and this I further find is what Downer purports to do.

[31] But I find that "remuneration" does not include redundancy compensation. I accept the submission that remuneration is reward or pay rendered for work or service delivered. I accept it is consideration for work that is performed. That is distinct from redundancy compensation which I consider is a contractual gratuity payable on the loss of employment. If I am correct in that view, then redundancy compensation is not remuneration which is capable of being saved by clause 1.5.

Prohibition on preference

[32] The Union argues that the interpretation contended by Downer of clauses 1.4 and 1.5 have the effect of conferring on employees certain preferences in relation to terms and conditions of employment because they are not members of the union. It is submitted such a position is a preference prohibited by section 9 of the Act which is as follows:-

9 Prohibition on preference

(1) *A contract, agreement, or other arrangement between persons must not confer on a person, because the person is or is not a member of a union or a particular union,—*

(a) *any preference in obtaining or retaining employment; or*

(b) *any preference in relation to terms or conditions of employment (including conditions relating to redundancy) or fringe benefits or opportunities for training, promotion, or transfer.*

(2) *Subsection (1) is not breached simply because an employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer.*

(3) *To avoid doubt, this Act does not prevent a collective agreement containing a term or condition that is intended to recognise the benefits—*

(a) *of a collective agreement:*

(b) *arising out of the relationship on which a collective agreement is based.*

[33] I do not accept that there is any advantage or priority provided to any class of Downer's employees under clauses 1.4 and 1.5 because they are or are not union members.

[34] I compare the positions of the Affected Employees with the other class, those employee members at the time of commencement. I find that the employee members at the time of commencement retain superior redundancy entitlements as a benefit arising out of the entering into the collective. That I accept is the underlying premise of clause 1.4. It has nothing to do with whether or not the two classes are members or not, of the Union. But of course they both are. The distinction arises out of the fact of when the employees joined the Union and became covered by the collective, and not the mere fact that they are Union members. Accordingly, I find there is no breach of section 9 of the Act.

The determination

[35] For the reasons I have outlined above, I now determine that:-

The effect of clause 1.5 for the Affected Employees is that each of these employees should receive notice and redundancy compensation consistent with the terms of the collective agreement and that any redundancy entitlements set out in any individual employment agreements which they may have previously entered into with Downer, have no application.

The costs

[36] There will be no order for costs.

Leon Robinson
Member of Employment Relations Authority