

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

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BETWEEN CHRISTCHURCH
 POLYTECHNIC INSTITUTE
 OF TECHNOLOGY
 Applicant

AND ACADEMIC STAFF IN
 TERTIARY EDUCATION
 Respondent

Member of Authority: James Crichton

Representatives: Sherridan Cook, Counsel for Applicant
 Peter Cranney, Counsel for Respondent

Investigation Meeting: 15 December 2008 at Christchurch

Determination: 9 March 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (CPIT) wishes the Authority to resolve a dispute between itself and the respondent Union (ASTE) over the interpretation and application of a particular leave provision in the collective employment agreement (the agreement) between the parties.

[2] The relevant clause is in the following terms:

6.5.7 Leave for approved statutory authorities.

The employer will grant leave on full pay to an employee who is required to attend as a member of, or in a formal capacity at, any of the following statutory authorities with the proviso that any fees due to the employee from the authority will be paid to the institute:

- (a) A Polytechnic Council.*
- (b) A College of Education Council.*
- (c) A University Council.*

- (d) *The New Zealand Qualifications Authority.*
- (e) *Disputes and grievance committees established under Part 12 of this collective agreement or any other bodies replacing them in function.*
- (f) *Hearings of the Employment Court or any body established to replace the Employment Court.*
- (g) *New Zealand Polytechnic Programmes Committee.*

The period with pay is for the time necessary to travel to, to attend and return from the meeting.

[3] In short, CPIT initially refused to pay (pursuant to that clause) employees who attended at a hearing of the Employment Relations Authority.

[4] While the particular circumstances of that refusal are no longer in issue between the parties, part of the resolution of that issue was an agreement that the issue be referred to the Authority for decision.

[5] CPIT says that the correct interpretation of this clause is that there is no *statutory authority* now existing (since neither disputes nor grievance committees still exist and therefore cannot be replaced), and the clause specifically refers to an employee being *required* to attend the statutory authority because of membership of that authority or because of a proper legal summons to attend.

[6] ASTE, on the other hand, contends that all full time employees who participate in either mediation or Authority hearings are participating in problem solving processes relating to the employment relationship and are, therefore, covered by the plain words of the clause.

[7] The investigation meeting that I convened effectively dealt only with the parties' submissions. There was no evidence taken because the parties agreed that the issue was exclusively one of interpretation and they had helpfully prepared an agreed statement of facts which had been filed as part of the proceeding.

Issues

[8] It follows that the primary focus of the determination must be on the words of the clause and the meaning to be derived from them.

[9] However, two other matters are relevant. The first is the historical context and the development of the particular clause over time, and the second is reference to the relevant law.

[10] Accordingly, the issues that this determination will consider are as follows:

- The historical context;
- The meaning of the relevant clause;
- The applicable law.

The historical context

[11] In the papers filed in the Authority, counsel for the two parties prepared an agreed statement of facts which, amongst other things, sets out a helpful chronology.

[12] The genesis of the present clause is to be found in the New Zealand Technical Institute Tutors' Award dated 10 July 1989 (*the 1989 award*). A similar provision to the current provision deals with a range of institutions which would have been familiar to the then parties in the late 1980s. In the main, the *approved statutory authorities* listed in the 1989 award are no longer extant. Furthermore, the legislation which underpinned the provisions of the 1989 award has long since been amended. In particular, the principal legislative enactment governing the terms and conditions of employment law for the purposes of the 1989 award was the Labour Relations Act 1987. Further, the Education Act which applied for the purposes of the 1989 award was the Education Act 1964.

[13] While there is an extensive provision in the 1989 award dealing with the requirements of the Labour Relations Act 1987 for the resolution of disputes of right and personal grievances through disputes committees and grievance committees, there is no reference in the 1989 award to paid leave for attending meetings of those committees. In that sense then, there is no provision like the one contained in the present agreement at clause 6.5.7(e).

[14] That omission was addressed in the 1991 award with a provision in substantially similar terms to clause 6.5.7(e) of the present agreement. The 1991 award also made the same provision for disputes committees and grievance committees as was found in the 1989 award, but the passage into law of the Employment Contracts Act 1991, a matter of days after the 1991 award came into effect, meant that those provisions were effectively otiose. Pursuant to s.176(1) of the Employment Contracts Act 1991, the 1991 award became *a collective employment*

contract which was deemed to incorporate the procedures set out in Schedules 1 and 2 of the 1991 Act for the resolution of personal grievances and disputes.

[15] In the 1993 collective employment contract, the relevant clause was subjected to very minor amendment, but critically for our purposes, the analogous provision to clause 6.5.7(e) of the present agreement remained substantially unchanged. That position broadly was repeated again in the 1996 collective employment contract and again for the 1999 collective employment contract.

[16] On 2 October 2000, the Employment Relations Act 2000 came into force. One of its consequences was to remove the distinction between disputes and personal grievances. A broad definition creating *employment relationship problems* was introduced.

[17] In the 2001 collective employment agreement, what had now become clause 6.5.7 was simply repeated without change from the 1999 collective employment contract. However, other changes were incorporated in the 2001 collective employment agreement to take account of the change in the legislative framework by the passage into law of the Employment Relations Act 2000.

[18] In fact, those two sets of provisions (namely clause 6.5.7 and the detailed provisions relating to the resolution of employment relationship problems) which first appeared in the 2001 collective employment agreement, were simply replicated in the 2003 collective employment agreement, the 2005 collective employment agreement, the 2007 collective employment agreement, and the 2008 collective employment agreement.

[19] It seems self-evident from an analysis of this summary of the historical context that the parties have only partly addressed the changes in relevant statute law in their negotiations. Clearly, the fundamental changes to the decision-making structure under which “employment relationship problems” are resolved, has been picked up and incorporated appropriately in the successive collective employment agreements.

[20] Furthermore, there have been relevant changes in the clause now numbered 6.5.7 concerning the nature of what is covered by the label *approved statutory authorities* save for the particular subclause that concerns us here.

[21] In effect, subclause (e) of clause 6.5.7 continues to refer to bodies which no longer exist, but more particularly refers to a regime for dealing with employment relationship problems which is no longer sanctioned by the current process for resolving those problems.

[22] In other words, while it is clear that disputes and grievance committees are no longer in existence, the more difficult question is whether it can be said that there are, in truth, *any other bodies replacing them in function*. By virtue of the fact that the system of problem resolution had changed so significantly, there is a real sense in which there is no body or bodies replacing those particular organs.

[23] A further difficulty which will need to be examined is the question of whether any of the potential candidates for replacing the disputes and grievance committees *in function* are themselves an *approved statutory authority*. These two related questions form the essence of the decision in the present matter.

The meaning of the relevant clause

[24] It will be remembered that the central provision for interpretation is as follows:

Clause 6.5.7

Leave for approved statutory authorities.

The employer will grant leave on full pay to an employee who is required to attend as a member of, or in a formal capacity at, any of the following statutory authorities with the proviso that any fees due to the employee from the authority will be paid to the institute: ...

- (e) *Disputes and grievance committees established under Part 12 of this collective agreement or any other bodies replacing them in function.*

[25] It is common ground that the balance of the complete clause (which I cite in full at para.[2] of this determination) is not directly in point in the present dispute about interpretation. However, it is appropriate to reflect on the other subparagraphs of the clause to see if they assist in an understanding of the meaning of subclause (e).

[26] It will be discerned at once that the general purpose of the clause as a whole is to give employees the opportunity to take approved leave from their employment when they are members of a statutory body defined in the clause or are attending a meeting of that statutory body in a formal capacity. That formal capacity might

include attendance before one of those statutory bodies as, for instance, a summonsed witness. The only gloss on that general principle is the requirement that where an employee attends such a statutory authority pursuant to the clause and is paid by that statutory authority, such payment is to be made back to the employer. This provision is simply a *set-off* because the employer is paying the employee while the employee is attending the statutory authority.

[27] As I have made clear in the preceding section of this determination, the parties, in their negotiations over time, have updated the bulk of the subclauses in the relevant clause but not the one that we are most concerned with here. My considered view in looking at the structure of the whole clause and the relationship between subclause (e) and the other subclauses, is that subclause (e) is effectively now *out of step* with the rest of the provision. When employment law provided for disputes committees and grievance committees, those bodies were in truth *statutory authorities* which employees might conceivably be either members of, or required to be in attendance at, for the purposes of the business of the committee.

[28] ASTE invites me to conclude that the successors in title of the disputes and grievance committees are mediations conducted by mediators employed by the Department of Labour pursuant to the Employment Relations Act 2000 and hearings of the Employment Relations Authority. ASTE argues that those just referred to bodies, trigger an entitlement for employees covered by the agreement, irrespective of what capacity it is that the employee is attending the mediation or Authority hearing in.

[29] Conversely, CPIT argues that the clause has no proper purpose or meaning and that it is in fact redundant.

[30] I am satisfied that no particular assistance can be derived, for interpretative purposes, from the adjoining subclauses (all of which plainly refer to extant statutory authorities).

[31] It is axiomatic that there are now no disputes and grievance committees. Indeed, as CPIT makes clear in its submission, the last occasion that these committees could properly be said to be in existence was 17 years ago in the 1991 award. Furthermore, I have already noted in my historical analysis above that there have been

numerous other amendments to the clause surrounding the subclause which is the subject of interpretation but little amendment to subclause (e) itself.

[32] Moreover, as well as there being no disputes or grievance committees in existence for almost two decades, it also seems to me that the reference to Part 12 of the collective agreement does not assist either. Part 12 of the collective agreement sets out a process for resolving employment relationship problems and refers, as part of that process, to the Mediation Service and the Employment Relations Authority, two organs of the new employment relations regime which together are provided for the resolution of employment disputes.

[33] But I must reach the conclusion that there is no sense in which those two organs just referred to are analogous in any way to the old disputes committees or grievance committees. Those old committees had members from the workplace and there is no sense in which either a mediation presided over by a Labour Department mediator or an Employment Relations Authority investigation meeting presided over by a member of the Authority has any analogous role for an employee covered by the document.

[34] Indeed, the closest that one might get is the contention that an employee covered by the agreement might be summonsed to appear before the Authority, by order of the Authority itself. If that were the position, then one would expect that, on general principles, CPIT, being a good public sector employer acting in accordance with the good faith principle, would use its discretion to treat that time away from the workplace as paid, even where there was no contractual provision specifically on point.

[35] I conclude that the fundamental point about the reference in the subject provision to disputes and personal grievance committees is that those committees have members and those members include employees who are party to the agreement and, in being members of those committees as and when required, those employees are participating in the activity of a *statutory authority*.

[36] In neither of the proposed replacements (the Mediation Service and/or the Employment Relations Authority) can it be said (with the limited exception perhaps of an employee summonsed to give evidence before the Authority) that any employee covered by the agreement is participating in *membership ... in a formal capacity*.

[37] ASTE relies on the disjunctive nature of the relevant provision where it states:

An employee who is required to attend as a member of, or in a formal capacity at, ...

[38] ASTE says, in effect, that because that provision is disjunctive, there are two kinds of cases referred to, those concerning membership of a body and those concerning attendance, but attendance in a formal way. In reaching the conclusion I do about the appropriate interpretation of the provision, I do not dispute ASTE's logic in relation to the disjunctive nature of the provision. However, the relevant provision refers first to membership and then to attendance *in a formal capacity*. It is not difficult to postulate both of those categories being relied upon from time to time in relation to all of the other subclauses in clause 6.5.7, but in no sense can that be true in relation to subclause (e).

The applicable law

[39] The well known passage from McGechan J's judgment in *Wel Energy Group Ltd v. Electricity Corporation of New Zealand Ltd* [2001] 2 NZLR 1 is illustrative of the appropriate steps to take in an interpretative decision of this sort. First, His Honour recommended examining the words themselves, then the provisions surrounding the words in question, then other provisions further away from the clause under interpretation but still within the document, and finally an examination of the surrounding circumstances.

[40] Applying those precepts to the present matter seems to me to confirm the result beyond question.

[41] First, the words themselves refer to two committees established under Part 12 or any other bodies replacing them in function. The factual position is that there are no longer such committees in existence and there have not been for many years. Moreover, such committees are not *established* under Part 12 of the agreement nor, I have found, are there any bodies replacing them in function.

[42] In reaching the latter conclusion, which arguably is the most pertinent in the present case, I am influenced particularly by the absence of any ability for employees governed by the agreement to become *members* of the Employment Relations Authority or of the Mediation Service (thus creating an entirely different class of body to the other bodies referred to in clause 6.5.7). Moreover, I am satisfied as a matter of

fact that the structure and function of the Mediation Service of the Department of Labour and the Employment Relations Authority are so different as to not be *statutory authorities ... replacing ... disputes and grievance committees*.

[43] The provisions immediately surrounding the subclause in question seem to confirm the contention that subclause (e) is out of step with all the others because only subclause (e) provides for an apparent class of *statutory authority* which neither exists nor has been properly replaced but even if those conclusions go too far, has been replaced by institutions which are quite different in function and which cannot conceivably create a class of membership which all the other subclauses in clause 6.5.7 could potentially do.

[44] The other clauses in the agreement do not assist in interpretation save for the reference to Part 12 of the collective agreement. But Part 12 of the collective agreement has been updated to include reference to employment relationship problems and the dispute resolution system which the new Act requires. Indeed, it could be said that all that a reference to Part 12 of the agreement proves is that that part of the agreement has been brought up-to-date by the parties whereas subclause (e) of clause 6.5.7 has been left to languish in the past.

[45] Certainly a study of Part 12 does not assist me in reaching a conclusion that any other bodies have been created to replace the disputes and grievance committees. Indeed, the requirement that the replacement bodies replace disputes and grievance committees *in function* seems to make it all the more difficult for it to be contemplated that the Mediation Service and the Authority are those replacements. Neither the Mediation Service nor the Authority fulfil anything like the same functions as a disputes committee or a grievance committee. All that can be said is that all of the bodies mentioned play a role in the resolution of what we now call *employment relationship problems* but the role that the body performs is dependent on the statutory framework and that framework has changed fundamentally not once but twice since this clause first appeared.

[46] Finally, looking at the surrounding circumstances of a factual nature does not assist me in reaching an alternative conclusion either. I am satisfied that the history discloses that, while the parties have amended most of the provisions which reflect the fundamental changes in the governing employment law statute, the evidence suggests that they have failed, for whatever reason, to deal with this particular provision. In

my judgement, it is not the role of the Authority to *write in* provisions in a collective employment agreement because the parties have failed to deal with the matter appropriately, in a succession of negotiations through two changes in statute law and 17 years of history.

Determination

[47] I am satisfied that the applicant, CPIT, is entitled to a declaration that clause 6.5.7(e) is meaningless, the parties having failed to appropriately amend the provision to reflect the evident changes in statutory employment law and the consequential changes in those structures which assist in resolution of employment disputes.

Costs

[48] Costs are reserved.

James Crichton
Member of the Employment Relations Authority