IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 107A/10
5124386

	BETWEEN	NEW ZEALAND DAIRY WORKERS UNION Applicant
	A N D	FONTERRA CO-OPERATIVE GROUP LTD Respondent

Member of Authority:	James Crichton
Representatives:	Andrew McKenzie, Counsel for Applicant Andrea Dunseath, Advocate for Respondent
Investigation Meeting:	On The Papers
Submissions Received:	14 October 2010 from Applicant 5 November 2010 from Respondent
Date of Determination:	16 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 5 May 2010, (CA107/10), the Authority dealt with the original issues between these parties. The present proceeding has come before the Authority because of an application by the applicant Union (the Union) to reopen the investigation; that application is resisted by the respondent (Fonterra).

[2] The original determination of the Authority concerned in the Authority's own words: *The correctness or otherwise of the respondent's management of employee leave entitlements* and the Authority categorised the issue between the parties as *less a dispute over the operation of the collective agreement than the operation of a component of the respondent's administration systems.*

The application to reopen

[3] The essence of the Union's application to reopen is that the Authority's substantive determination does not effectively dispose of the employment relationship problem. That problem, according to the Union was a request to the Authority contained in a letter dated 9 April 2009, for the answer to two questions. The Union contends that the approach to the Authority at that time was a joint approach; that is that Fonterra agreed to the approach being made and agreed that the two questions were questions that the parties needed to have answers to.

[4] The Union's specific practical difficulty was complaints from its members that they were discovering they had *negative leave balances.* Fonterra's position was that the only explanation for negative leave balances was employees taking leave in advance of entitlement, that is anticipating leave.

[5] What the Union says it was endeavouring to avoid was a situation where either itself or its members would be put to extensive trouble, tracing whether or not there had been agreement on anticipating leave, or not. The two questions promulgated by the Union were designed to have the Authority resolve the issue in principle to avoid the necessity for the work just mentioned.

[6] In the result, it is contended that the Authority did not answer either question and instead, responded to a different issue which was not raised at all.

Fonterra's position

[7] Fonterra resists the application to reopen. It says that the application to reopen is without merit and does not fall within the usual legal test for such an application.

[8] Critically, Fonterra advances the view that the Authority's substantive determination proceeded on the footing that there was no dispute between the parties in the legal sense, that is a dispute *about the interpretation application or operation of an employment agreement.* It is suggested, amongst other things, that in the absence of a dispute, the Authority is not able to answer questions put to it by parties to employment agreements.

[9] Furthermore, Fonterra say that they did not agree to the submission of the two questions put before the Authority by the Union. They complied with and

participated in the process as a good and fair employer ought, but they did not agree that the reference to the Authority was necessary.

[10] Moreover, while the substantive determination of the Authority did not find there was a dispute between the parties in a legal sense, the Authority was happy to rule that there was no breach of the collective agreement nor of the Holidays Act 2003.

[11] Fonterra point out that when the Union raised its issue of members referring negative leave balances to the Union, Fonterra promptly addressed the issue. The Union's suggestion was that leave balances should be *zeroed* given its anxiety that its members were being docked annual leave that they had not taken. Fonterra declined to take that action as they considered the system was robust enough to respond appropriately to individual cases. In essence, Fonterra told the Authority that if an employee was satisfied that the leave balance notified to him on a pay slip was incorrect then he would immediately raise the issue with the employer and the matter would be addressed.

[12] Fonterra also make the claim that the Union failed to adduce any evidence of Fonterra's alleged wrongdoing and that it would be unjust to give the Union another opportunity to present the same case. Finally, Fonterra note that it has offered to discuss a variation in the collective agreement to deal with the matter in a collaborative fashion, an offer that was noted by the Authority in its substantive determination.

The law

[13] It is clear law that the Authority has the statutory power to grant an application to reopen an investigation: Clause 4, 2nd Schedule, Employment Relations Act 2000. The remedy is a discretionary one and as with all discretionary remedies, that discretion must be exercised in accordance with principle.

[14] The principal legal test for determining whether a matter ought to be reopened or not is whether a failure to do so would constitute a miscarriage of justice. The Authority must balance the risk of miscarriage of justice against the countervailing principle that certainty in litigation is important.

Discussion

[15] It seems to me clear from the Authority's file on this matter that first, it puts it too strongly to say that this was, at it were, a *joint* application. Mr McKenzie did write to the Authority by letter dated 9 April 2009 summarising his instructions from his client Union but the response from Fonterra on 14 April 2009 can hardly be read as a fulsome round of applause. Indeed, Fonterra suggest that the legal meaning of the word *agreement* in this context is well settled which deals with the Union's first question, and the practical reality is that unless workers quarrel with their leave balances when notified of them on their pay slips, Fonterra is in no position to take the matter further on the basis of some sort of hypothetical problem. Further and finally, Fonterra's email wonders whether the Authority is the right forum in which to ask these sorts of questions, if they must be asked at all.

[16] Fundamentally, I have difficulty with Mr McKenzie's submission that the Authority has failed to deal appropriately with the issues before it in the substantive determination. It is certainly true that the Authority did not answer Mr McKenzie's questions. But that is because the Authority's view was that it decided it was not able to answer hypothetical questions about apparent concerns of Union members when there is no legal dispute and even if there were, there is no breach proved of the Holidays Act or the Collective Employment Agreement.

[17] That is the Authority's decision and I am satisfied it is a decision that the Authority was entitled to make on the basis of the evidence and the submissions before it. It may not suit the Union but there are a variety of other avenues of resolution available to it of which the most straightforward is the prospect of negotiating a variation to the Collective Employment Agreement which Fonterra have already flagged they are prepared to entertain. That very prospect is signalled in the Authority's substantive determination.

[18] At its most straightforward, I am satisfied that a correct application of the legal test must be to refuse the application by the Union to reopen the investigation. This is because there is no evidence whatever in the Union's submission that there has been any miscarriage of justice and indeed were the investigation to be reopened, it is difficult to see how the Authority could come to a different conclusion from the one it has already reached. There is no suggestion in the Union's submissions that it would advance evidence before the Authority which was not available to be adduced when

the matter was originally dealt with and in the absence of fresh evidence which would bear on the problem and encourage me to conclude the Authority's original decision was somehow wrong headed, I think the application must be denied.

Determination

[19] I am not persuaded that the Union has made out its case for a reopening of this investigation and I deny the remedy sought.

Costs

[20] In the particular circumstances of this case, it seems to me that, although the matter is not commented on either representative, the proper course is for costs to lie where they fall.

James Crichton
Member of the Employment Relations Authority