IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 208/10
5287473

	BETWEEN	THE POSTAL WORKERS UNION OF AOTEAROA First Applicant
		DOUG BEHAN-KITTO Second Applicant
	AND	NEW ZEALAND POST LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	P Blair, Advocate for Applicants N Jones, Advocate for Respondent
Investigation Meeting:	4 February 2010 at Rotorua
Determination:	4 May 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] There is a dispute about the interpretation, application and operation of certain provisions of the relevant collective employment agreement ("CEA") relating to the payment of delegates representing the Postal Workers Union of Aotearoa ("the Union"), while dealing with the concerns of Union members.

[2] The provisions of the CEA in pertaining to the dispute are to found at Part K – ***Union Representation***. At clause 3 the relevant provision is:

> *The company will:*
> - *recognise local delegates elected by employees at a specific work-site where the election of the employee is advised to the company, by the union, in writing.*

Then, there follows a provision for ***PAID LEAVE FOR DELEGATES*** and clause 5 states that:

> *The company will grant delegates paid leave to attend meetings and conferences of the union's District Committee [where delegates are elected officials], delegate training or health and safety courses provided:*
>
> - *this does not unreasonably disrupt business operations; and*
> - *the union/delegate has given the company 3 weeks notice in writing of the intention to take paid union leave.*

There then follows at clause 6:

> *Delegates are entitled to reasonable time off on pay to deal with concerns of employees who are union members.*

Background to the Dispute

[3] On 12th August 2009, a mediation meeting took place to discuss the circumstances pertaining to a NZ Post employee (Ms Whitney) who had been dismissed. While Ms Whitney was represented by a paid Union Official, Mr Blair, the Union also required a union delegate to be present at the mediation. The elected union delegate, Ms Cox, was on sick leave convalescing from major surgery. She had indicated that she could only attend the mediation and participate in a limited capacity, as an observer/supporter, if she felt well enough on the day. The position of the Union is that it required someone to actively participate in the mediation for the Union and so Mr Behan-Kitto was "delegated" to be the union delegate for the day of the mediation in the place of Ms Cox, albeit Ms Cox did subsequently attend the mediation.

[4] The evidence of Ms Trish Adler, Mail Centre Leader – Rotorua Mail Centre, is that on 10th August 2009, she received a request from the Union for Mr Behan-Kitto to attend the mediation on 12th August, on pay as an unelected (appointed) special purpose delegate. Ms Adler declined the request on the basis that that NZ Post does not pay employees to attend mediation. Ms Adler referred to the policy of NZ Post in regard to employees attending mediation. The policy recognises the importance of mediation in regard to the resolution of employment relationship problems and allowing employees to attend, but employees are:

> *… not entitled to be paid when they attend mediation unless they are on annual leave or using a lieu day. Employees who are union delegates may be entitled to attend mediation on pay if they are representing another employee who does not have any other representation."*

Mr Behan-Kitto did attend the mediation but was not paid.

The Respective Arguments

[5] It is the position of the Union (First Applicant) and Mr Behan-Kitto (Second Applicant) that under the provisions of Part K, clause 5 and clause 6, of the CEA, Mr Behan-Kitto was a "*delegate*" and was; "*entitled to reasonable time off on pay to deal with concerns of employees who are union members*." On the other hand, NZ Post say that firstly, Mr Behan-Kitto was not a person "*elected* [as a delegate] *by employees at a specific work-site where the election of the employee is advised to the company, by the union, in writing."* Rather, Mr Behan-Kitto was simply appointed by the Union to act in the possible absence of Ms Cox and such appointment is not provided for by the CEA, or by any other policy or practice accepted by the NZ Post. Furthermore, NZ Post says that because Ms Whitney had been dismissed, she was no longer an "employee" under the terms of Part K of the CEA.

Determination

[6] The applicants have posed several questions for the Authority to determine (paraphrased and in a different order) as follows:

(a) **Must the term "delegate" referred to in Part K, clause 6, of the CEA, be taken to mean elected delegates only?**

I conclude that the answer to this question is: Yes. This is because I believe that clause 6 must be read in conjunction with clause 3[1] in that NZ Post will:

> *recognise local delegates **elected by employees** at a specific work-site where the **election of the employee** is advised to the company, by the union, in writing.*

Clause 6 must also be read in conjunction with clause 5 and the reference to the words … *where the delegates are **elected** officials* …

While Mr Blair has advanced the somewhat ingenious argument that clause 6 must be read alone in regard to the term "delegates," and that this should include an employee such as Mr Behan-Kitto who is "appointed" as a delegate by the Union, I do not find this to be so. It seems to me that it is only elected delegates that can acquire recognition by the company. This is qualified further in that the elected employee union delegates must be advised to the company, in writing, by the Postal Workers Union.

[1] The *noscitur a sociis* rule of interpretation applies, whereby the meaning of a term may be revealed by its association with other words or terms.

(b) **Should Part K, clause 6, of the CEA have operated in favour of Mr Behan-Kitto on 12th August 2010 to provide payment to him for time off to attend the mediation dealing with the concerns of a union member, who had been recently dismissed by NZ Post?**

Consistent with my finding at (a) above the answer must be: No. This is because Mr Behan-Kitto was not an elected delegate.

(c) **Can clause 6 of Part K of the CEA, be restricted, as a matter of policy, to exclude a delegate from reasonable time off on pay, to attend and deal with the concerns of a union member at a mediation conference run by the Department of Labour?**

Clause 6 provides that:

> *Delegates are entitled to reasonable time off to deal with concerns of employees who are union members.*

It seems to me that the words of the clause are plain and unambiguous in that elected union delegates: **are entitled / to reasonable time off / to deal with concerns of employees who are union members.**

It is now well accepted that under the Employment Relations Act 2000, mediation is a primary and effective means of resolving employment relationship problems. Therefore, provided the time off is considered to be "*reasonable*" and given that most mediations are of about 3–4 hours, time off to attend a mediation meeting would normally qualify as being reasonable. And, given that if mediation is required, then an employee would obviously have a "*concern*" for which they may require union representation. I note that following an earlier determination of the Authority relating to employees being paid to attend mediation,[2] in March 2009, NZ Post issued guidelines to its team leaders and managers pertaining to employees and delegates attending mediation. In regard to delegates attending mediation, the guideline is:

> *6. Employees who are union delegates may be entitled to attend mediation on pay if they are representing another employee who does not have any other representation. You should discuss this with your leader or HR before approving this.*

While the March 2009 document can only be seen as the guidelines they express to being, it does appear that NZ Post sees the matter of paying delegates to attend mediation, involving a union member, as requiring some discretion, depending upon

[2] CA 20/08 Member, H Doyle, 29th February 2008. The issue before the Authority was whether employees involved in mediation should be paid. It was not about whether delegates should be paid while attending mediation pursuant to Part K, clause 6.

whether the employee has other representation i.e. a full time union officer such as Mr Blair. This position seems to me to be fair and reasonable.

To answer the question posed by the applicants, I conclude that clause 6, of Part K of the CEA, does not exclude an elected delegate from being paid for a reasonable time to attend Department of Labour convened mediation. But nor does it provide any absolute right for a delegate to be paid to attend a mediation. It seems to me that NZ Post is entitled to take into account the circumstances as they arise on a case by case basis taking into account such matters as whether the employee has other competent representation and whether a union delegate can provide value to the mediation process, even if the employee has other representation. Nonetheless, I would suggest that given that the mediation process is often valuable in regard to gaining further knowledge and insight into employment relations and employment law, there may be future benefits for both the delegate and the company in regard to the overall due process, that may warrant a delegate being paid to attend mediations, from a training and education perspective.

(d) **Can union members who have been dismissed by NZ Post, be lawfully and correctly excluded from the operation of Park K, clause 6 of the CEA on the grounds that such union members are, by definition, no longer employees?**

I conclude that it cannot be correct that because an employee is dismissed that this person ceases to be an “employee” for the purposes of union representation under the above provision. Obviously, there is no more serious “concern” for an employee than to be dismissed and clearly an employee in such circumstances, requires representation. Furthermore, there are many examples of employees being dismissed but as a result of effective representation and constructive discussion between parties, a dismissal may be reversed, or at least the issues surrounding the dismissal are resolved without the requirement for litigation. I find that the position adopted by NZ Post, that because Ms Whitney had been dismissed, she was no longer an employee for union delegate representation purposes under the CEA, to be erroneous and unsustainable. While my finding has no effect in regard to the representation of Ms Whitney, as that matter is now well concluded, I would suggest that NZ Post reconsider their view should similar circumstances arise.

(d) **Is the operation of Part K, clause 6, of the CEA, restricted to brief periods of time spent away from a delegate's workstation and their tasks at the particular delivery branch?**

I conclude that the key words in this clause are "*reasonable time off.*" It is not possible for the Authority to determine what constitutes "reasonable" time off as clearly each situation that arises must be examined accordingly. I can only conclude that the term "reasonable" allows for some discretion to be exercised by NZ Post as the employer but should that discretion not be exercised reasonably in particular circumstances, hence creating some conflict between the parties, the dispute resolution processes provided by the Employment Relations Act are readily available.

Costs

[7] As NZ Post was represented by a national manager (Ms Jones) and the Union by a full time official (Mr Blair), the issue of costs does not appear to be applicable.

K J Anderson
Member of the Employment Relations Authority