

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 31

File Number: 5321766

BETWEEN                      Service and Food Workers  
   Union Nga Ringa Tota  
   Applicant

AND                              Care Park New Zealand Limited  
   Respondent

Member of Authority:      Denis Asher

Representatives:            Peter Cranney for the Union  
   Karen Soich for the Company

Investigation Meeting      Wellington, 3 December 2010

Submissions Received      By 28 February 2011

Determination:              4 March 2011

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**DETERMINATION OF THE AUTHORITY**

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**The Problem**

[1]     The parties are in dispute about the interpretation, application and operation of a collective agreement binding on the union's members and the respondent's (the company's) employees. Their original question was: should shuttle bus drivers be paid \$13.80 per hour and \$552.00 per week as the applicant contends or \$13.32 per hour and \$532.80 per week as the company asserts?

[2] I say ‘original’ because, following an inquiry from me, and in its subsequent submissions, the company adopted the position that the Authority had no jurisdiction to make the determination sought.

### **The Investigation**

[3] During and following a telephone conference call on 3 November 2010 the parties agreed to add this matter to an extant one day investigation in Wellington on 3 December.

[4] Following the investigation meeting, and by email dated 21 December, I sought submissions from the parties on the implications on this dispute of ss 161 (2) and 163 of the Employment Relations Act 2000 (the Act), and the applicability of *Canterbury Wool Spinners Ltd v Vaughan* [2002] ERNZ 255. The question was put, can the Authority determine this matter in favour of one or other of the parties or was it statutorily barred by those sections of the Act?

### **Background and Summary of Parties’ Positions**

[5] The applicant is a union.

[6] The respondent is an incorporated company.

[7] The union and company were parties to a collective agreement (the agreement) binding on the company and the union’s members. The term of the agreement was 1 December 2007 to 31 December 2009.

[8] The parties are attempting to re-negotiate the agreement but are in dispute about the interpretation, application and operation of it.

[9] The agreement provided for the following categories of employees:

	<i>1<sup>st</sup> Dec 2008</i>	<i>1<sup>st</sup> Dec 2008</i>
	<i>Hourly rate</i>	<i>Full Time Weekly rate</i>
<i>All new employees (first month)</i>	<i>\$12.87</i>	<i>\$514.80</i>

<i>Booth Attendants</i>	\$13.32	\$532.80
<i>Car Park Auditor</i>	\$13.32	\$532.80
<i>Park Security</i>	\$13.32	\$532.80
<i>Groomers &amp; Drivers</i>	\$13.80	\$552.00
<i>Cleaners</i>	\$13.80	\$552.00
<i>Valet staff / Reception</i>	\$14.97	\$569.60

(clauses 2 & 9 of the agreement)

[10] At the time the agreement was negotiated the company did not employ shuttle bus drivers and therefore no reference was made in the agreement to this class of employee.

[11] The parties endeavoured to negotiate a variation to the agreement to cover shuttle bus drivers but failed to reach agreement.

[12] Now that shuttle bus drivers are employed by the respondent, the union seeks a determination that shuttle bus driver should be paid at the rate of groomers & drivers, i.e. \$13.80 per hour and \$552.00 per full time week. This is on the basis that the work undertaken by shuttle bus drivers is specified in the agreement and, “*The driving part of the “groomers & drivers” work is exactly the same **type** of work as the (shuttle bus) drivers’ work*” (emphasis added; par 8, applicant’s submissions dated 11 February 2011). The work done by the shuttle bus drivers is therefore covered per the agreement’s clause 2 coverage provision and s. 56 of the Employment Relations Act 2000 ( the Act) therefore binds both the respondent and the drivers to the terms of the agreement.

[13] The claim is based on the commonality of the driving duty undertaken by shuttle bus drivers and groomers & drivers.

[14] The company has a different (alternative) view: it says that when job descriptions and responsibilities of shuttle bus drivers are compared to booth attendants, it can be seen that they are virtually identical as opposed to the job descriptions and responsibilities of the groomers & drivers class.

[15] A comparison of the job descriptions show that shuttle bus drivers and booth attendants do the same as well as different tasks. For example, both are expected to: be accurate and have good computer skills; be good with maths and able to multi-task; greet and farewell customers, provide safe collection of customers and their luggage; report any damage or maintenance of the shuttle van, car park, building and equipment; maintain, clean and tidy waiting room and shuttle van; collection, accountability and reconciliation of all monies due and paid; accountability for all cash handled, non-revenue tickets and barrier raises and banking as directed, etc.

[16] However, unlike groomers & drivers, shuttle bus drivers are only required to drive the one vehicle to transport passengers and not take care of customer vehicles such as “*Mercedes, Ferraris, Lamborghinis, Porsches and the like*” (par 9.1.2. of the respondent’s submissions dated 30 November 2010), including grooming and servicing them, and obtaining warrants of fitness, while minimising the company’s exposure to law suits for damage to these third party vehicles while in the respondent’s care.

[17] The Company says that the logic of the union’s position in trying to isolate the driving part of the groomers & drivers’ work would result in groomers falling under the cleaners’ classification.

[18] It also says that shuttle bus drivers were employed on the basis of the job description provided and at the same rate as booth attendants and in any event the Authority lacks the legislative power to adjudicate this matter.

### **Discussion & Findings**

[19] I am satisfied from a comparison of duties, in particular the different vehicles being driven, that shuttle bus drivers are not already covered by the agreement, i.e. they are therefore not to be aligned with groomers & drivers because both drive vehicles. Instead they are a new category of employee whose type of work is not covered by the agreement. Per sub-clause 3 (d) of the agreement, it is therefore necessary for the parties to negotiate and vary the agreement to incorporate a new classification.

[20] Furthermore, s. 161 (2) of the Act specifically prescribes the Authority from “*bargaining; or fixing new terms and conditions of employment*”. Section 163 of the Act provides that the Authority may not make an order “*cancelling or varying*” a collective agreement “*or any term of the agreement*”.

[21] These limits were discussed extensively in the Court of Appeal’s decision in, *Canterbury Wool Spinners Ltd v Vaughn* [2002] ERNZ 255:

*[44] The proper question for the Authority to ask itself, when considering whether the disputed provision brought before it is one upon which it is prohibited from giving a determination is whether, correctly interpreted, the provision already creates rights which are legally enforceable and, if so, what those rights are. Or is it merely an agreement to agree, or an agreement which directs a certain procedure but does not go so far as to indicate sufficiently an end result, so that, in either case, it is incapable of creating contractual rights? If so, any determination would in law create a new term or condition and the Authority may not intervene.*

And:

*[47] Whether the Authority has jurisdiction to determine the level of redundancy will therefore depend upon the interpretation which can properly be given to the disputed provision. That does not, however, mean that the Authority (or the Court) could by a strained interpretation expand its jurisdiction and, in effect, circumvent the limitations imposed by s 161(2). The interpretation adopted must be one which is reasonably open in accordance with normal contractual principles applied in the setting of an employment relationship.*

[22] The Court of Appeal remitted the matter back to the Employment Court which subsequently set the rate of redundancy compensation in respect of Mr Vaughn.

[23] Having regard to the above, I can confirm my preliminary view that I am satisfied this is not a genuine dispute as to the interpretation, application and operation of the agreement as the effect of me granting either party’s application would clearly be to vary the agreement, i.e. to add to it a new position/classification with an attendant pay rate which the parties have already agreed would be the subject of negotiation and variation of the agreement as required.

**Determination**

[24] The Authority is statute-barred from making the orders sought in this matter.

[25] While costs are reserved, and subject to the parties' submissions, as neither have succeeded, they are likely to rest where they fall.

**Denis Asher**

**Member of the Employment Relations Authority**