IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 92
5356775

	BETWEEN	THE RAIL AND MARITIME TRANSPORT UNION First Applicant
		KIERAN BREWSTER, RICHARD CATTAWAY, STEWART GRAINGER, DARRYL HAINES, ALAN HEALY, RUSSELL RINGDAHL, DAVID VINEY AND TIM LAWTON Second Applicants
	A N D	LYTTLETON PORT COMPANY LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Geoff Davenport, Counsel for Applicants Rob Towner, Counsel for Respondent
Investigation meeting:	17 October 2011 at Christchurch
Further Information:	Affidavit & Memorandum from the respondent on 21 October 2011 Memorandum from the Applicant on 3 November 2011 from Respondent
Date of Determination:	18 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Brewster and the other second applicants are employed by Lyttleton Port Company Limited (LPC) at a depot in Woolston, close to the Christchurch end of the Lyttleton road tunnel. They joined the Rail and Maritime Transport Union (RMTU) in 2011. Having joined RMTU, they say that they are entitled to the terms and conditions of employment set out in a collective employment agreement (CEA)

between the RMTU and LPC. However LPC says that Mr Brewster and the other applicants are not covered by this CEA because they do not work at the Port of Lyttleton and they are not cargo handlers. That references words in the collective employment agreement.

[2] While in their statement of problem the second applicants seek arrears of wages and benefits the problem turns on the interpretation of clause 1 of the CEA. That is the real employment relationship problem on which I will focus.

[3] There are two issues. First, properly construed, are the words *at the Port of Lyttelton* a reference to location or to function? Secondly, are the applicants *Cargo Handlers* as defined in the CEA? I will say something about the principles of interpretation before setting out the coverage clause from the CEA. I should also explain how the problem arose. I will then set out my findings on the issues.

[4] There is a substantial amount of documentary evidence, photographs of work activities and short video clips as well as the testimony of a number of witnesses. I have also received carefully considered submissions from counsel. I intend no disrespect if I do not refer to every piece of evidence and every submission even though in preparing this determination as earlier for the investigation meeting I have read and reviewed all that material.

Principles of interpretation

[5] *Vector Gas Limited v. Bay of Plenty Energy Limited* [2010] NZSC5 concerned the interpretation of an agreement in a commercial context but the principles are nonetheless applicable for present purposes. There are two extracts particularly which are helpful in the present context. At [19] Tipping J said:

> *The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties*

> *subjectively intended or understood the words to mean, or what their negotiating stance was at any particular time.*

[6] At [23] Tipping J went on to say:

> *Context is always a necessary ingredient in ascertaining meaning. You cannot claim to have identified the intended meaning without reference to context. Hence it is always permissible to go outside the written words for the purpose of identifying the context in which the contract was made and its objective purpose.*

[7] Although decided before the *Vector Gas* case the decision of the Employment Court in *ASTE v. Chief Executive of Bay of Plenty Polytechnic* [2002] 1 ERNZ 491 remains authoritative in this area. Later in *Spotless Services (NZ) Ltd v. Service and Food Workers Union Nga Ringa Tota Inc* 10 August 2006, Perkins J, AC44/06 the Court adopted the reported headnote as a helpful summary of the principles contained in *ASTE*:

> *... the law of interpretation of employment agreements remained unchanged by the Employment Relations Act 2000. Agreements were to be interpreted with reference to their factual matrix. This included matters such as the background to the transaction and to industry practice. The law had moved on so that such reference was possible and even desirable. The Court was also required to adopt an objective approach to interpretation, so that evidence of what either party thought the words meant was inadmissible. The interpretation of an agreement was not to be narrowly literal, but in accord with business common sense. Nevertheless, if the words were clear and could only have one possible meaning that would generally determine the matter.*

[8] The application of these principles follows.

The coverage clause

[9] Every collective agreement must have a coverage clause: see s.54(3) of the Employment Relations Act 2000. That term is defined in s.5 as follows:

> *Coverage clause –*
>
> *(a) In relation to a collective agreement, -*
> *(i) means a provision in the agreement that specifies the work that the agreement covers, whether by reference to the work or type of work or employees or types of employees; and*

> *(ii) includes provision in the agreement that refers to named employees, or to the work or type of work done by named employees, for whom the collective agreement applies:*
>
> *...*

[10] From 2 October 2000 to 30 November 2004 the definition was:

> *Coverage clause –*
> *(a) in relation to a collective agreement, means a provision in the agreement that specifies the work that the agreement covers, whether by reference to the work or type of work or employees or types of employees:*
> *...*

[11] Notably, there is no requirement for the coverage clause to identify where employees are to perform their work. Individual employment agreements on the other hand must include that indication: see s.65(2)(iii) of the Employment Relations Act 2000. S.65(3) emphasises the legislatures intent that a *coverage clause* should not be narrowly construed.

[12] A coverage clause is required because s.56 of the Employment Relations Act 2000 says that a collective agreement that is in force binds and is enforceable by employees who are employed by an employer party provided they are members of a union party and their work comes within the coverage clause.

[13] In 2011, LPC and RMTU entered into the present CEA. It is a comprehensive document providing terms and conditions applicable to all categories of employees that come within its coverage clause and includes schedules with provisions as such as rostering and rates of pay applicable only to particular groups. It starts under the heading **General Provisions** with an explanation that clauses 1 through to clause 32 shall be applicable to all employees who are party to the CEA.

[14] Clause 1.0 is the CEA's coverage clause and I will set out relevant parts:

> ***1.0 APPLICATION AND INTENT***
>
> ***1.1*** *This collective employment agreement is made pursuant to the Employment Relations Act 2000 between the Lyttleton Port Company Ltd ("the employer") or ("the Company") ..., and the Rail and Maritime Transport Union (Inc), or their successor bodies ("the Unions").*

1.2 *This agreement covers members of the Unions who are or become employed by the Company at the Port of Lyttleton as:*

…, Cargo Handler, …

The parties agree that the functions of Cargo Handler are varied, but include the following:

Cargo and coal handling, driving and operation of mechanical equipment (straddles, forklifts, front end loaders, hoists, cranes, ship loaders, stationary machines, ships' cranes, gantries, ships' gear used in cargo handling, water cart, coal shipoader, bulldozer), lashing work, hatchman work, cargo tallying, monitoring and movement of reefer containers, receival and delivery of containers and other cargo to and from rail, CFS, and container wash area, receival and delivery of coal, relieving as Leading Hand/Foreman, the cleaning of containers, container handling equipment and coal handling equipment.

1.3 *For the purpose of any benefit under this Agreement the commencement date for each existing employee is recorded in Appendix 1. Continuous service shall not be deemed broken by the expiry of this Agreement. New employees who are members of one of the Unions, who are employed after the commencement of this Collective Agreement and who are covered by this Collective Agreement, shall be added to Appendix 1.*

1.4 *…*

1.5 *The intent of this Agreement is to afford to each employee the same terms of employment, conditions of work and opportunities for training, promotion and transfer as are made available for other employees of the same or substantially similar qualifications, experience or skills employed in the same or substantially similar circumstances.*

1.6 *This Agreement supersedes all previous awards, contracts, agreements, arrangements and customary practices that were in force or being observed prior to the coming into force of this Agreement.*

…

1.7 *The terms of this Agreement shall be binding on all parties from the date of agreement between the parties (such date being) Monday 5 September 2011 until 7 September 2014.*

…

[15] There were earlier CEAs with identical coverage clauses in 2003, 2005 and 2008.

[16] Before 2003 there was a collective employment contract made pursuant to the Employment Contracts Act 1991. The RMTU was one of the union parties to a 1999 collective employment contract with LPC. Under the terms of that contract, employment by LPC was sufficient to entitle an employee to coverage: see clause 1.2 of the 1999 contract and s.21 of the Employment Contracts Act 1991. However, the statutory environment was very different as employees were direct parties to the contract and there was no requirement for a coverage clause as understood previously and now.

The Woolston site

[17] In 2003 when the currently disputed words were first negotiated, LPC did not employ any staff at Woolston. I will briefly explain how the applicants came to be employed by LPC.

[18] Prior to 2005 there was a business called New Zealand Express (NZE) operating from the Woolston site. NZE had a contractor based there. When LPC purchased the site it originally decided to retain NZE's contractor but eventually terminated that contract in 2007. LPC then employed staff to meet its operational needs. Two of the applicants had worked for NZE, later were employed by a wholly owned subsidiary of LPC and more recently directly by LPC.

[19] There is a collective employment agreement for CityDepot between LPC and another union (AWUNZ) dated 23 June 2011 that came into in 1 July 2011. It replaced a similar agreement dated 1 July 2010. Its coverage clause states:

> *1. PARTIES*
> *This collective employment agreement is made between:*
> *LYTTELTON PORT COMPANY LIMITED – CITY DEPOT*
> *(Referred to as "the Employer")*
> *AND*
> *AMALGAMATED WORKERS UNION NEW ZEALAND SOUTHERN INCORPORATED*
> *This agreement shall cover those Employees who are members or intending members of the Union parties to the Agreement (Amalgamated Workers Union New Zealand Southern Incorporated) who are employed by the Employer in Christchurch.*

> 2. *COVERAGE*
> *This agreement covers Employees of the Employer, engaged in the following business activities:* ***container depot services*** *including the functions of:*
> - *Forklift Operators*
> - *Container Surveyors and Repairers*
> - *Wash Operators*
> - *Supervisors*

[20] Kieran Brewster and Tim Lawton are Forkhoist Operators who work for LPC at Woolston. Mr Brewster was employed in December 2010 under an individual employment agreement. He joined RMTU in June 2011. Mr Lawton was employed from March 2010 under an individual employment agreement. He joined RMTU in March 2011. Neither man has belonged to AWUNZ or been covered by the AWUNZ collective agreement.

[21] All or most of the following employees were members of AWUNZ and were covered by the AWUNZ agreement before they resigned from AWUNZ and joined RMTU. Richard Cattaway is a Forkhoist Operator who works for LPC at Woolston. He was employed in October 2009 and joined RMTU in June 2011. Stewart Grainger is a Forkhoist Operator/Wash Operator who works for LPC at Woolston. He was employed in February 2011 and joined RMTU in June 2011. Darryl Haines and David Viney work for LPC at Woolston as Forkhoist Operators. They worked for the previous operator of the facility at Woolston and later transferred their employment to LPC. They joined RMTU in June 2011. Alan Healy is a Forkhoist Operator who works for LPC at Woolston. He was employed in September 2009 and joined RMTU in May 2011. Russell Ringdahl is a Forkhoist Operator who works for LPC at Woolston. He was employed in November 2009 and joined RMTU in June 2011.

[22] Because they had resigned from AWUNZ, none of the applicants could be bound by the 1 July 2011 AWUNZ agreement.

[23] Do the applicants come within the coverage clause in the RMTU agreement?

Cargo Handlers

[24] LPC argues that the applicants are not *Cargo Handlers*. That is based on the evidence that they principally handle empty containers (ie not cargo) and that they

only drive forkhoists. *Cargo Handlers* in Lyttelton predominantly do straddle carrier driving, container lashing, front end loader driving and the operation of other mechanical equipment, none of which is performed at the Woolston facility. Photos and video clips of operations at Woolston and Lyttelton show containers being loaded/unloaded or stacked/unstacked. Trains and trucks are loaded/unloaded at both facilities. At Lyttelton straddle cranes are used but at Woolston the work is done with forkhoists. The photos and videos do not reveal whether the containers are full or empty. However, at Lyttelton 75% of the containers are full while at Woolston only 13% are full. LPC nonetheless derives revenue from handling containers, whether at Woolston or Lyttelton.

[25] I disagree with the contention that handling empty containers falls outside the work done by a *Cargo Handler*. Counsel for RMTU points out that clause 1.2 simply refers to containers without distinction. I also consider that a container itself is cargo – clause 1.2 says *containers and <u>other</u> cargo* (emphasis added). That is not a special definition. In ordinary usage a container is an item of cargo. Whether a container is full or empty, it must still be handled and that work falls comfortably within the description of the work done by a *Cargo Handler* set out in clause 1.2.

[26] There is some evidence provided after the investigation meeting about work arrangements in Lyttelton. Counsel for the applicants objects to it being included as part of the Authority's investigation meeting. The actual arrangement of work in Lyttelton is immaterial for present purposes. In Woolston, the Forkhoist Operators do only one set of the tasks that might be done by a *Cargo Handler* in Lyttelton – loading, unloading and stacking of containers. The equipment they use is called a Forkhoist. Clause 1.2 refers to *forklifts* and *hoists* in the list of *mechanical equipment*. A *Forkhoist* is a piece of *mechanical equipment* and is synonymous with either or both of the two descriptors used in the bracketed list.

[27] There is no doubt that if the *Forkhoist Operators* were doing their present work but alongside the wharf in Lyttelton they would certainly be doing work covered by the collective agreement. It follows that the Forkhoist Operators in Woolston would be *Cargo Handlers* if they are otherwise covered by the CEA.

[28] The more difficult question is whether the applicants are *employed by the Company* *at the Port of Lyttelton* (my emphasis).

At the Port of Lyttelton

[29] It is common ground that when the parties negotiated the 2003 CEA LPC had port related operations employing labour only in Lyttelton. While LPC's evidence is that during the 2003 negotiations it sought to geographically restrict coverage in response to a union claim for unrestricted coverage, that is really evidence of LPC's subjective intentions and must be ignored. So too must the union's claims prior to the most recent collective agreement.

[30] LPC submits that the words bear a natural and ordinary meaning which the Authority must apply. I am referred to the Concise Oxford Dictionary (6th ed) for the meaning of *Port* as a harbour or a town possessing a harbour. The definition refers to a geographical location. The respondent says that *at the Port of Lyttelton* is a precisely defined geographical area, namely the area in or around Sumner Road on the Lyttelton waterfront, being an area that is fenced off from the public and with clearly identifiable boundaries. If that was the case, those are the words that would have been used in the collective agreement. Accordingly I reject this submission.

[31] If the words refer solely to a geographical area, while there might be room for uncertainty about how far the geographical limit extends away from the water, I do not think it would extend through to the Christchurch side of the Port Hills.

[32] The applicants say that the natural and ordinary meaning of the phrase supports their claim. The argument focuses more on the overall operations or functions of the *Port of Lyttelton* as a business activity. The work in Woolston is said to be part of the overall operation of the business of the *Port of Lyttelton*. Because land is restricted alongside the water LPC took advantage of the relative availability of land through the Christchurch road tunnel to meet its expanding *Port of Lyttelton* business requirements.

[33] The argument has merit. In July 2009 LPC management in a memo to RMTU about mechanic support at CityDepot said *When CityDepot was incorporated into the*

operations of LPC ... There is other evidence of day to day operational and management integration of container handling in Woolston into wharf operations in Lyttelton.

[34] The operation in Woolston is referred to by LPC in its annual reports and on its website as its *Inland Port*. The website says:

> *CityDepot is Lyttelton Port of Christchurch's inland port, providing an extensive container servicing facility and 14,000 sq metres of covered warehousing.*
> *LPC's CityDepot is located at Chapmans Road in Woolston, just 5 minutes through the tunnel. CityDepot provides expanded container services, reducing port congestion and attracting cargo to a centralised location.*

[35] I agree with counsel for the applicants that these communications cannot be dismissed as just marketing. LPC is a public company listed on the New Zealand stock exchange. That and other legal obligations proscribe misleading statements.

[36] Interestingly, LPC describes itself in these and other communications as *Lyttelton Port of Christchurch*. That description focuses on the function of the port rather than just its geographical location. All the applicants employed in 2009 or later received letters from LPC offering them a position with *Lyttelton Port of Christchurch* as part of the *CityDepot* team. Mr Lawton's individual employment agreement states the location of his position as *Lyttelton Port of Christchurch* although he has always worked at Woolston.

[37] There is precedent where the Labour Court considered two geographic locations as one integrated operation: see *NZ Meat Processors, etc IUOW v Auckland & Tomoana Freezing Works, etc IUOW* [1989] 1 NZILR 1006. That case was a demarcation dispute. Two nearby meat works were covered by separate unions. One closed down. Some while later the remaining works began to use the facilities at the closed plant as its business expanded. A dispute arose over whether the workers at the closed plant were covered under the rules of the established union at the remaining plant. The Labour Court needed to interpret the union's rules which gave it coverage *in or within the precincts of* the remaining works. The Court held that the word *precincts was* not a precise term but included geographical content. The Court went on to hold that operations at the previously closed plant were sufficiently integrated with the continuing plant so that it could not be said that the 3 kilometres separation

took the operations out of the precincts of the continuing plant. Here, the submission is that the *Port of Lyttelton* is one integrated port operation that encompasses activities at both Lyttelton and Woolston.

Conclusion

[38] The relevant context for present purposes is that the 2003 CEA was the first under the current statutory regime requiring parties to include a coverage clause. The form of words had to facilitate statutory coverage for subsequent employees who joined the union. That was a way of achieving the objects of the Employment Relations Act 2000 such as acknowledging and addressing the inherent inequality of power in employment relationships, promoting collective bargaining and protecting the integrity of individual choice. The statute required the parties to include a provision specifying the work covered by the CEA, whether by reference to the work or type of work or employees or type of employees. There was no requirement to specify the location of work for the purposes of a coverage clause. Clause 1.5 of the CEA is an expression of the parties' intent that the CEA should not be narrowly applied and that approach is supported by the Act.

[39] Considered in that context, I find that the phrase *at the Port of Lyttelton* is principally a functional reference linked to the type of work rather than strictly a geographical reference. To be covered by the CEA employees must work in the business of the *Port of Lyttelton* in one of the occupations listed in clause 1.2. The second applicants meet both those requirements and are therefore entitled to coverage under the CEA from the date of their membership of RMTU.

[40] The parties should be able to resolve any issues about quantum based on this ruling. However I will reserve leave in case of any difficulty.

[41] The parties might think that this is a case where costs should lie where they fall. However I will reserve costs in case there is a different view.

Philip Cheyne
Member of the Employment Relations Authority