IN THE EMPLOYMENT RELATIONS AUTHORITY
CRISTCHURCH

[2012] NZERA Christchurch 76
5367865

	BETWEEN	NZ AMALGAMATED ENGINEERING, PRINTING & MANUFACTURING UNION INC Applicant
	A N D	CLOUGH AGRICULTURE LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Greg Lloyd, Counsel for Applicant Linda Penno, Advocate for Respondent
Investigation meeting:	18 April 2012 at Christchurch
Submissions Received	At the investigation meeting
Date of Determination:	24 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dispute over the interpretation, application and operation of a collective agreement. At issue is the level of contribution the respondent, Clough Agriculture Limited (Clough), is required to make to the KiwiSaver accounts of its employees.

[2] The applicant, the NZ Amalgamated Engineering, Printing and Manufacturing Union Inc. (EPMU), contends that the contribution should be at the level specified in the collective agreement it has with Clough and which covers its members there. That clause reflects the levels of contribution envisaged at the time the clause was included in the agreement in September 2007.

[3] Clough contends a lesser obligation as a result of both the content of the relevant clause and subsequent amendments to the Act.

Background

[4] Members of the EPMU employed at Clough are covered by a collective agreement. It has, in recent years, been settled for 12 month terms.

[5] On 20 July 2007, the EPMU organiser responsible for the agreement, Mr John Gardner, wrote to Clough advising the Union claims for the next renewal of the collective agreement. It contained a claim entitled *New Provision for Kiwi Saver* which read:

> ***Kiwisaver Clause for a 2%/2% split***
>
> *Where a worker covered by this agreement has opted to have 2% of his/her gross salary or wages deducted for his/her KiwiSaver account, the employer shall contribute an amount equivalent to 2% of the worker's gross salary or wages to the worker's KiwiSaver account, and shall forward to Inland Revenue along with the worker's contribution as required. From 1st April 2010 both the employer and the worker's contribution will move to 3% and from 1 April 2011 the amount will move to 4%.*

[6] Neither party can now tell me if there was any negotiation over this claim or, if there was, the details thereof. Suffice to say, it was agreed that the clause, as drafted by the EPMU, would be included in a collective agreement whose stated term was 1 August 2007 to 31 July 2008 and this was recorded in a signed Terms of Settlement on 4 September 2007.

[7] When preparing the collective agreement for signature, the parties engaged in what they portray as a *tidy up*. As part of this process, Mr Nigel Barrett, Clough's Operations Manager, sent an email to Mr Gardner on 18 September 2007. Amidst other changes he asked that at the end of the agreed KiwiSaver clause they add the phrase:

> *This clause is subject to KiwiSaver legislation and IRD rules*.

[8] The request was followed by a note advising:

> *John, just a simple addition. Just to note that we will abide by prevailing legislation and IRD rules.*

[9] Mr Gardner responded later that day. He said:

> *I have no problem with these changes here is the changed version I can call in tomorrow morning with a signed copy if this suites.*

[10] On 10 October 2007 Mr Craig McIsaac, Clough's Managing Director, sent all staff a memo about the employer subsidy. It outlines the fact that Clough would assist staff who found the then minimum contribution of 4% too high by contributing half. In other words staff would pay 2%, with Clough voluntarily paying the other 2%. It goes on to note that those who were already members of KiwiSaver or who wished to join and contribute in excess of 2% would also receive the employer contribution. The memo then went on to advise that the voluntary company contribution would dovetail into the government's proposed compulsory employer contribution regime. In essence, this meant that compulsory employer contributions which were then envisaged were phased in, the voluntary component of Clough's contribution would reduce and remain at a total of 2% until it was required to increase to 3% on 1 April 2010 and later 4% (refer explanation of the statutory scheme – paragraph 20).

[11] The 2007/2008 collective agreement was followed by another 12 month document. The issue of KiwiSaver was not discussed and the clause remained unchanged.

[12] The 2008/2009 collective agreement continued to be applied for another year. While it is clear from the evidence that some discussion occurred at the time, the parties cannot advise me whether the 'roll-over' came about as a result of the operation of s.53 of the Employment Relations Act 2000; an undocumented agreement; or whether it simply happened. Suffice to say, they are in agreement that the terms of the 2008/2009 agreement continued to apply and that the issue of KiwiSaver was not discussed between them at this time.

[13] A new agreement was concluded and operated from mid-2010 to mid-2011 but, once again, the issue of KiwiSaver was not discussed. It did, however, become an issue during negotiation for a new agreement in 2011. The EPMU, having noticed that Clough's contribution had not increased from 2%, raised the issue during that negotiation. It then became clear that the parties had different expectations about the clause and how it would operate. They were therefore unable to resolve their differences and that has, ultimately, led to this investigation meeting.

[14] Clough's position, as enunciated by Mr McIsaac, is:

> *Our intention has always been to contribute the minimum/ compulsory employer contribution once the assistance to get staff into KiwiSaver was reached, as indicated in the memo (of 10 October 2007). This voluntary company contribution programme was notified to staff and was to dovetail in and be ruled by the government's proposed compulsory employer contribution regime over time.*

[15] Mr Barrett's position is that:

> *KiwiSaver was new legislation, and the popular opinion at the time that it was by no means stable, therefore clause 20 needed to be subject to prevailing legislation.*

[16] That, he contends, was the rationale behind the additional sentence and it was his intention that any future level of contribution be governed by the legislation as it may be at the time.

[17] Mr Gardner's position is that, at the time the clause was introduced, the Union had specific expectations about what would be delivered to its members and what the future would hold. It sought to ensure that those expectations were met by enshrining them into the collective agreement, thus avoiding a situation where the Union would later have to return to its members and advise that previously held expectations would no longer be delivered.

The legislative regime

[18] The KiwiSaver Act is a lengthy and complicated piece of legislation. It has also been subject to considerable amendment over a relatively short period of time. That said, this dispute focuses on only one element of the legislation – the level of contribution required of both employee and employer.

[19] The KiwiSaver Act, as initially enacted on 6 September 2006, envisaged that an employee would contribute 4% of his or her earnings to a superannuation scheme. This could be increased to 8% if the employee chose and then subsequently notified his or her employer. At that time, employers were not required to contribute but could do so on a voluntary basis if they so wished.

[20] The situation would soon change. The Taxation (KiwiSaver) Act 2007 became law on 19 December 2007. It provided that an employer would contribute 4% of an employee's earnings to his or her superannuation scheme. This requirement would, however, be introduced incrementally. The employer would initially contribute 1% with that amount increasing to 2% as of 1 April 2009. There would be

a further increase to 3% with effect 1 April 2010 and the final figure of 4% would be reached on 1 April 2011.

[21] Again, this was to change. The Taxation (Urgent Measures and Annual Rates) Act 2008 was enacted on 15 December 2008. It stipulated that with effect 1 April 2009, employees could join KiwiSaver on the basis of a 2% contribution as opposed to the previous 4%. It also repealed the provisions that required an incremental increase of the employer contribution to both 3% and 4%, thus, effectively, capping that contribution at 2%.

Submissions

[22] Both Mr Lloyd and Ms Penno provided detailed and comprehensive submissions and for that I thank them. While I will not summarise those submissions in detail I do note that both used, as their starting point the principles enunciated in *Department of Corrections v. Corrections Association of New Zealand Incorporated* [2005] ERNZ 984 (EmpC). There the Court confirmed that *the essential principles of employment contract interpretation under the former legislation had not been altered by Parliament when enacting the Employment Relations Act 2000* [refer *Tertiary Education Incorporated: ASTE Te Hau Takitini Oh Aoteroa v. Hampton, Chief Executive of the Bay of Plenty Polytechnic* (2002) 1 ERNZ 491] before enunciating those principles (at least as they applied in that matter). They are:

- *Agreements are interpreted with reference to the factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question;*

- *One considers, first, the words used – they must obviously be a starting point – and then the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that natural meaning of the words;*

- *The Court is required to adopt an objective approach to interpretation: what matters is not what the parties say they intended the words to mean but what a reasonable person in the field, knowing all the background, would take them to mean. Evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier draft;*

- *Evidence of relevant conduct of the parties after the contract came into existence may sometimes assist in interpreting it, at least in the case of employment agreements;*

- *Interpretation of an employment agreement should not be narrowly literal but should accord with business common sense: the "business" in this case is that of employment relations in prisons. The interpretation should fulfil the purpose of the agreement and be based not simply on dictionary meanings or grammar. Even if the drafting is inept, the Court should attempt to give effect to the underlying intent. If a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find an interpretation that satisfies business common sense and fulfil the parties purpose;*

- *Nevertheless, if the words are clear and can only have one possible meaning, that should generally determine the matter. The Court will need to be very sure of what business common sense requires when interpreting a contract if that does not accord with the clear words.*

[23] It is, in this instance, easy to conclude that the words of the clause as tabled by the EPMU and initially accepted by Clough are abundantly clear. They require an employee contribution to KiwiSaver which will be matched dollar for dollar by Clough and that both contributions will increase on specified future dates. It is equally clear that, at the time and given their references to statutory changes that were then in the future in both the claim and Clough's memo (paragraph 10 above), that the parties were aware of what was going on and that these were the levels of contribution they then expected they would have to honour.

[24] The real issue is around the subsequently inserted sentence, *This clause is subject to KiwiSaver legislation and IRD rules,* and its effect.

[25] Both parties have advised what they consider the clause to mean and how they think it should be applied but this is of little use. I say this for three reasons. First, bullet point three of *ASTE v Hampton* states it is irrelevant. Second, the parties agree they never discussed the issue so neither had an inkling of just what the other considered the clause to mean and take that into account, and third, the last sentence is, in my view, open to various interpretations.

[26] On one hand it could simply mean that the levels of contribution stipulated above shall be administered in accordance to both legislative requirements and rules as they exist at the time. On the other, it could possibly mean, as Clough contend, that it means the whole clause is completely subservient to whatever legislative regime applies at the time. Ultimately I conclude that the first of these applies in this instance. I do so for the following reasons:

a. I agree with Mr Lloyd's submission that if Clough's position is correct then the whole clause is effectively reduced to one of 'The Act, as it reads from time to time, shall apply'. First that would effectively nullify and make meaningless the bulk of the clause which precedes that statement the minute an amendment such as that which subsequently occurred was enacted. Second, and as we have learnt from a number of recent cases around the effect of additional annual leave provisions after the increase of the statutory entitlement from three to four weeks, there is a considerable difference between a clause that contains a detailed and specified leave regime and one that simply states that annual leave shall be granted in accordance with the Holidays Act 2003. If Clough really intended that the clause be totally subservient to legislation, they should have specifically said so. They did not and to now imply that to be the case is, in my view, reading so much in that it would not be obvious to the *reasonable person in the field.*

b. I am also aware, as I discussed with the parties and as confirmed by Mr Gardner's evidence, that unions historically attempt to codify statutory benefits in collective agreements so that they become enshrined and impervious to reduction by virtue of subsequent statutory revision. It is part of a well established modus operandi and is, to me, part of the surrounding circumstances.

c. Third, there is no ambiguity in the clause. The ambiguity is over the application of the last sentence and its relationship with the legislation and I note that the KiwiSaver legislation, as amended, does not preclude the outcome being sought by the EPMU. Application of a higher rate of contribution remains possible.

d. Lastly, and once again, it is clear that when the clause was initially agreed, the parties expected (and, it may be implied, intended) that contribution levels be as specified in the clause.

[27] Before continuing – I digress. I do not think the parties really stopped to consider the implications of what they were doing at the time, and as already said, they expected to have to apply the levels of contribution specified in the clause. I also noted the way they interacted at the investigation meeting. They interacted well and

putting aside the differences that inevitably arise in an industrial setting, I conclude that these parties essentially trust each other and it is that which was behind the level of informality surrounding the clause's amendment.

[28] There is also the fact that the agreement has been renewed, unchanged, since the regulatory changes occurred. In her submission Ms Penno mentioned *Secretary for Education v New Zealand Educational Institute Te Riu Roa* [2002] 2 ERNZ 470 (EmpC) though not in the context about to be discussed. In that decision the Court upheld a Tribunal decision. A key factor which influenced the outcome in the Tribunal [unreported, 18 October 2001, WT99/01] was that the parties had renegotiated their employment contract without discussing regulatory changes which were at the heart of the dispute and which, in the appellant's view, now precluded the interpretation sought by the union and previously applied. A similar situation exists here.

[29] The removal of the 3 and 4% steps occurred before the 2010 negotiation. Indeed the failure to honour the increase to 3% had also occurred but the issue was not of sufficient import that it came to the parties' notice. The same may be said of the 2009 discussions (see 12 above) but again there is no evidence the parties considered this an issue. Again the parties should have been aware of the issue and, to me, their failure to address it confirms a satisfaction with, and (albeit inadvertent) willingness to retain the levels of contribution originally agreed.

Conclusion

[30] For the reasons outlined above I conclude that the levels of contribution should be as prescribed in the collective agreement's KiwiSaver clause. That means that Clough should have contributed 3% as of 1 April 2010 and 4% as of 1 April 2011 but only if the employee also increased his or her contribution. If the employee chose to continue contributing at 2% (as he or she was entitled to do as of 1 April 2009) Clough's contribution would also remain unchanged.

[31] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority