IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 201
5374822

	BETWEEN	NEW ZEALAND AMALGAMATED ENGINEERING, PRINTING AND MANUFACTURING UNION Applicant
	A N D	THE NEW ZEALAND AUTOMOBILE ASSOCIATION LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Anne-Marie McInally, Counsel for Applicant Richard Upton, Counsel for Respondents
Investigation Meeting:	On the papers
Submissions Received:	19 May 2014 from the Applicant 19 May 2014 (twice)from the Respondent
Date of Determination:	22 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (the Union) raises a dispute about the calculation of entitlement to pay in reference to a collective agreement between itself and the respondent (AA). The collective agreement came into force on 1 May 2010 and is expressed to expire on 30 April 2012. For the avoidance of doubt I refer throughout this determination to that document as the collective agreement.

[2] The Union and AA have used their best endeavours to resolve the dispute by agreement. A significant amount of energy has been devoted to that resolution by the parties and they are to be commended for their efforts in that regard.

[3] Notwithstanding those efforts which culminated in a mediation on 8 May 2014, a resolution by agreement was not possible and the matter came before me on a urgent basis with a request from both parties that I determine the matter before bargaining for the replacement collective agreement commences on 27 May 2014.

[4] I convened a telephone conference with counsel and after discussion between them, it was agreed that the matter could be dealt with on the papers. Counsel helpfully determined their own timetable for the exchange of submissions and the matter then fell to me to determine the issue in the usual way.

Issues

[5] The question that the Authority is asked to resolve, expressed in a practical way, is how pay is derived for members of the applicant Union, employed by AA, on a fixed roster, who do not work on a public holiday.

[6] In order to determine the answer to this question, I must first identify the relevant law pertaining to the interpretation of collective agreements generally and then apply that law to the documents in the present dispute.

[7] It follows that I will need to consider these questions:

(a) What is the relevant law; and

(b) How does that law apply in the present circumstances?

What is the relevant law?

[8] The AA has referred me to a helpful recent decision of Chief Judge Colgan in *Electrical Union 2001 Incorporated and Cowell v. Mighty River Power* [2013] NZEmpC 197 where the Chief Judge referred to the leading cases and summarised the relevant law.

[9] In *Vector Gas Limited v. Bay of Plenty Energy* [2010] NZSC 5, the Supreme Court set out the law for determining the meaning of commercial agreements and those principles were subsequently adopted, as they applied to collective employment agreements, in *Silver Fern Farms Limited v. New Zealand Meat Workers & Related Trades Union Inc* [2010] ERNZ 317.

[10] From those various judgments I discern one central guiding principle, which is that the interpretation of a document is the establishing of the meaning that that document would convey to a reasonable person with all the background knowledge that would have been available to the parties to the document . In giving effect to the agreement or provision, the natural and ordinary meaning of the subject provision is to be followed, but that natural and ordinary meaning should not do violence to *business common sense.*

[11] Most importantly for our purposes, in *Mighty River,* Chief Judge Colgan observed, at para.[28]:

> *I must assume an intention by the parties to mean what is ordinarily taken from those words in the context of the collective agreement as a whole having regard to the nature of the work performed by the employee subject to it.*

[12] The AA also relies on *Air New Zealand v. Barker* [2002] 2 ERNZ 719 where Judge Colgan (as he then was) had this to say about evidence of the parties' intentions at negotiation time at para.[20]:

> *The Court is required to adopt an objective approach to interpretation and this has always been so. What matters is not what the parties say they actually intended the words to mean, but what a reasonable person, knowing all the background, would take them to mean. So evidence is not admissible of what one party thought the words meant or preliminary negotiations or earlier drafts. That is because if such evidence was admissible, it would often, perhaps inevitably, be concluded that the parties disagreed.*
>
> *Second, the whole point is that a final written agreement supersedes the negotiations; positions may have changed in the course of negotiations and the final document is the agreed version which might involve a compromise of the respective parties positions.*
>
> *Third, there is a sense in which an agreement takes on a life of its own, liable to be used and relied on by third persons who were not privy to the negotiations. That is particularly so in the case of employment agreements. …*

[13] The AA relies on *Barker* to seek to exclude the relevance of the material advanced by the Union on certain aspects of the bargaining.

[14] I am satisfied that the short point is that what I am required to do is to assess what the reasonable person, with all the information that would have been available to the parties at the relevant time, would take the disputed words to mean. Provided that

the natural and ordinary meaning of the words does not lead to a meaning that is an affront to *business common sense*, there is no need to consider extraneous evidence.

How does the law apply?

[15] To put the matter in to a factual context, I note that until 2010 the present dispute would have been impossible because the employees of the AA who were members of the Union worked under a floating roster. The effect of this was that all days were treated as "otherwise working days" and that obviated the problem that later emerged.

[16] What happened in 2010 was that some employees of the AA requested that they go on to fixed roster to promote certainty of hours and days of work. The AA agreed to that, but a logical consequence of that change was that some days would be "otherwise working days" and some days would not be "otherwise working days". That of course is the antithesis of the position under a floating roster where, as a matter of fact, all days were "otherwise working days".

[17] The relevant provision in dispute is clause 10.1 of the collective agreement. Before setting out this provision, I simply note that in the original collective agreement, the subparagraphs in the clause are differentiated simply by bullet point. That makes it more difficult to refer to each subparagraph for analysis purposes and accordingly I have adopted the conceit of the AA and applied roman numerals to the subparagraphs in the subject clause:

> *10.1* ***Public holidays***
>
> ***Holiday entitlement*** *: the following holidays shall be allowed in accordance with the Holidays Act 2003 and its amendment:*
> *[lists public holidays from the Act]*
>
> ***Payment for working on a public holiday*** *: where an employee* ***works*** *on a public holiday they will be paid a minimum of 4 hours at the applicable rate and the following provisions will apply:*
>
> *(i)* *The employee will be entitled to an alternative holiday at the employee's relevant daily rate for the day.*
>
> *(ii)* *Any employee whose* ***roster day*** *off falls on a public holiday shall be paid their relevant daily rate for that day except where Christmas, Boxing Day are transferred.*
>
> *(iii)* *Payment for public holidays is T2 of the ordinary rate for all hours worked.*

> *(iv)* ***Casual employees*** *payment for working a public holiday shall be in accordance with the Holidays Act 2003. To avoid doubt, casual employees will not be entitled to an alternative holiday.*
>
> *Where an employee rostered to work on a public holiday does* ***not work*** *as a result of being either sick, bereaved, or on ACC then that day is to be treated as an unworked public holiday rather than as sick leave or bereavement lead. This means that the employee will get a paid day off, be paid their ordinary daily rate, but will not be entitled to an alternative holiday.*

[18] The question that I am required to answer is how should the pay be fixed of those employees who are employed on a fixed roster, have a rostered day off falling on a public holiday and who do not work on that day.

[19] The essence of the dispute between the parties is that so far as the AA is concerned, the provision in the collective agreement that I have just set out in this determination, does not cover the group of employees just referred to and that the calculation of what these particular employees are entitled to is derived from the relevant provisions of the Holidays Act.

[20] Conversely, the Union says in effect that the change from a floating to a fixed roster in 2010 ought not to have affected the payment regime for those employees who did not work on a rostered day off falling on a public holiday.

[21] In essence then, the Union's view is predicated on the conviction that clause 10.1 provides for payment for those affected employees who both work on a public holiday subject to a fixed roster and who do not work on a public holiday subject to that same fixed roster. In other words, clause 10.1 is seen by the Union as a fixed code which deals with all of the circumstances pertaining to payment for public holidays.

[22] Conversely, the AA says simply that with the inauguration of a fixed roster as distinct from a floating roster, the relevant factual matrix changed not because of any sleight of hand by the employer, but simply because under a floating roster all days had, by definition, to be "otherwise working days" within the meaning that term has in the statute. Once a fixed roster was adopted, that factual position had of necessity to change and it followed inexorably that some days would now be "otherwise

working days", for particular employees and other days would not be "otherwise working days".

[23] That change in roster from floating to fixed fundamentally changed the application of the clause and meant that the clause from the point at which fixed rosters were adopted could only apply in respect to payment calculations for those who actually worked on a public holiday. Again, I emphasise this is not because of any lack of good faith by the AA but simply an inevitable consequence of the change in the rosters' structure, a change which apparently was sought by the staff. It was not imposed by the AA.

[24] Looking at the clause as it stands, it seems to me apparent that given the change in the roster, which fundamentally changed what as a matter of fact were "otherwise working days" and what was not, there is, as the AA submits, no provision in the collective agreement which identifies the wage entitlement of the employees who have a rostered day off falling on a public holiday and who do not work on that day. In the absence of such an entitlement, as the AA submits, the Holidays Act 2003 must apply. Again, I make the point that it is characteristic of the different approaches of the parties in this matter that for the Union, the collective agreement is a code providing all of the requirements for determining wage entitlements, whereas for the AA, the relevant provision in the collective agreement deals only with part of the entitlement, the balance being dealt with by the statute itself.

[25] When I look at clause 10.1 it seems to me as plain as can be that the clause applies only to those who work on a public holiday. That is the subtitle to the relevant part of the clause and the references in the body of the clause refer to people working. The only reference to a person not working relates to the special situation where an employee is sick, bereaved or on ACC, which is, I am satisfied, a separate and particular class or category and not the more general run of situations thrown up by the effect of the change in the roster.

[26] That view of matters is supported, in my view, by the decision of the authors of this clause to bolden and underline the word "works" at the beginning of the provision and the two words "not work" which are also underlined, at the end of the provision.

[27] Most importantly, I agree with the AA's submission that the commencing preamble of clause 10.1 is in the following terms:

Where an employee works … the following provisions will apply.

[28] That provision is meaningless if some of the subsequent subparagraphs are actually supposed to relate to employees who are not working.

[29] Moreover, again as the AA submits, the provision just referred to is in the plural which suggests that all of the following subparagraphs are relevant qualifiers of the opening provision.

[30] In those circumstances, it is difficult to see how the Union's preferred interpretation of the provision can apply because, in effect, it requires a rewriting of the clause. In particular, the references which are made to an employee working, the heading of the subparagraph with "payment for working" and the listing of the "following provisions" would all, in my judgment, need to be altered in order to meet the Union's interpretation.

[31] Further and finally, the most difficult aspect of the clause from the AA's perspective is the meaning of subparagraph (ii). The AA says, plausibly, that what subparagraph (ii) does is clarify where an employee is required to work on a public holiday and the day in question is a rostered day off, their entitlement is to receive payment not at the T2 rate referred to in subparagraph (iii) but at the relevant daily pay rate. Put another way, what subparagraph (ii) does is differentiate between the entitlement to double time provided for in subparagraph (iii) and the situation where an employee works on a public holiday that is his or her rostered day off.

[32] I am not persuaded that an analysis of what the parties thought they were agreeing to at the time the document was negotiated can assist me. I am satisfied the law requires me to look at the words and given them their ordinary commonsense meaning. I am satisfied that doing that does not make for an interpretation which flies in the face of commercial good sense.

Determination

[33] I am satisfied that the interpretation consistently adopted by the AA is the correct one and that the Union's analysis of the position is mistaken. In particular, I have not been persuaded that payments made to members of the Union who are

employed by the AA under the collective agreement have deprived those employees of any entitlements they have at law, either pursuant to the provisions of the collective employment agreement or the provisions of the Holidays Act 2003 and its amendment.

[34] As a matter of practice, I am satisfied that the AA has complied with its obligations to pay workers appropriately by applying clause 10.1 of the collective agreement to those employees who worked on public holidays and by applying the relevant provisions of the Holidays Act 2003 to those employees who were not rostered to work on the particular public holiday and who did not in fact work.

Costs

[35] I am satisfied this is a genuine dispute between the parties, properly brought before the Authority given the inability of the parties to reach an agreement on the matter on their own terms.

[36] In those circumstances, my provisional view is that it would not be appropriate to make a costs award. However, if either party wishes to be heard on the matter of costs, I am happy to receive submissions. Initiating submissions should be filed and served and the responding party then has 14 days from the date of receipt of the initiating submissions to file and serve their response. There is to be no right of reply. The matter would then be determined by me on the papers.

James Crichton
Member of the Employment Relations Authority