

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 518  
3057252

BETWEEN	THE NORTHERN AMALGAMATED WORKERS UNION INCORPORATED Applicant
AND	BRIAN PERRY CIVIL A BUSINESS UNIT OF FLETCHER CONSTRUCTION COMPANY LIMITED Respondent

Member of Authority: Rachel Larmer

Representatives: Helen White, counsel for Applicant  
Susan Hornsby Geluk and Alastair Espie, counsel for  
Respondent

Investigation Meeting: On the papers

Submissions and  
Information Received: 19 July 2019 from the Applicant  
1 August 2019 from the Respondent  
5 August 2019 from Applicant

Date of Determination: 3 September 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Northern Amalgamated Workers Union Incorporated (the Union) asked the Authority to determine a dispute with Brian Perry Civil, a business unit of Fletcher Construction Company Limited (the Company) over the interpretation of the coverage clause in their Collective Agreement dated 1 July 2017.

[2] The Union also seeks a determination from the Authority that its members who work in the Northern Industrial District can join the Collective Agreement.

*Material clause*

[3] The disputed clause in the Collective Agreement is clause 2.1 which states:

This agreement shall cover employees of Brian Perry Civil who are members of the Union, and who are engaged in construction on projects in the Auckland area, specifically the job classifications listed in clause 6. It does not cover management above the level of site team leader. The agreement shall apply to the Northern Industrial District.

*Disputed interpretation*

[4] The Union currently represents three members who are based in Hamilton who it says should be covered by the coverage clause because they are employed by the Company to work in the Northern Industrial District, within the job classifications listed in the Collective Agreement, and they do not hold management positions above site team leader (“the affected members”).

[5] The Company’s position is that, as Hamilton based employees, employed by the Hamilton branch, these three affected employees are not covered by the coverage clause.

[6] The Union disagrees that the Company is able to refuse these three affected members coverage under the Collective Agreement on the grounds that they do not work within “*the Auckland region*”.

[7] The phrase “*the Auckland region*” is not defined in the Collective Agreement. Nor have the parties defined it elsewhere.

[8] The Company has interpreted the coverage clause to mean that a union member who is employed to work in Hamilton would not be covered by the Collective Agreement, because the coverage clause is limited to employees who are engaged on projects in the Auckland region.

[9] The Union says that the coverage clause was wider than just covering union members who worked in the Auckland region, and it applied to all union members working for the Company who are employed within the Northern Industrial District, so long as they fell within the job classifications listed and were not management above team leader.

[10] There is no dispute that “*the Northern Region District*” is a much wider geographical area than “*the Auckland region*”.

[11] The Union says that the phrase “*Northern Industrial District*” was a term commonly understood by the parties because it was used to describe coverage in many awards, including the one that preceded the Collective Agreement.

[12] The Union’s position is therefore that an award that had included coverage of the “*Northern Industrial District*” would have included coverage of the affected members, who are based in Hamilton. The Company said that was not how the parties have consistently applied this particular coverage clause.

#### *Compliance order*

[13] The Union has sought a compliance order from the Authority allowing its members within the Northern Industrial District to be covered by the Collective Agreement, provided they met the job classifications listed and are not management or above team leader.

[14] The Company’s position is that employees who are not engaged in construction on projects in the Auckland region do not fall within the coverage clause, so are not covered by the Collective Agreement.

[15] The Company said that a compliance order should not be issued because the affected members that the Union is seeking coverage for are not covered by the Collective Agreement, because they are employed by the Hamilton branch and do not work in the Auckland region.

[16] The Company’s position was that even if the Union succeeded with its interpretation of the coverage of the Collective Agreement, a compliance order should not be issued because the Collective Agreement expired on 30 June 2019, so the proper way to address coverage issues is for the parties to do so during their current round of collective bargaining.

#### *Coverage clause requirements*

[17] For a Union member to be covered by the Collective Agreement all of the following factors must be met:

- (a) The employee must be a member of the Union;

- (b) An employee of the Company, who is employed to work specifically within the Brian Perry Civil Business Unit;
- (c) Engaged to work on construction projects in the Auckland region;
- (d) Engaged in one of the job classifications listed in clause 6 of the Collective Agreement. These are not set out here because they are well known by the parties;
- (e) Are not employed in a management position or role above the level of site team leader; and
- (f) Are working within the area to which the collective agreement applied, namely the Northern Industrial District.

[18] The coverage clause makes it clear that an employee must satisfy all of the above requirements, including in particular the requirement that the employee is engaged in construction projects “*in the Auckland region*”, in order to be entitled to coverage.

*The Union’s evidence*

[19] Mr Maurice Davis, the National Secretary of the Union, provided an affidavit which stated that the reference to the “*Northern Industrial District*” in the Collective Agreement referred to a distinct geographical area that was habitually used by unions and employers in the time of awards.

[20] Mr Davis referred the Authority to a map that defined the Northern Industrial District, and stated that was the same area as that referred to in the “*Ninth Schedule Labour Districts*”, which identified the “*Northern Labour District*” in the Labour Relations Act 1987.

[21] Mr Davis acknowledged that the wording in the Collective Agreement of “*Northern Industrial District*” was different from “*the Northern Labour District*”, which was the wording used in the Ninth Schedule of the Labour Relations Act.

[22] However Mr Davis said the different wordings still meant the same thing. Mr Davis referred back to the Industrial Relations Act 1973 definition of the “*District*” which used the word “*Industrial*” as follows:

“*District*” or “*Industrial District*”, means an industrial district constituted under this Act.

[23] The districts constituted in s 236 of the Industrial Relations Act 1973 did not describe a geographical area for each district but instead adopted the districts from the 1954 Act, which allowed the gazetting of changes to the "*Industrial District*".

[24] Mr Davis believed that any changes to the original geographic area of any district, or change to a district's name, would have to have been published in the gazette. He therefore believed that it followed that the Northern Industrial District was eventually renamed, and its geographic boundaries set by the 1987 Act's description in "*Schedule Nine*".

[25] The parties did not provide the Authority with any proof that gazetted changes had occurred.

[26] Mr Davis said he was not aware of any definition of what "*the Auckland Region*" meant either in the Collective Agreement or in any other labour related legislation. He pointed out that he had not negotiated the Collective Agreement and noted that the person who had done so has since passed on.

[27] Mr Davis says that he didn't know what "*the Auckland Region*" would mean in terms of geographic area if it did not cover "*the Northern Labour District*", which he argued was the same as "*the Northern Industrial District*".

[28] Mr Davis' view was that union members who worked within "*the Northern Industrial District*" should be covered by the Collective Agreement, as should new employees. He further stated that new employees should also be advised of the existence of the Collective Agreement and of how they can join the Union.

#### *The Company's evidence*

[29] Matthew Findlay, the Branch Manager of the Brian Perry Civil Auckland Branch, has worked for the Company for nine years. Before he became Branch Manager in 2013, he held the position of Contracts Manager.

[30] Mr Findlay explained in his affidavit that Brian Perry Civil is a trading name of Fletcher Construction Company Limited's specialised civil engineering arm and its primary business is civil construction and foundations. Brian Perry Civil was a civil engineering business based in Hamilton before it was acquired by Fletcher Construction Company Limited in 1986.

[31] Brian Perry Civil has four branches across New Zealand – Auckland, Hamilton, Wellington and Christchurch. Members of the Union work at the Hamilton and Auckland branches only.

[32] While all of the branches are part of Fletcher Construction Company Limited, they operate in a decentralised manner and with a high degree of autonomy. Each branch has its own branch manager, commercial structure and keeps its own profit and loss statements.

[33] Each branch also makes its own staffing decisions. While branches receive centralised human resources support, decisions about whether to offer employment to employees, where employees will work, and what work each employee is employed to do, are made exclusively at the local branch level.

[34] When employees receive offers of employment, the allocation of work is identified in relation to a specific branch or a region that co-relates with a specific branch.

[35] For example, an Auckland based employee who is a member of the Union was provided with an offer letter that described the location of his employment as:

Your main place of work will be in Auckland or wherever we may reasonably relocate our premises from time to time to suit operational needs. You may need to travel throughout New Zealand and overseas from time to time in the course of your duties.

[36] The location clause in the employment offer to a Union member who was employed through the Hamilton branch stated:

Your position will be carpenter initially based in Taupo working on the [redacted] project and responsible to [name redacted] Project Manager, after the duration of this project you will be based out of the Hamilton branch provided that you may be required to work at other locations as required by the Company.

[37] Another Hamilton based Union member's location clause stated:

Your main place of work will be in Hamilton or wherever we may reasonably relocate our premises from time to time to suit operational needs. You may need to travel throughout New Zealand and overseas from time to time in the course of your duties.

[38] A third Union member's location clause stated:

Your position will be labourer based in Hamilton and responsible to [name redacted], manager Waikato/BOP provided that you agree that you may be required to work at other locations as required by us.

[39] Although each branch performs work primarily in the area in which they are based, at times employees from each branch may need to work on projects in other parts of the country.

[40] Mr Findlay explained that was more common for employees who worked in the foundations team and particularly those based in Auckland, because the Auckland foundations crew is the largest within Brian Perry Civil, and there is no permanent foundation crew in Hamilton.

[41] That meant that from time to time the Auckland foundations crew would be sent out of Auckland to work on large scale piling projects, where specialist expertise was required. An example Mr Findlay gave of that was the Hamilton City Edge Project on which Auckland branch employees had been working, despite the project being located outside the Auckland region.

#### *History of the bargaining*

[42] The parties have had a Collective Agreement in place since 2004. Bargaining for a new Collective Agreement is currently underway.

[43] Mr Findlay is leading the bargaining for the Company. Mr Findlay stated that he has always understood his mandate was to negotiate a Collective Agreement on behalf of the Auckland branch.

[44] Mr Findlay said that the other Brian Perry Civil branches, including Hamilton, do not and have not previously, had any input into the collective bargaining because firstly, workers from other branches were not physically employed by the Auckland branch and secondly they had not previously considered that the Collective Agreement applied to them and their employees.

#### *How the coverage clause has previously been applied by the parties*

[45] The Brian Perry Civil Hamilton branch has four Union members, none of whom are “engaged in construction work on projects in the Auckland region”. Mr Findlay said he was not aware of them having worked on construction projects in Auckland region either as their

primary employment or even having done so at all while employed through the Brian Perry Civil Hamilton branch.

[46] Mr Findlay gave the example of an employee who was previously employed by the Auckland branch but who is now employed by the Hamilton branch.

[47] Mr Findlay said that when that Union member transferred from the Auckland branch to the Hamilton branch the parties and the Union member agreed that once he had accepted employment with the Hamilton branch (which occurred in March 2007) he ceased to be covered by the Collective Agreement, because that had only covered Union members employed by the Auckland branch.

[48] Mr Findlay pointed out that it was not until 2019 that the Union first claimed that the particular Union member referred to above should be covered by the Collective Agreement that has just expired. The Authority noted that was raised for the first time approximately 12 years after the change had been communicated to the Union and affected member.

#### *Ambit of dispute*

[49] While Mr Findlay did not dispute Mr Davis' understanding of what the Northern Industrial District represented in geographical terms, he disagreed that any Brian Perry Civil employee who worked in the Northern Industrial District was also covered by the Collective Agreement.

[50] Mr Findlay's understanding of the reference in the Collective Agreement to "*Northern Industrial District*" was that it reflected the reality of Auckland based employees being sent outside of the Auckland region to work on projects for a limited period of time.

[51] Mr Findlay stated that historically the Auckland based employees predominantly carried out this work outside the Auckland region in the wider Northern Industrial District, which is why that sentence was included in the Collective Agreement, to reflect that historical understanding.

[52] Mr Findlay pointed out that the Company did not want to deny employees' coverage under the Collective Agreement for the sake of it, but felt that it was important that only Auckland based Brian Perry Civil employees who had bargained for the Collective Agreement were covered, because it did not take account of the specific circumstances that

related to Union members who were employed by other Brian Perry Civil branches, and in particular those Union members who had been employed by the Hamilton branch.

[53] Mr Findlay said that the Company would consider in good faith the Union's desire to negotiate for a broader coverage clause or any initiation of bargaining that the Union did for a new Collective Agreement on behalf of Hamilton based employees. Mr Findlay stated that he believed that bargaining was the appropriate way to address these issues, not a compliance order.

*Plain meaning of "the Auckland region"*

[54] The Authority considers that the reference to "*the Auckland Region*" in the coverage clause limits the coverage of the Collective Agreement to those employees who meet the other requirements in the coverage clause and who have been engaged by the Auckland branch or any other branch to work "*on projects in the Auckland region*".

[55] The Authority considers that the requirement will be clear from each employee's offer of employment and/or position description for the position that the employee is in. To adopt the Union's interpretation would render the words "*in the Auckland region*" superfluous, so that cannot logically be the preferred interpretation.

[56] The interpretation preferred by the Authority does not render the words "*the Northern Industrial District*" superfluous or ineffective because that represents a wider geographical area than "*the Auckland region*".

[57] It is a way of limiting the coverage of the Collective Agreement to a specified geographical area. That limitation meant that someone who was engaged by the Wellington branch but who was undertaking work in the Auckland region would not be covered by the Collective Agreement because they were based outside of the Northern Industrial District.

[58] It also means that an employee who was employed by a branch to work within the Northern Industrial District, would only be covered if in addition to meeting that geographical requirement the Union member was "*engaged in construction on projects in the Auckland region*".

[59] It is entirely possible that a Union member could be engaged to do work within the Northern Industrial District which did not also fall within “*the Auckland region*”, in which case that Union member would not be covered.

*Cross check on plain wording used in coverage clause*

[60] In adopting this interpretation based on what the Authority considered was the plain wording of the coverage clause, a cross check has also been done to ensure that the plain meaning of the words makes sense within the context in which the Collective Agreement was bargained for and ultimately agreed.

[61] Consideration was given by the Authority to the wider context of the Collective Agreement to see if there was an interpretation, other than the most obvious one, that suggested that the words used in the coverage clause were intended to convey a meaning other than that described by the Authority. The Authority is satisfied that they did not.

[62] The Authority’s interpretation of the coverage clause, as limiting it to those employees who have the location of employment recorded in their offer letter or position description as Auckland and/or the Auckland region, aligns with the way that the Company operates its business.

[63] It makes sense for the coverage clause to cover employees who have been able to bargain for the terms and conditions in the Collective Agreement, which were intended to cover the work that those particular employees (meaning those who worked in the Auckland region) would be undertaking.

[64] Union members outside of Auckland, such as the affected employees that the Union has identified in these proceedings, did not have any input into the bargaining. It can be anticipated that the ratified Collective Agreement may not have met their (as in non-Auckland based employees’) work specific requirements in the way that it would have for the Auckland based employees who were covered by the Collective Agreement.

[65] It is also significant that the parties’ custom and practice has always been that the Collective Agreement only applied to employees who were employed through the Auckland branch and whose substantive role was to work in construction projects in the Auckland region.

[66] The Collective Agreement has consistently been applied by the parties on the basis that Union members who are employed by the Brian Perry Civil Hamilton branch do not fall within the coverage clause so are not covered by the Collective Agreement.

[67] The fact that for the 15 year period, from 2004 to 2019, Union members who had been employed by the Auckland branch ceased coverage when they subsequently became employed by the Hamilton branch, without any dispute about that arising, strongly indicates that the parties' intention accorded with the Authority's plain wording interpretation.

[68] That interpretation was not inconsistent with the right that the Company has to relocate employees to a different region for specific jobs from time to time, because that does not change the underlying substantive or predominant location of the employee's position.

[69] The Authority considers that it is correct that an Auckland branch employee who is based in a substantive role that involved working on construction projects in the Auckland region is still subject to coverage under the Collective Agreement if the Auckland branch temporarily transfers that employee, for a limited period of time, to work on a project outside the Auckland region.

[70] That coverage would not occur for an employee who is in a substantive role that works on construction projects in a different area of the country (not the Auckland region), who is transferred to the Auckland region for a limited period of time and is always intended to revert back to their original (non-Auckland) region, as recorded in their offer of employment and/or job description.

[71] Where a Union member is permanently transferred out of the Auckland branch, then at that point their coverage would cease, as occurred in 2004 for one of the affected members.

[72] The Authority considers that the determining factor was where the employee has been substantively employed to work, in accordance with the location provision advised to them in offer of employment and/or other employment documentation.

[73] The Authority considers that the Union's interpretation of the coverage clause of the Collective Agreement is inconsistent with the plain wording of the clause.

[74] In particular, if accepted, the Union's interpretation would result in employees being covered by the Collective Agreement who were not engaged in construction projects in the

Auckland region, which would render that part of the clause redundant. It therefore cannot be the correct interpretation, as all of the words used by the parties are presumed to have meaning.

[75] The Authority further notes that if the parties had intended for the Collective Agreement to cover all employees who work on projects within “*the Northern Regional District*”, rather than only those who were engaged in projects in “*the Auckland region*”, then the coverage clause could have easily been drafted to reflect that. That fact that it was not is a significant factor.

[76] The coverage clause could also have been worded to provide that coverage to those who were engaged in construction projects in the Auckland region and/or the Northern Regional District, but it was not. Alternatively, the clause could have omitted reference to the Auckland region entirely, but it did not. These are also significant factors when determining the correct interpretation of the coverage clause.

[77] The way the coverage clause is currently drafted does not state that an employee will be covered by the Collective Agreement if the employee is based in, or does work within, the Northern Industrial District. The specific words used in the coverage clause are “*the agreement shall apply to the Northern Industrial District*” – not that the agreement shall cover all employees in the Northern Industrial District.

[78] The Union’s argument that the reference in the coverage clause to “*the Auckland region*” and the “*Northern Industrial District*” are interchangeable is not accepted, because they reflect two different concepts, contexts and geographical areas.

[79] “*The Auckland region*” is a specific defined region which is much smaller than the wider “*Northern Industrial District*”, and as such is distinct from other regions (such as the Waikato region) that would partially fall within the definition of the geographical area of the Northern Industrial District.

*Bargaining solution is available for the coverage issue*

[80] The Authority agrees with the Company that to the extent that the Union wants to bring the “*affected members*” within coverage of the Collective Agreement, then that is an issue that can and should be addressed in bargaining.

[81] It is open to the Union to either bargain over changes to the existing coverage clause and/or to initiate bargaining for a new Collective Agreement, that contained a coverage clause that was wide enough to include employees who are not engaged in construction projects in the Auckland region.

### **Outcome**

[82] The Union's application for a compliance order does not succeed.

[83] The Authority was satisfied that the Company has been correctly applying the coverage clause in the Collective Agreement, in a way that was consistent with the plain wording of the clause and with longstanding and well-established custom and practice that has been built up by the parties over (at least) the past 15 years or so years.

### **Costs**

[84] The Company as the successful party is entitled to a contribution towards its actual costs.

[85] The Authority encourages the parties to resolve costs by agreement. However if that is not possible then costs will be assessed in accordance with the Authority's usual notional daily tariff-based approach costs. In which case the following costs timetable applies:

- (a) The Company is to file its cost submissions by 23 September 2019;
- (b) The Union is to file its costs submissions by 9 October 2019.

[86] The parties are invited to identify in their costs submissions any factors that they say should result in adjustments being made to the notional daily tariff.

[87] Costs will be assessed on a pro-rata basis to reflect that this was an 'on the papers' matter, so did not take a full day of investigation meeting time.

**Rachel Larmer**  
**Member of the Employment Relations Authority**