

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 412/08
5117260

BETWEEN JOHN ANDREWS, PIETER
 DU JONGE, NERANDERAN
 GOVENDER, STEPHEN
 NEVILLE, HENNIE
 PRINSLOO, JANSE VAN
 VUUREN, AND ERNEST
 WEGENER
 Applicants

AND TOLL NEW ZEALAND
 CONSOLIDATED LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Tanya Kennedy for Applicant
 Nikki Dines for Respondent

Investigation Meeting: 5 and 6 August 2008 at Auckland

Submissions received: From both parties on 5 August 2008. Further
 submissions from Applicant on 20 August 2008 and
 from Respondent on 27 August 2008.

Determination: 4 December 2008

DETERMINATION OF THE AUTHORITY

[1] The Applicants are seven qualified locomotive engineers recruited in South Africa by Toll during 2005 and 2006 to work as train drivers in New Zealand. They say the pay and conditions provided in this country have not matched what they were promised and some have incurred costs for healthcare, education and residency applications contrary to what they were led to believe by Toll representatives.

[2] Based on what they say they were told by Toll representatives during the recruitment process, the Applicants seek the following remedies:

- (i) a declaration that Toll must recognise their previous South African service for all salary and other service-based entitlements provided in the collective agreement; and
- (ii) wage arrears from various dates since March 2006 after they gained New Zealand certification as Locomotive Engineers (LEs), including payment of overtime and interest on any wages found owing to them;
- (iii) payment of another \$500 each for relocation expenses;
- (iv) damages under the Contractual Remedies Act 1979 to cover costs some of them incurred for healthcare, education and residency applications; and
- (v) damages under the Fair Trading Act 1986 including damages for distress because of what they say were misleading statements about the employment offered; and
- (vi) penalties for not providing a reasonable opportunity to seek advice on their terms of employment; and
- (vii) a declaration that Toll did not act in good faith in dealing with their concerns.

[3] Toll denies the representations for which these remedies are sought were made by its representatives. Even if such statements were made, Toll says they were not part of the subsequent employment terms offered to and accepted by the Applicants. Toll also doubts that the claims on health and education costs are within the scope of the Authority's jurisdiction of employment relationship problems.

Issues

[4] The Authority investigation canvassed evidence regarding the following four issues:

- (i) Did Toll representatives make the representations alleged by the Applicants?
- (ii) If the representations were made are they enforceable terms of employment or were the Applicants' terms solely those in Toll's letters offering the jobs and the applicable collective employment agreement?
- (iii) If enforceable representations were made and not met, what damages or losses resulted and what remedies are required?

- (iv) Did Toll breach its obligations to the Applicants in relation to an opportunity to get independent advice before accepting the jobs and then fairly addressing concerns once raised by the Applicants?

[5] Written witness statements were provided by each of the Applicants and Glendyr Andrews, the wife of Mr Andrews. Each of them, along with Mr Neville's wife Noeline Neville, also gave oral evidence in response to questions from the Authority and counsel.

[6] Only four of the seven applicants attended the investigation meeting in person. Mr Prinsloo, Mr van Vuuren and Mr de Jonge were given leave not to attend. These three men no longer work for Toll. They have moved to Australia where they have found other jobs as train drivers. Instead they answered questions during an hour-and-a-half telephone conference on the second day of the investigation meeting.

[7] Scott Wilson, an industrial officer of the Rail and Maritime Transport Union, also provided a written witness statement and answered questions.

[8] For Toll written witness statements were provided by recruitment consultant Rowena Foster and the following former or present managers: Belinda Bell, Theunis Botha, Brendon Judd, Soren Low and Graeme Smart. Eddie van Eeden, a train driver for Toll recruited in South Africa by the same process as the Applicants also provided written and oral evidence in support of Toll.

[9] All witness took an oath or affirmation before confirming written statements and answering questions.

Representations

[10] The Applicants says the following representations were made to them about the pay and conditions that they would receive in New Zealand:

- a. Their railways service in South Africa would be recognised for the purposes of salary and other service-related benefits paid by Toll; and

- b. They would receive \$7500 in reimbursement of relocation expenses; and
- c. They would receive assistance and payment of the costs to get permanent residence in New Zealand after two years; and
- d. Their children would be treated as New Zealand residents for the purpose of getting university education; and
- e. Their spouses and children would be treated as New Zealand residents for the purpose of getting public healthcare

[11] In April 2005 Toll representatives Belinda Bell and Theunis Botha visited South Africa on a recruitment drive. The seven Applicants were among many dozens of interested South African train drivers they met. Six of them – referred to as “the 2005 applicants” – later attended a second interview with Toll representatives Soren Low, Graeme Smart and Rowena Foster. One – Pieter du Jonge – attended a second interview in 2006 with Soren Low and Brendon Judd.

[12] The 2005 applicants received written job offers shortly after their interviews. These included the following terms or information:

- a. an offer of work as a LE trainee in New Zealand;
- b. relocation assistance up to \$7000 on production of actual invoices;
- c. advice that they could contact Mr Low with any questions and that they were entitled to seek independent advice;
- d. the pay rates while doing theory training and on the job training and for LE grade 1 once they had complete the training programme;
- e. a statement that the letter confirmed the terms and conditions of Toll’s offer of employment and that conditions of employment were contained in the collective employment agreement (CEA), a copy of which was provided.

[13] Clause 15.1 of the CEA acknowledged that the agreement contained all the terms intended to be legally binding, except for terms implied by common law and statute and to the extent those terms were consistent with the agreement.

[14] The letter of offer to Mr de Jonge in 2006 was the same or not significantly different in all respects except one. It included a ‘completeness’ statement emphasising that the offer should be read in conjunction with the CEA and that “*this agreement replaces all previous written or oral agreements and understandings*”.

[15] The importance of the latter point is that the letter to the 2005 applicants had not included such a ‘completeness’ statement. By the time Mr de Jonge was sent an offer letter in 2006, the 2005 applicants had already raised concerns with Toll in New Zealand about whether they were getting what they said the company had promised them before they accepted their job offers.

[16] The Applicants’ allegations about the representations made to them were the subject of extensive evidence. Although I have given careful regard to everything written and said by them during the course of the Authority’s investigation, I am not satisfied from the totality of that evidence that the representations about the extent and nature of their terms and conditions were made or had the meaning that the Applicants now allege. That conclusion is reached on the balance of probabilities – that is whether it was more likely than not that what is alleged was said, done or had the meaning now attributed to it. I come to this conclusion for the following reasons.

[17] Firstly, there was no contemporaneous documentary evidence supporting the Applicants’ allegations as to what Toll representatives told them. None of the Applicants had any notes made in meetings or later diary notes or emails about what they were told about terms and conditions in the job interviews. Their evidence relied solely on how they remembered what was said at the time. Neither do the notes of Toll representatives made at the time, available for some but not all interviews, provide any evidence that the alleged representations were made.

[18] Secondly, I take account of the context in which the Applicants responded to Toll’s job advertisements in South Africa in 2005. The Applicants acknowledged that South Africa’s crime rate and their real concern for the safety and security of their families was the primary motivator for seeking to migrate to New Zealand. As some Applicants accepted in their oral evidence, they were more focussed on securing a job offer that would enable them to leave South Africa than paying close attention to the specific terms and conditions offered.

[19] Thirdly, it was not until the Applicants had been in New Zealand for some months that any of them raised concerns about what they now say in a gap between representations made and actual terms and conditions provided by Toll. In making what the Applicants' submissions called a life changing decision to move with their families to take up employment with Toll, it is more likely than not that at least one of them would have made some query at the time of receiving the written offer if it was less than what they understood was being offered. None did.

[20] In addition to those general reasons, I find it was more likely than not that the specific representations were not made as alleged for the following reasons.

Wages and service recognition

[21] There is no evidence that Toll, in planning its South African recruitment campaign in 2005, ever contemplated engaging new staff in New Zealand on a basis that would recognise their previous service with the South African railways.

[22] Some drivers attending Toll's recruitment information sessions did raise the question of whether their South African service would be recognised for the purpose of progression through the service-based steps of the New Zealand pay scale. Belinda Bell's evidence was that she replied that consideration may be given, but no guarantees were made. She accepts that she told some questioners that she would "*look into it*" although she took no steps to do so or come back to any questioners with a firm answer or further information about it. That may be poor human resources practice but it does not amount to making the representation alleged by the Applicants. At best the Applicants may have formed an impression from Ms Bell's words that it was possible to have their South African service recognised for advancing through the pay scale, and had a hope it would occur, but her words did not amount to telling them that it would happen.

[23] However the arrangements for their New Zealand training did include a level of recognition of their previous service and experience. The Applicants were provided with the opportunity to 'fast track' through both the theory and practical aspects of required training which enabled them to progress more quickly than an

ordinary New Zealand trainee to the certified LE rates of pay. Mr Neville for example completed his New Zealand training in seven months and believes it would have taken a trainee without any experience a further six months. Mr Govender took four months to complete what he believes would have taken a year for a new trainee to do. In that way their service was recognised and any references about such recognition were likely to have been to that.

Relocation expenses

[24] The 2005 Applicants saw a ‘power point’ slide presentation from Toll representatives which included a statement that Toll would assist relocation by paying “up to \$7500” and that further detail would be “*discussed one-on-one*”.

[25] This is not a representation that the full sum of \$7500 would be paid to each Applicant. It was clearly an upper range and subject to further discussion. The actual term offered was the \$7000 referred to in the letters of offer to each Applicant.

Residency costs

[26] A covering letter with the letter of offer to each Applicant included a statement that Toll “*look[ed] forward to assisting you in any way regarding your immigration and settling in period in New Zealand*”. From this, and other references to assistance, some Applicants say they reasonably understood this would include assistance in the sense of meeting the costs of applying for permanent residency after two years in New Zealand.

[27] I do not accept the bare use of the word “*assisting*” is reasonably to be taken to be a commitment to meeting all future costs of residency applications. None of the Applicants asserted that they understood this to refer to the immigration fees they incurred in applying in South Africa but some suggest it does refer to the fees for applying for permanent residency in New Zealand two years later.

[28] The ‘power point’ presentation shown to all Applicants said Toll could “*guarantee*” work visas allowing entry of the “*principal applicant and immediate family members*” and “*work to residence after 2 years*”. That presentation was silent

about the question of cost for immigration visas but I am satisfied from the other evidence of all witnesses that it was clear, or should have been clear, that all immigration costs were to be met by the Applicants themselves. As Mr Govender put it: “*I came knowing residency would be at my cost*”.

[29] Some did receive assistance by way of advice or guidance from Toll officials but this did not extend to paying the cost of immigration fees.

Healthcare

[30] The Applicants say that they were told their families would get free public health care from the time of arrival in New Zealand and that Toll should reimburse those who incurred some hospital costs.

[31] Toll witnesses accept that the Applicants were told that New Zealand had free public hospitals but this did not amount to a representation that this would cover all healthcare costs incurred for children.

[32] I accept the evidence of Toll witnesses on this point particularly because each Applicant signed a declaration as part of their immigration applications in South Africa which clearly set out the position on healthcare costs for them and any dependent children. This stated that people holding work permits for a stay of two or more years, and their dependent children, were eligible for publicly funded health and disability services. That was the status of the Applicants. If any did not receive the proper extent of their entitlement, it is a matter between them and the healthcare provider, not Toll.

Education

[33] Two Applicants say Toll should meet the costs of university fees paid for their children. They say they were told education would be free and not warned that their teenage children would have to pay international fees for university study.

[34] I accept the evidence of Toll witnesses that the Applicants were told that publicly-provided primary and secondary education was “free” (except for school donations). I reject, as more unlikely than not, that Mr Neville and Mr Wegener were reasonably given the clear impression that their dependent children would not incur university fees as overseas students. Rather, it is more likely that those families made an assumption or hoped that fees would be at the same level as those charged to citizens and permanent residents. That those Applicants later found that those children could have stayed in South Africa and attended university more cheaply there does not now mean Toll should meet the cost.

Enforceability

[35] If I am wrong as to whether the representations were made as alleged to the Applicants, their case falls at the next hurdle in any event.

[36] If there were any ambiguity during the recruitment interviews about what their conditions might be, the letters of offer were clear. None promised recognition of South African service for pay scale purposes, or payment of \$7500 relocation allowance, or payment of costs for residency applications, education and healthcare.

[37] The letters expressly referred to the collective agreement and provided a copy. It includes the clear statement at clause 15.1 that the CEA contained “*all the terms which are intended to be legally binding*”.

[38] This is no less clear because the 2006 offer to Mr de Jongh had an additional express completeness clause in the body of the letter as well.

[39] Because of the findings made and conclusions reached I have not had to consider further the Applicants’ submissions regarding potential application of the Contractual Remedies Act 1979 and the Fair Trading Act 1986. If I had to consider claims of misleading conduct or misrepresentation under those statutes, the issue of whether they apply to pre-employment discussions outside of New Zealand would also need to be addressed. I do not need to do so in this case.

Independent advice

[40] The Applicants say a penalty should be imposed on Toll because it did not give them a reasonable opportunity to seek independent advice.

[41] I decline to impose such a penalty. It is clear from the Applicants' evidence that each had an opportunity to seek advice. Some chose not to. Some attempted to do so but could not get advice from South African lawyers about a New Zealand employment agreement. However I do not accept that Toll's obligations to give a reasonable opportunity for potential employees to seek advice required it to arrange access to New Zealand legal advisors. The position might be different if Toll had been asked to do so and refused.

[42] The Applicants had been told of Toll's relationship with the union that negotiated the drivers' collective agreement. Each were given a copy of that agreement. In these days of relatively cheap international telephone calls and internet communication, they could have sought information from the union. None did.

[43] None raised concerns with their Toll contact person about any difficulty of getting independent advice or needing more time to do so.

[44] Most of the Applicants had friends or relatives already living in New Zealand. None sought their assistance getting local legal or union advice about any queries to do with their employment agreements.

Breach of good faith

[45] The Applicants say Toll breached its good faith obligations by failing to deal actively and constructively with their concerns.

[46] I accept Toll's submission that it did investigate the Applicants' concerns through meetings with them and their union representatives, correspondence and attending mediation.

[47] However there is one area where the Applicants have established a breach of good faith obligations by Toll. That was during a conversation between Mr Govender

and Mr Low in mid 2006. I find that during that discussion Mr Low actively discouraged Mr Govender from pursuing concerns about whether the terms stated in his offer letter were being honoured.

[48] Mr Govender's evidence was that Mr Low said words along the following lines: *"You haven't been here for five minutes and you want to engage the union already. Your behaviour will guarantee we will never bring any South Africans over again"*.

[49] Mr Low accepts he said the first sentence but disputes that he said the words reported in the second sentence. In hindsight and quite properly he now accepts that his comments were *"probably not appropriate"* and that Mr Govender had the right to discuss the matter with a union representative without any discouragement from a Toll manager.

[50] His latter view is correct. However I find his comments at the earlier time were a breach of the duty of good faith to be active and constructive in employment relationships, not just with the Applicants as union members but also the union with which Toll has an employment relationship as defined by s4(2) of the Act.

[51] The breach – although brief and not sustained because of subsequent dealing through the union over the concerns raised – was plainly intended at the time it was made to undermine the employment relationship by discouraging Mr Govender from exercising his right to seek union assistance. If sought I would have imposed a penalty under s4A(b) of the Act.

Determination

[52] For the reasons given the Applicants' claims are dismissed.

[53] The application for a penalty to be imposed on Toll under s63A of the Act is also dismissed.

[54] Toll breached its duty of good faith by discouraging Mr Govender from seeking union assistance when he first raised his concerns with the company.

Costs

[55] Costs are reserved. The parties are encouraged to resolve any issues of costs between themselves. If they are not able to do so, either party may lodge a memorandum as to costs within 28 days of the date of this determination. The other party will then have 14 days to lodge a memorandum in reply before the Authority determines costs. No application for costs will be considered outside this timetable without prior leave.

Robin Arthur
Member of the Employment Relations Authority