

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 151/08
5111610

BETWEEN

JOHN HODGE
Applicant

AND

TOLL NEW ZEALAND
CONSOLIDATED LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Guido Ballara, Counsel for Applicant
Samantha Turner, Counsel for Respondent

Investigation Meeting: 11 July 2008 at Wellington

Determination: 13 October 2008

DETERMINATION OF THE AUTHORITY

Introduction

[1] John Hodge worked for Toll New Zealand Consolidated Limited as a Master from September 2005 until April 2008. From the beginning Mr Hodge was paid in accordance with an individual agreement that differed materially from collective agreements that covered Masters and others employed by Toll who are members of the NZ Merchant Service Guild. I must determine whether Mr Hodge was covered by and should have been paid in accordance with the collective agreement and what (if anything) must now be done to rectify any breach arising from Toll's application of the individual employment agreement.

Application of the collective agreement

[2] It is common ground that Mr Hodge was a member of the New Zealand Merchant Service Guild at all relevant times and that Toll knew he was a member. There is some dispute however about precisely what was discussed between Mr

Hodge and Toll managers involved in his appointment concerning the terms of his employment.

[3] From Toll's perspective, Mr Hodge was offered an individual employment agreement as an alternative to coverage by the existing collective agreement. Toll says that this was mutually agreed and that there was no suggestion at the time that the individual agreement was supplemental to the terms contained in the collective agreement. Toll denies giving any advice to Mr Hodge about the terms of his employment. Mr Hodge's position is that he was told at the time that the collective agreement applied *as a backstop* despite the individual agreement and that he would be better off under the individual agreement. Even if Toll's account of these discussions is preferred, the law results in a different conclusion.

[4] The 2004-2005 collective agreement applied from 1 July 2004 until 30 June 2005. Prior to the expiry date the Merchant Services Guild initiated bargaining for a replacement collective agreement. As a result and by effect of s.53 of the Employment Relations Act 2000, the collective agreement continued in force through to June 2006. When he was employed in September 2005 Mr Hodge's work came within the coverage clause of the collective agreement which his employer was a party to. The Merchant Services Guild was also a party to this collective agreement and Mr Hodge belonged to the union. Section 56 of the Act says that *a collective agreement that is in force binds the Union and employer parties as well as any employee who belongs to the Union and whose work comes within the coverage clause*. It is not possible to contract out of these statutory provisions: See s.238. It follows that Mr Hodge was bound by the collective agreement from the commencement of his employment.

[5] I should note that the 2004-2005 collective agreement purported to exclude from its coverage employees who agree to an individual agreement that it is agreed it overall more favourable to the employee than the collective agreement, although including terms that are inconsistent with the collective agreement. Following *APN New Zealand Limited v. NZ Amalgamated Engineering, Printing and Manufacturing Union Inc.* [2004] 2 ERNZ 281 there is no scope for an argument that an employee can opt out of an applicable collective agreement otherwise than by leaving the Union. Mr Hodge did not leave the Union. Accordingly, he was bound by the relevant collective agreement for the entire duration of the employment.

[6] The legal capacity for Mr Hodge and Toll to validly agree on additional terms of employment is subject to s.61 of the Act. That section permits them at any time to agree to additional terms and conditions that are not inconsistent with the terms and conditions in the collective agreement. In *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc. v. Energex Ltd* [2006] ERNZ 749 the Employment Court held that:

The question of inconsistencies between the collective employment agreement and additional terms must be resolved objectively.

The relevant provisions are to be compared to determine whether they can live together as terms of the employment agreement.

The definition of inconsistent is that in the Oxford English dictionary.

Not agreeing in substance, spirit, or form; not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous.

If the additional term is more favourable to the employee than the CEA, there is usually no inconsistency.

Where there is a true inconsistency and where the two provisions cannot stand together, the CEA must prevail whether the result is perceived as favourable or unfavourable to the employee.

[7] I will return to the inconsistency issue (if necessary) once I have resolved Mr Hodge's attack on the individual employment agreement as being the result of unfair bargaining by Toll.

Unfair bargaining

[8] Mr Hodge claims that he was subject to unfair bargaining for an individual employment agreement. Toll's Operations Manager at the time of Mr Hodge's employment was Timothy Burfoot. Mr Hodge says that Mr Burfoot told him that he would be covered by the collective agreement despite entering into the individual agreement. Mr Burfoot denies saying this to Mr Hodge. It is also said that Mr Burfoot told Mr Hodge that he would be better off under the individual agreement. In these ways Mr Burfoot is said to have given advice to Mr Hodge who reasonably relied on the skill, care or advice. It is said that Mr Hodge was induced to enter into the individual agreement by oppressive means, undue influence or duress. Third, it is said that Mr Hodge did not have the information or opportunity to seek advice about the proposed individual agreement. It is only unfair bargaining if the other person

(here Mr Burfoot) knows or ought to have known that any of the three circumstances just mentioned apply.

[9] These claims are first answered by the facts.

[10] Toll wrote to Mr Hodge on 29 August 2005 enclosing a copy of the proposed individual agreement and advising him of his right to seek independent advice. Mr Hodge signed the agreement on 31 August 2005 just below an acknowledgement that he had read and understood the letter and the agreement. Mr Hodge was given information and an opportunity for advice in accordance with s.63A of the Employment Relations Act 2000.

[11] I further find that Mr Hodge did not rely on Mr Burfoot's skill, care or advice in bargaining for the individual employment agreement. He made his own inquiries of a colleague and satisfied himself that he should accept the individual employment agreement on offer. Nor would I accept that reliance on Mr Burfoot's comments was reasonable in the circumstances or that Mr Burfoot knew or ought to have known of any reliance. To the contrary, in light of the invitation for Mr Hodge to get independent advice and the knowledge of Mr Hodge's Union membership, Mr Burfoot reasonably assumed that Mr Hodge had satisfied himself about the offer.

[12] Finally, there is no evidence to support the allegation of oppression, undue influence or duress.

[13] To some extent also the unfair bargaining aspect of this problem is answered by the law. I have already found that Mr Hodge throughout the employment was bound by and is now entitled to enforce the terms of the collective employment agreement. That resolves Mr Hodge's complaint that he was disadvantaged vis-à-vis Masters who Toll recognised as being bound by the collective employment agreement. Where Toll failed to afford him the benefits of the terms contained in the collective employment agreement appropriate remedies will follow.

[14] For the above reasons the claims related to unfair bargaining do not succeed.

Night shift

[15] Mr Hodge says that he has a personal grievance and/or has suffered a breach of the terms of his employment agreement because he was required to work permanently on night shifts for about 18 months of his employment.

[16] Toll raises a point about whether a grievance was raised within time. I will assume that it was because the dispute needs to be resolved as a breach of contract claim in any event.

[17] The collective employment agreement contained the following provision:

An employee shall perform such duties as the employer may require and in the manner and at the time or times required by the employer provided that such requirement is lawful and in accordance with the provisions in this agreement.

[18] Nothing else in the collective employment agreement can be read as limiting or enabling work to be done at particular times of the day.

[19] Mr Hodge's individual employment agreement contains the following provision:

Hours of Work *Hours of work will be determined by roster. The normal daily working duration shall be 8-10 hours, 7 days per week. However to meet commercial and operational requirements, employees may be required to work up to twelve (12) hours in any one day, and work consecutive seven day cycles.*

[20] What had developed by the time of Mr Hodge's employment was an informal system whereby the longest serving Masters tended to get first choice of rosters. Toll acquiesced in that arrangement. Mostly the senior Masters preferred day shifts so that left Mr Hodge (and other less senior Masters) on permanent night shift. There had been no discussion about rosters between Toll and Mr Hodge before he started work, both sides assuming the other would understand their differing expectation.

[21] After some while working exclusively on night shifts, Mr Hodge raised concerns with Toll. In part the concern was one of principle in that all Masters were employed on the same terms and conditions and the contractual arrangement did not support the informal distinction between *Senior* and *Junior* Masters by which the former got roster preference. Mr Hodge was also concerned about fatigue and disruption caused by changing between working nights and his living patterns when on time off.

[22] Mr Burfoot attempted to change the rosters in December 2005 but met resistance from the Union and those Masters who preferred the status quo. Mr Burfoot persisted and eventually a rotational shift arrangement incorporating some scope for flexibility was introduced in March 2007.

[23] I do not accept that a grievance or a breach of contract can arise from the requirement for Mr Hodge to work exclusively night shifts for the first part of his employment. For the purposes of a personal grievance, an unjustified action does not include an action deriving solely from the application or operation of an employment agreement: see s.103(3) of the Employment Relations Act 2000. The collective employment agreement and the individual employment agreement permitted the employer to determine the roster arrangements. The allocation of Mr Hodge to night shift was an action deriving solely from the application or operation of the relevant employment agreement so it cannot give rise to a personal grievance.

[24] Similarly, doing something specifically permitted by an express term of an employment agreement cannot also amount to a breach of that same agreement.

Travel

[25] The collective employment agreement provided an entitlement to travel privileges for staff and family. Mr Hodge sought the travel privilege for his wife but was declined. Toll acted in breach of the collective employment agreement in refusing Mr Hodge this travel privilege. There is no dispute about the sum involved. Toll is to reimburse Mr Hodge \$124.00 and pay interest on that sum at the rate of 9% per annum from the date that Mr Hodge originally paid for the travel.

12 hour shifts

[26] Mr Hodge says that Toll breached his employment agreement and caused him a personal grievance by requiring him to work 12 hour shifts throughout his employment. For the same reason as above, I will make the same assumption in response to Toll's point about whether a grievance was raised within 90 days.

[27] The collective employment agreement says:

5. *Hours of Work*

5.1 ...

| | |
|----------------------------------|----------------------------|
| <i>Superannuation Allowance</i> | \$12,342.71 |
| <i>(11% of Cash Salary)</i> | |
| <i>Pilotage Allowance</i> | \$5,006.00 |
| <u>Total Remuneration</u> | <u>\$129,555.14</u> |

[32] Subsequent to Mr Hodge's employment but with retrospective effect the collective agreement was settled with the rate for pilotage allowance at \$5181.00 per annum from 1 July 2005. It increased further on 1 November 2005, 1 July 2006 and 1 April 2007. Specifying a lower rate in an individual employment agreement must amount to an inconsistency under s.61 of the Act so Mr Hodge is entitled to recover the difference.

[33] The *cash salary* in the individual agreement seems to be an attempt to gross up other regular components of salary payable to a Master. In line with the *Energex* decision, provided that was more favourable to Mr Hodge, it did not create a true inconsistency. The individual agreement makes no mention of a hospitality allowance or a service allowance but the collective agreement includes both. From 1 November 2005 the combined salary and hospitality allowance from the collective agreement exceeded the *cash salary* in the individual agreement. The *cash salary* paid under the individual agreement fell further behind when Mr Hodge became entitled to the service allowance and after subsequent increases in the collective agreement. Mr Hodge is entitled to recover any difference between what was payable under the collective agreement from 1 November 2005 for salary, hospitality and service and what he was actually paid by way of salary.

[34] The superannuation allowance does not appear to be inconsistent with the collective agreement.

Bonus Scheme

[35] Mr Hodge received a payment in September 2007 as a result of Toll's discretionary bonus scheme. I see no basis for now bringing this payment to account in an assessment of arrears arising from the application of the collective agreement.

Recalls

[36] It seems that, in reliance on the individual employment agreement Toll from time to time recalled Mr Hodge to duty without paying him the allowance payable in the defined circumstances under the collective agreement or crediting him with the relevant leave.

[37] The finding that the collective agreement was applicable to Mr Hodge means that he may now be entitled to this additional payment.

Rostered days

[38] There is an inconsistency between the provisions in the individual agreement and the collective agreement. Under the individual agreement Mr Hodge was rostered on for 168 days per year with the remainder being rostered time off, annual leave and public holidays. However, the collective agreement says *The roster cycle shall provide: Up to a maximum of 161 days time on per year and up to 204 days clear of the vessel* In short, Mr Hodge was rostered on each year to work 7 more days under the individual agreement when that should have been rostered time off under the collective agreement. The term in the individual agreement cannot stand given the term in the collective agreement. Because Mr Hodge was rostered in accordance with the term in the individual agreement his working pattern breached the collective agreement and he is entitled to damages. Mr Hodge should be paid a day's pay for each extra day's work.

Alternative holidays

[39] There is no evidence to establish any failure to grant Mr Hodge the correct number of alternative holidays nor am I satisfied that there was any default in payment for alternative holidays or for work on public holidays. These findings are subject to what is said below concerning the dispute about relevant daily pay.

Resignation from the Guild

[40] There is some complaint in Mr Hodge's amended statement of problem that Toll improperly suggested he resign from the Guild. The context was the realisation that Mr Hodge was lawfully covered by and entitled to enforce the terms of the collective agreement. The point was made to Mr Hodge that the only way to avoid being covered by the collective agreement was for him to resign from the Guild. In context there was nothing improper about this and it did not amount to undue influence or duress in relation to union membership. Mr Hodge did not resign from the Guild.

Relevant daily pay

[41] There is a dispute about whether Toll calculated Mr Hodge's relevant daily pay correctly for the purposes of payments relating to statutory holidays and alternative holidays.

[42] During the investigation meeting I raised with the parties a concern about the position of the Guild as a party to the collective agreement, potentially being affected by a ruling on this issue, without having had an opportunity to appear or to join these proceedings.

[43] Mr Hodge was to reconsider his position in light of this. To date I have not heard further from Mr Hodge so I will reserve this issue for further consideration if necessary.

Summary

[44] There are claims for penalties and damages arising out of the issues canvassed above but except as expressly mentioned above they are not made out. Mr Hodge is entitled to the benefit of the collective agreements for the entire duration of his employment as well as the benefit of the not inconsistent terms of the individual agreement. Where there has been a shortfall in payments due I would also award interest at the rate of 9% per annum but this is not a case for compensation, penalties or interest beyond that.

[45] It may now be possible for the parties to resolve the question of quantum between themselves but I will reserve leave if that proves impossible.

[46] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority