Determination Number: CA 29/07
File Number: 5045293

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY OFFICE

BETWEEN	National Distribution Union
AND	Arthur Barnett Limited
REPRESENTATIVES	David Fleming, Counsel for the Applicant Sharon Knowles, Counsel for the Respondent
MEMBER OF AUTHORITY	James Crichton
INVESTIGATION MEETING	Dunedin, Wednesday 7 February 2007
DATE OF DETERMINATION	27 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] An initial statement of problem was filed by the applicant, the National Distribution Union (the Union) on 17 July 2006. A statement in reply was filed on 3 August 2006 by the respondent, Arthur Barnett Limited (Arthur Barnett).

[2] After a directions conference with the Authority, an amended statement of problem and then an amended statement in reply were filed. The substance of these documents remain, however, revolving around a dispute about the interpretation of the overtime provisions in the applicable collective employment agreement to which the parties are signatories.

[3] The Union represents about 30 workers who are employed by Arthur Barnett and there has been a collective employment agreement in place between the parties to this dispute for about 15 years.

[4] There is now and has always been a provision in the agreement concerning the payment of overtime to employees covered by the agreement. It is common ground that that overtime provision has remained relatively unchanged over time.

[5] I set out now the relevant provisions from the existing collective employment agreement:

> ***Hours of work***
>
> *5.1 A week's work may be defined Monday to Sunday both inclusive. A week's work for the company at ordinary time shall not exceed 40 hours, defined as follows: For all sales employees employed for 40 hours over six of the seven days of the week or for employees employed on a five day week 40 hours over five of the seven days of the week, two consecutive days off will be provided unless mutually agreed otherwise.*
>
> *An individual employee's hours of work are as set out in the agreement of employment. The company reserves the right to trade on any legal hours provided by law and as required by its leases or tenancy.*

Variations to standard hours

6.1 From time to time the employer may vary the specific hours and meal breaks in order to cover sickness, absence, sudden busy periods or similar situations. Permanent changes to the normal hours of work will be advised on reasonable notice by the employer but will be by mutual agreement between the parties.

Notice of overtime

8.1 If an employee is not employed on a salary and overtime rates of pay are payable then notice shall be given to the worker by 4pm on the day prior to the days that overtime is to be worked.

Overtime

23.1 Overtime is paid on daily basis to employees who work outside their standard hours as defined in their agreement of employment. The overtime rate is ordinary time plus 50% at all times.

23.2 Work performed after the normal closing time (except in the case of the store's normal late night) will be paid for at the agreed overtime rate. If the standard hours of work include a late night or late nights, the rate of pay on those late nights after 6.30pm will be at the agreed overtime rate of ordinary time plus 50%.

[6] Although it is a somewhat simplistic analysis, the essence of the difference between the parties may be encapsulated in the observation that for the Union, overtime entitlement is triggered on a daily basis whereas for Arthur Barnett, the overtime entitlement of an employee is triggered on a weekly basis.

[7] It seems common ground that the relevant provisions are not artfully worded, certainly that is my conclusion having been asked by the parties to adjudicate on the matter.

[8] No doubt because of the unsatisfactory nature of the relevant wording, there was at least one attempt in the 2002 negotiations to amend the relevant provisions. The proposal for those amendments was advanced by Arthur Barnett but did not find favour with the Union and accordingly was not adopted.

[9] Interestingly, the proposal which Arthur Barnett advanced in 2002 was virtually in the same terms as the interpretation of the existing provisions by Arthur Barnett. Not surprisingly, the Union encourages me to draw the inference that, because Arthur Barnett proposed wording which had the effect of implementing its present interpretation of the relevant provisions and that proposed wording was not accepted by the Union, then Arthur Barnett knew or ought to have known that its present interpretation of the relevant provisions is in fact erroneous.

[10] The Union's position remains that Arthur Barnett has misinterpreted the relevant provisions and thus caused members of the Union financial loss. The claim on behalf of those members is for a compliance order requiring Arthur Barnett to correctly apply the overtime provisions together with an order for payment of any arrears of wages due to the Union's members.

[11] Arthur Barnett says that there is no need for a compliance order and that there are no arrears of wages due and owing because it has correctly applied the relevant provisions.

[12] The essence of the argument for Arthur Barnett is that, with the exception of a period for about two years prior to 2002, which one witness for Arthur Barnett elegant called *the error period*, the custom and practice of Arthur Barnett had been to interpret the relevant provisions in the collective employment agreement such that overtime was triggered by the completion of weekly hours rather than the completion of daily hours.

[13] Arthur Barnett says that the Union never criticised it for incorrectly paying overtime until after the end of the so-called *error period*. Arthur Barnett's position is that once the error

period ended and Arthur Barnett returned to payment of overtime on the basis it had paid it prior to the error period, the Union raised its present claim and has pursued the matter since.

The law

[14] I accept the submission of the Union that the legal position is that an employment agreement must be interpreted so as to give effect to the *natural meaning of the words used*, given their context in the agreement and the factual background to the agreement.

[15] That fundamental principle has been restated on a number of occasions. A recent example is the decision of the Full Bench of the Employment Court in *New Zealand Tramways and Public Transport Employees' Union Inc & National Distribution Union v. Transportation Auckland Corporation Ltd & Cityline (New Zealand) Ltd* AC 61A/06; ARC 46/06:

> *The starting point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectively, the aim of the transaction …*

[16] Again, in *Godfrey Hurst v. National Distribution Union* AC62/04; ARC 45/04, Judge Colgan (as he then was) said:

> *So long as it does not create an illegality, the words on their face, if they are unambiguous, determine their own meaning. If, however, there is a true ambiguity, then broader extrinsic assistance for interpretation can be relied on. In addition to having recourse to other relevant provisions in the agreement, such extrinsic aids to interpretation may include evidence of the context in which the agreement was settled, the relevant legislation, and sometimes of the negotiations that lead to the settlement. What the Court cannot consider are the accounts of the parties or their negotiators as to what they now say they intended to mean by the clause.*

[17] In *Association of Staff in Tertiary Education Inc v. Hampton [2002] 1 ERNZ 491* the Employment Court emphasised that evidence as to what the parties say they intended by certain words cannot be admissible and that the proper test was to ask what a reasonable person, knowing the relevant background, would understand by the words in question.

[18] On the face of it then, if the relevant provisions in the instant collective employment agreement are *clear and unambiguous* then those words must be given *their ordinary meaning*. It would be wrong and not in accord with legal principle to apply extrinsic evidence to a determination of the meaning of the relevant provision if that extrinsic evidence was in fact unnecessary.

[19] The next issue us is the number of clauses in the applicable collective employment agreement that we need to consider. The law is clear that *… consideration must be given to the whole of the contract*. The Union's position is that we need consider only three clauses, namely clause 6 which relates to the variation to standard hours, clause 19 which is concerned with employees other than full time permanent employees and clause 23 which is concerned with overtime per se.

[20] Conversely, Arthur Barnett argues that other provisions are relevant including in particular clause 5 which defines a week's work as happening between Monday and Sunday, both days inclusive, and as not exceeding 40 hours.

[21] Arthur Barnett submits that clause 23 must be interpreted by reference to clause 5 which, in its submission, produces the result that an employee must complete 40 hours work before overtime applies and that, for instance, the phrase *standard hours* in clause 23.1 must relate to hours of work in a week rather than to hours worked on a particular day.

[22] Arthur Barnett also refers me to clause 19 of the collective employment agreement which provides that in respect of part time and casual staff, they will not receive overtime unless they have worked a minimum of 40 hours in any one week. By extrapolation, I am invited to reach the conclusion that given the effect of clause 19 in relation to casual and part time staff specifically require a minimum of 40 hours work before overtime is payable, the same precept should apply in respect of full time permanent staff.

[23] Arthur Barnett also submits that I should consider the custom and practice of the parties which, with the exception of the so-called error period, have overtime payments paid to staff in accordance with Arthur Barnett's interpretation of the collective employment agreement rather than the Union's. Arthur Barnett also urges on the Authority the relevance of certain extrinsic material such as exchanges between the parties around the negotiations for the successive employment agreements. Finally, Arthur Barnett encourages me in the view that I ought to consider the terms of successive employment agreements.

The relevant provisions themselves

[24] It is common ground that the relevant employment agreement provisions have remained constant since 2002 and, given that the Union seeks remedies only back to the error period, and the central provisions remain constant even back to that date, it is not helpful to consider the earlier collective employment agreements.

[25] Applying the relevant law, our first obligation is to look at the principal provision and see whether its meaning is *clear and unambiguous*. The central provision is clause 23.1 which provides as follows: *Overtime is paid on daily basis to employees who work outside their standard hours as defined in their agreement of employment. The overtime rate is ordinary time plus 50% at all times.*

[26] Overtime itself is defined as ordinary time plus 50%.

[27] The phrase *on a daily basis* in relation to the payment of overtime is less straight forward. The Union says this means that overtime should be accrued each day while Arthur Barnett says that all it means is that overtime is calculated on a daily basis. I prefer the Union's analysis to Arthur Barnett's. Were the phrase to mean what Arthur Barnett says it means, the phrase would effectively be otiose whereas if the Union's meaning is to be applied, the phrase makes sense in the context of the meaning of the clause as a whole.

[28] The next phrase refers to employees working outside their standard hours as being entitled to overtime. This expression must be given its ordinary meaning.

[29] Next there is the reference to the definition of an employee's standard hours *in their agreement of employment*. What is referred to by the phrase *their agreement of employment*? In their submissions, both parties have directed me to document 33 in the agreed bundle which is a sample Letter of Engagement which each party considers is the *agreement of employment* referred to in clause 23.1. That sample document has, under the heading *Roster* the words *Mon-Fri 8 to 4.30pm*. On the face of it, for the particular employee to whom document 33 applies, their standard hours of engagement are from Monday to Friday from 8am to 4.30pm.

[30] This interpretation is supported by reference to Clause 1 of the collective agreement, a clause which neither party relied on. At Clause 1.1 the final paragraph reads: *All employees who are members of the Union will complete a standard company letter of engagement (LoE) which will include individual hours of employment and rate of remuneration and after being*

signed by both parties will bind those parties to agreeing to the terms and conditions of the Arthur Barnett Collective Employment Agreement dated 1 April 2005 and subsequent amendments.

[31] It follows that in respect of the particular employee to whom document 33 applies, I find that such an employee would be entitled to overtime at ordinary time plus 50% for each and every hour or part thereof worked outside of the hours 8am to 4.30pm Monday to Friday. It seems to me that that construction is clear from the words of the clause and I am unable to reach any different conclusion. The law is clear that the starting point must be the relevant provision and its proper and commonsense construction. In the absence of ambiguity in relation to the provision in question, I am not drawn to consider any other matters and it seems to me that that must be an end of the inquiry.

[32] I accept the submission of Arthur Barnett to the effect that a consequence of the Union's position being vindicated may well be little change in the way that employees of Arthur Barnett are remunerated in terms of overtime, but that is not the issue. There is a dispute between the parties as to what the clause means and in the absence of any agreement between the parties, the matter has been referred to the Authority for determination and I have reached the conclusion I have after applying the relevant law.

Determination

[33] I am satisfied that the Union has made out its claim that the overtime provision in the relevant collective employment agreement as it applies to full time permanent employees has been wrongly applied by Arthur Barnett since 5 July 2002, that is the date of a memorandum from Arthur Barnett to management staff of Arthur Barnett in respect of the interpretation of the overtime provisions from Arthur Barnett's perspective.

[34] The Union seeks a compliance order to remedy the default and back-payment of arrears of wages owing to members of the Union from that date.

[35] Arthur Barnett resists that claim by contending that the application is not a suitable one for a compliance order and by contending that there ought to be no backdating because the Union has not been diligent in progressing its claim. As to the first issue, while it is true that a compliance order may issue *… where any person has not observed or complied with … any provision of any employment agreement,* this is in reality a dispute about the *interpretation, application or operation of an employment agreement*: S129 (1) Employment Relations Act 2000.

[36] As to the second point made by Arthur Barnett in resisting the Union's claim, I think the contention that the Union has not been diligent in progressing its claim has some force. Mr Coburn, the witness for Arthur Barnett, made the point in his evidence that Arthur Barnett had since 1992 consistently applied the same meaning to the overtime provision (apart from the so-called error period). The Union, he said, had only complained in 2002 at the end of the error period having presumably realised another interpretation of the provision was possible. Arthur Barnett contend that the Union only raised its claim sporadically, first in 2002 as I have just mentioned, then again in 2004 and again in 2006 coinciding each time it seems, with the arrival of a new organiser and the onset of collective employment agreement negotiations. On each occasion when the Union failed to persevere with its objection, it is contended, Arthur Barnett thought the matter had been resolved in favour of Arthur Barnett's interpretation of the relevant provision.

[37] I think the proper course for the Authority to follow in the instant case is to determine the meaning of Clause 23.1 of the relevant collective employment agreement and ask the parties to engage with each other to determine the consequences of that decision. In the event matters are not able to be resolved by agreement then leave is reserved for the parties to revert to the Authority.

[38] In my opinion, Clause 23.1 of the relevant collective employment agreement requires Arthur Barnett to pay overtime at time plus 50% to any employee who, on any day, works any time in excess of the hours of work specified in that employee's letter of engagement.

Costs

[39] Costs are reserved.

James Crichton
Member of Employment Relations Authority