New Zealand Employment Relations Authority Decisions

Pender v Lyttelton Port Company Limited (Christchurch) [2018] NZERA 1137; [2018] NZERA Christchurch 137 (21 September 2018)

Last Updated: 28 September 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 137
3023102

BETWEEN CARL PENDER Applicant

AND LYTTELTON PORT COMPANY LIMITED Respondent

Member of Authority: Andrew Dallas

Representatives: Jeff Goldstein and Linda Ryder, counsel for Applicant

Tim Mackenzie, counsel for Respondent Investigation Meeting: 20 June 2018 in Christchurch Submissions received: On the day

Determination: 21 September 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Carl Pender is employed by the Lyttelton Port Company Limited as a cargo handler. Mr Pender is a member of the Maritime Union of New Zealand (MUNZ) and his terms and conditions of employment are regulated by the Lyttelton Port Company Ltd – Maritime Union of New Zealand, Collective Agreement, 2017 – 2020 (collective agreement).

[2] The collective agreement covers a wide variety of work undertaken by cargo handlers including operating straddle carriers, forklifts, ship loaders and container cranes, lashing (cargo) and coal stevedoring services. The performance of this work is not further segmented within the collective agreement beyond the definition of “cargo handler”, although some work attracts additional payments. This lack of segmentation is reinforced by the fact cargo handlers can, and do, perform a variety of work during a shift or on a shift by shift basis. Presumably this is done to promote equity among cargo handlers and to prevent deskilling.

[3] As part of the shift arrangements at Lyttelton, cargo handlers are organised into four operational work groups: A, B, C and D. Each group has approximately 40 cargo handlers. Within that number, between 10 and 12 are trained as, and perform the duties of, crane drivers. When performing this work, these cargo handlers receive an allowance of (currently) $2.06 per hour. Lyttelton has four container cranes and, if all four are operating, eight trained cargo handlers are required per shift. Seemingly, crane driving is figuratively, and indeed literally, the pinnacle of cargo handling work.

[4] Mr Pender commenced employment at Lyttelton as a cargo handler in 2011. He is currently in Group B.

[5] Mr Pender applied unsuccessfully for crane driver training in 2013. He said he was determined to be successful during the next intake which he thought would be in around six months later. In fact, Lyttelton did not advertise such training for four years. During this period, Mr Pender sought to upskill himself and also sought out alternative training options. However, he discovered crane operator training was only conducted “in service” by the various New Zealand port companies operating such cranes.

[6] In April 2017, Lyttelton promulgated an advisory, on-line and via notice boards, seeking applications from cargo handlers in all groups who wished to be trained as container crane drivers (and signalpersons, a separate but related task). The

advertisement stated:

Whilst a preference of Groups can be taken into consideration this cannot be guaranteed and some successful applicants may be required to shift Groups to ensure the appropriate level of resource is able to be provided at all times.

[7] It further stated in this regard: "[p]lease state your preferred work group – A, B, C, D". The advisory also referred to the process for "untrained applicants" (but existing cargo handlers) being subject to "a pre-employment medical and drug test".

[8] Mr Pender said he spoke to one of Lyttelton's crane drivers who advised him 12 drivers were needed across the four groups, however only two were needed in Group B. Mr Pender said from this conversation he understand why a change in group, as stated in the advisory, may be necessary.

[9] Mr Pender applied for crane driver training and subsequently advised a Lyttelton senior manager via text message that he was happy to change groups if required. The manager responded to the text noting Mr Pender's advice.

[10] Approximately a month later, Mr Pender undertook the training assessment, which he described as rigorous. During the assessment, Mr Pender said he was advised by crane driver trainer, Mr Jones, that cargo handlers would not be able to change groups to secure a crane training opportunity. Mr Pender said he was concerned about this because it would limit his chances based on the small number of vacancies in Group B. Mr Jones would deny he told Mr Pender this. However, the effect of what Mr Jones had, on Mr Pender's evidence, said about the training would transpire and Mr Pender would not be able to change groups to achieve it.

[11] On 29 June 2017, Mr Pender was advised he would not be offered training as a crane driver because he was ranked fourth in Group B (with two drivers required). He would ultimately be ranked third in Group B when another cargo handler withdrew from the process.

[12] However, of significance, Mr Pender's result of 80.93% meant he was sixth overall when ranked across all groups. Expressed another way, if Mr Pender was able to change groups, as the advisory appeared to suggest he could, he would have been first in Group A (with two drivers required), third in Group C (with six drivers required) and first in Group D (with two drivers required).

[13] Mr Pender raised his concerns with MUNZ local branch secretary Gary Horan who in turn raised them with Lyttelton. Mr Pender also met with Lyttelton container terminal manager, Doug Parker.

[14] Mr Pender said as the discussions with Lyttelton were going nowhere he raised, through his lawyer, a person grievance on 25 September 2017. Lyttelton responded on 6

October 2017 and the parties' positions became entrenched. A further personal grievance was raised for Mr Pender when a crane driver from Group B resigned and Lyttelton would not train Mr Pender to fill this, and potentially other, vacancies (arising from secondments).

[15] In addition to his personal grievances, Mr Pender says he was subject to breaches of the collective agreement and a breach of good faith by Lyttelton. As remedies, Mr Pender sought compensation for hurt, humiliation and injury to feelings, reimbursement of lost wages, a penalty for breach of good faith and penalties and various compliance orders arising out of the breach of the collective agreement including one requiring Lyttelton to train him.

Issues

[16] The issues for investigation were and determination are:

(i) Was Mr Pender subject to unjustified actions by Lyttleton causing him disadvantage in his employment?;

(ii) If Lyttelton's actions were not justified, what remedies should be awarded, considering:

(b) Lost wages and other moneys under s 123(1)(b); and

(c) Compensation under s 123(1)(c)(i) of the Act.

(iii) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Pender, which contributed to the situation giving rise to his grievance?;

(iv) Has Lyttelton breached the collective agreement in respect of Mr Pender and, if so, should a penalty be imposed and, if so, should this be made payable to Mr Pender;?

(v) Has Lyttelton breached its obligations of good faith to Mr Pender and, if so, what, if any remedy should be ordered, including a penalty, and if so, should this be made payable to Mr Pender;

(vi) Should compliance orders be issued arising out of pleaded breaches of the collective agreement; and

(vii) Should either party contribute to the costs of representation of the other party?

The Authority's investigation

[17] During the Authority's investigation meeting, I heard evidence from Mr Pender and Mr Horan and for Lyttelton, Mr Jones and Mr Parker.

[18] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received during my investigation of Mr Pender's employment relationship problem. Although I have not referred to all the submissions advanced by the representatives in this determination, I have fully considered them.

Evaluation

Personal grievances: breach of contractual and implied obligations

[19] Mr Pender said there were several relevant provisions of the collective agreement which supported his argument he had been subject to an unjustifiable disadvantage in his employment by Lyttelton. Mr Pender observed that the coverage clause of the agreement (cl 1.2) listed the functions of the "cargo handler positon" as including "the driving and operation of...cranes". Mr Pender said there was no separate position of "crane driver", however, he went on to observe cargo handlers performing this function received an hourly allowance for doing so: cargo handling schedule, cl 8.2.1.

[20] Mr Pender then referred to clause 1.5 of the agreement, which relevantly provides:

The intent of this Agreement is to afford to each employee the same terms of employment, conditions of work and opportunities for training, promotion and transfer as are made available for other employees of the same or substantially similar qualifications, experience or skills employed in the same or substantially similar circumstances.

[21] Mr Pender said the practical effect of reading these two clauses together, aided by the references to training and skill development set out in cl 5, meant Lyttelton was required to train any cargo handler who wished to be trained as a crane driver. While an equalitarian and attractive approach to skill development within Lyttelton cargo handling workforce, my view is that in reading these two clauses together – and there is no reason why they cannot or should not be so read – one does not necessarily arrive at that outcome.

[22] An opportunity for training does not preclude some form of objectively verifiable process to discern which cargo handlers wish to be trained in specific skills. Provided Lyttelton allows all employees an "opportunity" for training, this would, in my view, satisfy the requirements of the clause provided all other applicable elements of the clause are subsequently met. However, while Mr Pender was afforded an opportunity for training he was not treated the same as other employees in the same or substantially similar circumstances because he was not trained as a crane driver when other cargo handlers who received lower scores in the initial assessment process were. Further, the failure by Lyttelton to train Mr Pender meant he was not given an opportunity to "increase [his] skill levels and job satisfaction" in contravention of cl 5.4.

[23] Lyttelton argued that "cargo handlers are cargo handlers from beginning to end". However, while advancing this submission it further suggested that rather than crane driving being a "function" of the cargo handler position, as we have seen, it was, in effect, a "promotion" or "progression" above or away from that position. The problem with this approach, of course, is that is not supported by the plain wording of cl 1.2 of the agreement and the evidence before the Authority that cargo handlers perform a variety of functions during a shift including, where trained, crane driving.

[24] Lyttelton accepted Mr Pender had been disadvantaged in his employment by not being offered training as a crane driver but said this was justifiable. Lyttelton said it had complied with its obligations under cl 1.5 of the agreement. It also relied on cl 32 of the agreement relating to "vacancies" and how these were filled. However, it is clear on its face the clause does not relate to training opportunities or even training vacancies but rather to actual vacancies within the workforce. Clause 32 had no work to do in circumstances relating to a training opportunity such as this for existing employees. Indeed the advisory that Mr Pender responded to was clearly directed at existing employees engaged as "full time Cargo Handlers".

[25] Lyttelton also relied on "employer discretion" in the absence of what it said was an express contractual term requiring Mr Pender to be transferred from one work group to another. Lyttelton said this discretion should not be interfered with in circumstances where Mr Pender had been treated fairly. The problem with this argument is that Mr Pender was not treated fairly. Lyttelton had the ability under the agreement to move Mr Pender to another group if it so chose to. The collective agreement permitted Lyttelton to determine the number of employees necessary to perform work under the agreement and how work would be performed: cl 6.1. Within that context Lyttelton is required to establish four work groups of "similar sizes" with a "balance of skills in each group" to perform cargo handling work: cargo handling schedule, cl 2.2.2.

[26] I am satisfied that cls 1.5 and 5.4 of the collective agreement are conditions of Mr Pender's employment and have been breached without justification by Lyttelton to his disadvantage.

[27] To the extent that Mr Pender raised other personal grievances relating to this period, they are either subsumed by the

findings in paragraph [26] above or were expressed as alternative arguments which, also in light of the finding in paragraph [26], are not required to be dealt with.

Personal grievance: non-appointment to vacancy in 2018

[28] Mr Pender said he also had a personal grievance arising out of non-appointment to training in 2018 when one of the cargo handlers from Group B who had been trained as a crane driver in 2017 resigned. Mr Pender said he asked in writing to be trained in these circumstances but Lyttelton did not reply. Mr Pender suggested this was a reaction to his complaint and grievance and invited the Authority to draw an inference to that effect.

[29] Lyttelton said there was no vacancy, the collective agreement did not require it to maintain a vacancy were one to exist and to have appointed Mr Pender in such a way would have offended other provisions of the collective agreement and given rise to allegations of unfair treatment by other cargo handlers in a similar situation to him.

[30] Ultimately, I find this personal grievance allegation is, in effect, a continuation of the employment relationship problem extant between the parties and the legal dispute arising from this.

A breach of good faith

[31] Mr Pender said Lyttelton repeatedly and deliberately misled him about the selection process. Mr Pender also said Lyttelton was not active, constructive and communicative about his non-appointment and other opportunities for crane driving training. Lyttelton denied there had been any breaches of good faith in respect of Mr Pender.

[32] However, on the facts, I find that Lyttelton did breach its good faith obligations to Mr Pender by engaging in conduct that was misleading or likely to mislead him.1 It was clear from his evidence that he believed based on direct representations made in the advisory that he could change groups, as necessary, to be trained. Indeed, he advised Lyttelton very early on in the process of his willingness to do so. His advice in this regard was acknowledged and no attempt was made to disabuse him of his belief based on some

form of altered position.

[33] In addition, I find Lyttelton was not active, constructive and communicative in informing Mr Pender the advertised selection criteria for training had changed and he would not be able to change groups. Mr Pender said he found this out informally from Mr Jones during the initial assessment process. However, Mr Jones denied this and said there had been no change “either writing or verbal”. However, this is not supported by the presenting facts of Mr Pender’s inability to change groups. So then, even on Lyttelton’s case, Mr Pender was not advised that such a change had occurred. Lyttelton knew, given Mr Pender’s previous attempt, of his clear desire to be trained as a crane driver. If it wished to change the criteria, as was arguably its right it should have, consistent with its obligations under s 4 (1A)(b) of the Act, been open and communicative with all cargo

handlers about this. However, this was not how the situation unfolded.

1 Employment Relations Act, s 4(1)(b)

[34] As it was, it was only through persistence that Mr Pender ascertained how well he had actually performed in the initial assessment process. Indeed, it is remarkable given his performance Mr Pender was not offered training as a crane driver in one group or another. Clearly he was one of the most skilled cargo handlers who sought training as a crane driver. Perhaps the situation is even more remarkable when considering Mr Parker acknowledged in his evidence that Lyttelton’s position that cargo handlers could not move between groups to be trained as crane drivers was not actually fixed in stone and was subject to, what only can be described as, pragmatic considerations in the event of, for example, poor scoring aspirants or training failures within a group.

What, if any, remedy should be awarded?

[35] Mr Pender said Lyttelton’s breaches of good faith were serious and sustained and this enlivened the Authority’s jurisdiction to award him a penalty under s 4A of the Act. However, even if the criteria set out in the Act is met, is a penalty an appropriate remedy given Lyttelton and Mr Pender are in an existing employment relationship? Ultimately, I believe the answer is no. Further, the mischief that Mr Pender really wants addressed arising out of Lyttelton’s established breaches of good faith is to be trained as a crane driver. A penalty in that context, while deriving a modest monetary sum, which may, in turn, be payable to Mr Pender, does not actually remedy the effect of the breach of good faith.

[36] Subsequent to the introduction of the good faith regime under the Act, some judicial consideration was given to whether damages were available for a breach of good faith.2 The Court subsequently took the view in *Hally Labels Ltd v Powell*3 the Act provides expressly for its own enforcement other than by way of damages.4 However, there is now some doubt *Hally* is the last word on this. In *Kazemi v Rightway Limited* the

Court suggested ‘... the availability of damages for breach of good faith remains uncertain’.5 Regardless of what arises from

further judicial consideration, if anything beyond *Hally,* Mr Pender would still be without an effective remedy even if damages were available. In short, his position may have materially improved but he would still not

receive training as a crane driver.

2 For example, *Baguley v Coutts Cars* [2001] NZEmpC 47; [2000] 2 ERNZ 409 at [64] and *Coutts Cars v Baguley* [2001] ERNZ

660 (CA) at [39].

3 [2015] NZEmpC 92

4 At 134

5 [2018] NZEmpC 3 at [14]

[37] It is clear a multi-dimensional approach to remedying breaches of good faith is required. Some circumstances may warrant penalties and some may warrant damages, assuming that approach is ultimately accepted. Contrastingly, some breaches of good faith clearly require more than some form of monetary compensation to alleviate the wrongdoing. Such breaches warrant redress by a remedy such as an order – a "good faith order" – requiring a party to perform a positive act to address the root cause of the lack of good faith. However, while contemplated, is such an approach permissible?

[38] By its nature, good faith is an implied and/or incorporated term in all employment agreements. Substantively, it probably does not matter which is the actual legal formulation. Within the context of employment agreements, under s 162 of the Act the Authority can make any order the High Court or District Court can make as if they were "contracts". The form of good faith order contemplated here could perhaps be seen as akin to a mandatory injunction remedying an established breach. In my view, any residual reluctance on the part of the Authority to order specific performance of a contract of service ought to be set aside given the statutory overlay that provides for reinstatement injunctions and other remedies under the Act within the context of a working agreement. The only qualification would be whether a good faith order would be an impermissible variation under s 163 of the Act. However, I find, in the circumstances of this case, it would not be.

Residual considerations

[39] Having established a legal basis to make a good faith order, are there any other reasons why such an order should not be made? Lyttelton raised the matter of a small number of other cargo handlers being in the same position as Mr Pender. However, these cargo handlers appeared not to have pursued the situation with Lyttelton as Mr Pender did and certainly not in the Authority.

[40] A further consideration is the cost of the training. Training for container crane driver is conducted "in-house" by Lyttelton. While there will be an opportunity cost to being required to train Mr Pender, this, in my view, is not particularly significant and is outweighed by the benefits accruing to Lyttelton of having an additional cargo handler trained to drive cranes.

[41] Lyttelton is directed by good faith order to train Mr Pender as a crane driver.6 The order remains in force until:

(i) Mr Pender is successfully trained as a crane driver; or

(ii) Mr Pender withdraws from the training as a crane driver before it is complete; or

(iii) Mr Pender does not reach the standard required to successfully complete the training as a crane driver.

Other Remedies *Personal grievances Reimbursement for lost wages*

[42] As a remedy for his personal grievances Mr Pender sought lost wages resulting from not being trained by Lyttelton. Assuming he successfully completed the training, Mr Pender said he would have paid the allowance of 2.00 per hour (increasing to $2.06 on 5

March 2018) for crane driver. The parties agreed that if Mr Pender was successful with his claim in the Authority, he was owed lost wages.

[43] Mr Pender initially calculated this loss, based on his best information and belief, as approximately $5,000. However, after consideration of Mr Parker's evidence on the point and discussion, Mr Pender accepted $800 was effectively his actual loss.

[44] This amount being fair and reasonable in the circumstances of the case, I award

Mr Pender, subject to contribution, $800 as reimbursement for lost wages under s

123(1)(b) of the Act.

6 As the parties commonly understand, as a result of these proceedings and this determination, the

definitions of “train” and “crane driver” to mean.

[45] Mr Pender provided extensive evidence to the Authority of the impact that not being trained as a crane driver had on him. In summary, he said he had been anxious, stressed and de-motivated by the situation. He said he believed he had lost the esteem in the workplace and felt embarrassed being around his workmates. Mr Pender also said he had a strong sense of justice and fairness and felt totally let down by Lyttelton. He said a sense of hopelessness had overcome him arising from his inability to gain any traction within the workplace to resolve the issue.

[46] I am satisfied that Mr Pender did experience all these things and as such he is entitled to an award of compensation as compensation for that humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act.

[47] Subject to any consideration of contribution under s 124 of the Act, I award Mr

Pender an award of $12,500.

Contributory behaviour by Mr Pender?

[48] There is no evidence of any contributory conduct by Mr Pender. Consequently, there is no deduction in his remedies.

Penalties for breach of employment agreement?

[49] A claim was made for penalties for established breaches of the collective agreement and for this these to be paid to Mr Pender.

[50] However, as Mr Pender has already been compensated through his personal grievances, the employment agreement in question is a collective agreement (for which the union party was not a party to these proceedings) and because there is an extant employment relationship, it neither necessary nor appropriate to award penalties against Lyttelton in the circumstances of this case.

[51] Mr Pender sought a compliance order requiring Lyttelton to comply with its obligations under cl 1.5 of the collective agreement to train him as a crane driver so as to ensure he was treated the same as other cargo handlers in the same or substantially similar circumstances that were trained as such.

[52] Lyttelton resisted Mr Pender’s application suggesting such an order would affect a number of other staff and border on the impossible to carry out. It also suggested “damages” were an appropriate remedy.

[53] Given the remedy for Lyttelton’s breach of good faith, in the form of a good faith order, requires it to specifically address Mr Pender’s training and does not, as such, affect the rights of any other person, it is hoped this is sufficient to resolve the employment relationship problem between the parties. However, in the event that is not the case, leave is reserved for Mr Pender to apply to the Authority for further consideration of his application for a compliance order.

[54] Such consideration, which can be simply enlivened by Mr Pender contacting the relevant Authority Officer, will be undertaken on papers already lodged with the Authority together with any other information the parties wish to be considered, provided it is strictly relevant and does not result in a further cost impost on either or both parties.

Costs

[55] Costs are reserved. The parties are invited to resolve the matter between them. It may be the parties can agree costs lie where they fall in light of the extant employment relationship. However, if they are unable to do so, Mr Pender has 28 days from the date of this determination in which to file and serve a memorandum on costs. Lyttelton has a further 14 days in which to file and serve a memorandum in reply.

[56] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.7

Andrew Dallas

Member of the Employment Relations Authority

7*PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.