

but the point at which an employee becomes eligible can only be when the employee applies and then becomes a member of the superannuation scheme and not earlier.

[3] Mr Wilton and Mr Pollak were able to agree to a statement of facts with respect to what they both agree is a dispute about the interpretation and application of the collective agreement with respect to superannuation benefits. The matter proceeded on the basis of some very limited evidence mainly about other contractual arrangements in Fonterra and submissions.

The agreed facts

[4] The applicants are members of the NZ Amalgamated Engineering, Printing and Manufacturing Union (“EPMU”).

[5] Before they became bound by the collective agreement in question, the applicants were party to a number of different employment agreements which reflected the time at which they became employed by Fonterra and its predecessors which over time had been merged with or subsumed into Fonterra.

[6] Those different agreements had a variety of arrangements regarding superannuation.

[7] In 2005 EPMU initiated bargaining with Fonterra for the renewal of a collective agreement which was to expire on 31 July 2005. Bargaining commenced in June 2005.

[8] Among the matters claimed by EPMU in the bargaining were:

- (a) An extension of coverage to include the Edendale plant where the applicants were employed; and
- (b) For the commencement of the new agreement to be 1 August 2005.

[9] The parties reached terms of settlement.

[10] Fonterra signed the terms of settlement on 17 November 2005. The terms of settlement were ratified by EPMU members in December 2005. The EPMU did not sign the terms of settlement until 13 February 2006.

[11] Following ratification in December 2005 a number of the applicants, but not all of them, at various times applied to join the Dairy Industry Superannuation Scheme (“DISS”). Fonterra did not process the applications received in December 2005 and January 2006 until early 2006 because the EPMU was seeking changes to the terms of settlement and some employees did not make application until March 2006 and subsequently.

[12] All superannuation issues between the parties subsequent to May 2006 have been resolved. The dispute between them relates solely to the period between 1 August 2005 and May 2006.

[13] The DISS scheme allows for employees to apply for membership and then such application is considered and approved or not by the trustees. Membership commences at the date of approval by the trustees.

[14] Fonterra has, as a result of this employment relationship problem arising, received advice that it is technically possible to make retrospective contributions to the DISS scheme. However, it does not believe that it has agreed to do so and does not wish to do so.

The issue

[15] The issue in this case is whether it was intended by the parties that the superannuation benefit under the collective employment agreement would be back dated to 1 August 2005 and whether the superannuation benefit is capable of being fulfilled retrospectively.

The terms of settlement

[16] Clause 2 of the Terms of Settlement provides:

Term

The Collective Agreement shall come into force on 1 August 2005 and shall expire on 30 September 2007.

Page 2 of the Terms of Settlement provides:

Edendale

The effective date for the agreed salary for Edendale will be 1 August 2005 subject to the Road Map to MBP being signed off before 15 December 2005. If sign off occurs after that date, the effective date for the agreed salary will be the date of sign off.

There is no dispute that this provision was met.

Edendale Sick Leave

Current sick leave provisions for Edendale will be replaced by the sick leave provisions in the MBP CA effective from the date that the site transitions to the salaries set out in the CA (this is the date that Edendale employees will be covered by the CA). At the date they become covered by this collective, Edendale employees will carry over an accumulation of sick leave calculated as the amount of sick leave they would have accumulated since April 2004, less the sick leave they have taken since that date.

Superannuation benefit

[17] The superannuation benefit is set out in Part 1, General Provisions, on page 17 of the collective agreement:

Benefits

Fonterra offers a range of conditions and other benefits as part of the employment package of each individual. On commencing permanent employment, employees will be eligible to the following benefits, which are available for the period of employment.

- *The Company shall subsidise employee's contributions to a Company superannuation scheme, to a value no less than the employee's standard contribution. (as per the Dairy Industry Scheme, or the Anchor Scheme).*

The Legal Position

[18] I was referred by Mr Wilton to the approach taken by the Authority in *EPMU v. Assa Abloy NZ Ltd* WA 178/05 (member Greg Wood) which, although not directly on point, provides a useful discussion about the backdated application in that case of an increase in wages and allowances rates. In *Assa Abloy* agreement was reached by the parties to the collective employment agreement on 4 February 2005 when the terms of settlement document was signed. The terms of settlement included a provision that the term of the agreement was 1 July 2004 – 31 January 2006.

[19] The issue in *Assa Abloy* was whether or not those employees who were employed as at 1 July 2004 but left before 4 February 2005 should be entitled to the increased rates provided by the new agreement. It was found that the plain words of the agreement were that the new collective agreement was to come into force on 1 July 2004 and wages and allowances were to be increased by 3.75%. It was implicit that the wage increase would apply from 1 July 2004. *Assa Abloy* did not dispute

that. Mr Wilton placed some emphasis on the following passage from the determination:

The collective agreement could easily have provided for the back-dating only to apply to existing and current employees or for a lump sum equivalent to the back-pay to be paid at a time after 1 July 2004, such as 4 February 2005, which equated to the outstanding allowances. The parties, however, took a broad brush approach, with the attendant broad brush consequences. No exceptions were made by the parties and the agreement should be interpreted on its face accordingly.

[20] In *Assa Abloy* it was found that the provisions with respect to wages and allowances were clearly capable of enforcement.

[21] The Employment Court judgment in *Butler v. Carter Holt Harvey Limited (AC57/05, 14 October 2005)* Couch J was referred to in *Assa Abloy*.

[22] In *Butler* terms of a mediated settlement were recorded in a formal record of settlement dated 27 August 2005 and included setting up a working party to agree on the detail of a performance recognition scheme to operate from no later than 1 July 2004. The working party was never established and the employees either ceased to be employed by Carter Holt and/or to do productive work from about 8 September 2004.

[23] Couch J answered a question in the affirmative as to whether there was any work done by the plaintiff to which the performance recognition scheme agreed to in a record of settlement could apply. Couch J said that the record of settlement explicitly provided that the performance recognition scheme was to operate from no later than 1 July 2007. Although the agreement to the record of settlement was reached on 27 August 2004 Couch J stated in para 30 of the judgment: ... *the only possible construction of the document is that the parties intended the application of the performance recognition scheme to be backdated to 1 July 2004. Any other construction would be inconsistent with the plain words of the agreement.*

[24] Mr Wilton submitted that the plain words of the terms of settlement as they apply to the Edendale employees leave no doubt that the superannuation benefits were to have retrospective effect.

[25] Mr Pollak accepts in his submissions that a collective employment agreement may be backdated – s.52 (1)(a) of the Employment Relations Act 2000. He agreed that is what the parties in the present situation have in part clearly and specifically agreed to and have given effect to. He submits that unlike a superannuation benefit wages and allowances are quantifiable, precise and automatic. The superannuation benefit Mr Pollak submits entitles an employee to apply to join the scheme and the employee may decide to join or not. The timing of an employee's application is up to each employee and it is a matter of individual choice.

[26] Mr Pollak submits that support is found for this submission in the employees applying to join the superannuation scheme at different times after the terms of settlement were ratified in December 2005.

[27] Mr Pollak says in his submission that Fonterra has sought the advice of the trustees of the Dairy Industry Superannuation Scheme and the trustees have confirmed that technically they have no objection to a backdated contribution as in effect this part of the scheme is merely a very generously subsidised savings scheme for retirement. Mr Pollak submits that Fonterra never agreed to backdate employer contributions to the scheme and does not wish to.

Determination

[28] In this case the parties specifically agreed to a back dating provision in the collective employment agreement and the agreement came into force on 1 August 2005. The issue is what the parties intended with respect to the superannuation benefit set out on page 17 of the collective agreement.

[29] I have firstly considered the meaning of the provision in dispute on page 17 of the collective agreement. The provision makes it clear Fonterra offers a superannuation benefit as part of the employment package of each individual. The provision provides that an employee is eligible for the superannuation benefit. It is not compulsory but up to each employee to elect whether they wish to join and make contributions to a company superannuation scheme.

[30] I have then considered what the superannuation benefit is. The words in the provision about the benefit to the employee are in my view plain and unambiguous. The benefit to the employee is that Fonterra shall subsidise an employee's contributions to a Company superannuation scheme.

[31] The next matter for consideration is when Fonterra shall subsidise an employee's contribution to a company superannuation benefit. The employer is subsidising employee contributions to a company superannuation scheme and there must be a contribution therefore to subsidise. Fonterra's obligation to subsidise contributions therefore arises when an employee makes contribution to a company superannuation scheme. It was agreed by the parties that the DISS scheme allows for employees to apply for membership which commences at the date of approval by the trustees.

[32] I have then considered what the parties intended would happen to the superannuation benefit provision when it was agreed that the collective agreement would come into force on 1 August 2005. Mr Wilton says not only do the plain words of the terms of settlement leave no doubt that the superannuation benefits were to have retrospective effect but the condition with respect to the superannuation benefit is capable of being met retrospectively because it is possible to do so by backdating contributions. It was accepted that membership could not be backdated.

[33] Unlike the situation in *Butler* there is no explicit provision in the terms of settlement between Fonterra and EPMU that the superannuation benefit was to operate from 1 August 2005. Mr Wilton submits quite correctly that there is also nothing that ousts the application of the superannuation provision to the Edendale employees from 1 August 2005. He says that the parties took a broad brush approach as was found in *Assa Abloy* with the attendant broad brush consequences. He said that the parties could have limited the application of the superannuation provision to the Edendale employees but did not.

[34] In terms of the back-dating clause there is no particular difficulty with the back-dating of salary. Other provisions in a collective employment agreement may be difficult or incapable of application or operation if they are deemed to come into force at an earlier date. The superannuation benefit in this case provides an employee is eligible for a superannuation benefit and can elect to join a scheme to contribute but fundamentally it is a matter of individual choice. Such provisions are different for example from working a shift and being paid for doing so.

[35] Backdating of contributions to a superannuation scheme to a point in time where an employee has not had corresponding membership and could not therefore make contributions to a company superannuation scheme is a different application and

operation of the superannuation benefit to that contained in plain words in the collective agreement.

[36] Mr Pollak submits that, for example, a person who applies to join a scheme for insurance cover in April 2006 cannot claim insurance cover for an accident on 2 August 2005. Mr Wilton accepts that but says that in this case because there can be backdating of contributions to a superannuation scheme the conditions are capable of being fulfilled retrospectively.

[37] Mr Pollak also submits that the logical conclusion of EPMU's position is that if an employee decided not to join the scheme until 2009 and therefore makes no contribution then membership of the scheme in May 2009 would trigger a backdating to 1 August 2005. Mr Wilton said in response that the situation in this case was limited to the Edendale employees who have all become members of the Company superannuation scheme.

[38] I am only being asked to determine the essential back-dating issue. I have not heard evidence from any of the applicants. It is clear to me from the submissions that there are a number of different circumstances pertaining to the applicants which may need to be considered. For example, some of the applicants may have been making contributions to a company superannuation scheme as at 1 August 2005. There may also be an issue as to whether Fonterra could be expected to take reasonable steps in terms of those applicants who applied to join the superannuation scheme after ratification of the collective agreement to process those applications promptly.

[39] I conclude that the superannuation benefit on page 17 of the collective employment agreement is that Fonterra shall subsidise employee's contributions to a Company superannuation scheme. An essential element of that benefit is that an employee elects to and joins a company superannuation scheme in order to make contributions to it which are then subsidised by Fonterra. This is a provision which is not capable of application and operation in the way it was intended by an employee joining a scheme and then backdating contributions for Fonterra to subsidise to a point where there was no corresponding membership.

[40] It would not be appropriate in these circumstances to simply adopt a broad brush approach and find that the parties intended that the provision apply

retrospectively in the way that it is now proposed by the applicants in the absence of express provision that it was agreed it would apply in that way.

[41] The answer to the issue as to whether the parties intended the superannuation benefit in the collective employment agreement to apply retrospectively and whether it is capable of being fulfilled retrospectively is no.

[42] The dispute is determined in favour of the respondent.

Costs

[43] I reserve the issue of costs. It may be from the parties submissions that this is an appropriate case for costs to lie where they fall.

Helen Doyle
Member of the Employment Relations Authority

SCHEDULE “A” - NAMES OF APPLICANTS

Tim Snow

Bruce Aitken

Simon Alderson

Duane Ashman

Russell Baker

Francis Baastiansen

Stephen Birkhead

Kevin Bone

Anthony Bradley

Russell Britton

Wayne Cameron

Ricky Gerrard

Barry Gibson-Smith

James Grandiek

Stephen Hallam

Kipp Henderson

Kenneth Hunter

David Laverty

Geoffrey Mahon

Stephen McDonough

Adrian McGillam

Stephen McLennan

Kieran McSoriley

Garry Sexton

Richard Sloane

Patrick Stauffer

John Whimp

David Wiseman

Ross Witham

Michael Wyatt