

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 133/08
5108190

BETWEEN

NOEL GORDON SMITH
First Applicant

BRIAN WELBY SULLIVAN
Second Applicant

THOMAS LEONARD
COWLISHAW
Third Applicant

AND

BRIDGESTONE NEW
ZEALAND LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Rob Davidson, Counsel for Applicant
Richard Harrison, Counsel for Respondent

Investigation Meeting: 11 June 2008 at Christchurch

Submissions received: 4 July 2008 from Applicants
11 June and 25 July 2008 from Respondent

Determination: 5 September 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants, Noel Smith, Brian Sullivan and Thomas Cowlshaw, are salaried employees at the respondent company's Papanui tyre plant at Langdons Road Christchurch.

[2] The respondent, Bridgestone New Zealand Limited (Bridgestone) is the employer of the three applicants.

[3] The employment relationship problem that the applicants have is in the nature of a dispute. They say that they are entitled to the benefit of the provision in clause 23.5 of the collective agreement between Bridgestone, Bridgestone Rubberworkers Union Inc (the union) and Manufacturing & Construction Workers Union - 15 February 2006 to 14 February 2008 (the collective agreement). Clause 23.5 provides:

23.5 If you commenced employment with us prior to 1st January 2007 and have completed six (6) years current continuous service, you will be entitled to an additional one (1) week's annual holiday in addition to your entitlement under this clause and the Holidays Act. For the avoidance of doubt, employees commencing employment on or after 1st January 2007 will not be entitled to this additional annual holiday.

[4] The applicants say that there was an express verbal agreement between them and Bridgestone that benefits in the collective agreement are automatically passed on to them. The applicants say that the benefit of an additional weeks holiday has not been passed on to them. They approached management at Bridgestone to have it applied to them but there was no agreement from management in that respect.

[5] Bridgestone do not accept that there was an agreement with the applicants that required it to automatically pass on to the salaried staff any benefits in the collective agreement. Mr Harrison submits that even if it was to be found that the benefit of an additional week's leave should be passed on such an order would not change the overall entitlement of leave that currently applies to the applicants.

[6] Mr Harrison confirmed as directed by the Authority that he had organised for a representative of the Union to be provided with a copy of the statement of problem, statement in reply and notice of the Authority's direction. The Authority had indicated in its notice of direction that the Union had an opportunity to make submissions or be joined to the proceedings if it wished. The Union did not indicate to the Authority that it wanted to make submissions or be joined as a party.

The issues

[7] The issues for the Authority to determine are:

- What are the applicants' entitlements at the current time to annual leave; and
- Why do the applicants claim that benefits in the collective agreement would be automatically passed on to them?

- Was there an express verbal agreement entered into with the applicants to this effect; and, if so, what was that agreement; and
- Was there subsequent conduct by the parties to support that agreement;
- What is the effect of the entire agreement provision in each of the applicants' individual employment agreements on any such agreement; and
- If there was an agreement to pass on would it breach the passing on provisions in the Employment Relations Act 2000; and
- If the terms and conditions related to annual leave in the collective agreement were passed on to the applicants would there be any change to their current entitlements?

The applicants' current entitlement to annual leave

[8] Mr Smith commenced employment with Bridgestone on 13 August 1979. His current position is Shift Manager. Mr Smith is party to an individual employment agreement which was signed on 28 August 1997 and was effective from 1 September 1997. Prior to Mr Smith signing an individual employment agreement, his terms and conditions of employment were in the main contained in a written letter of appointment.

[9] The individual employment agreement provides in clause 8.1 the following for Mr Smith in terms of his annual leave:

8. ***Annual Holidays***

8.1 *Annual leave will be provided in accordance with Company Policy as detailed in the Staff Manual. Current entitlements are:*

8.2 *If you are employed on rotating shifts for a complete year you are entitled to an additional week of annual leave, with a reasonable pro rata adjustment for working a part year on rotating shifts.*

8.3 *Your current annual leave entitlement is specified in Schedule 1.*

[10] Schedule 1 of Mr Smith's individual employment agreement provides that he is entitled to six weeks paid annual leave including one week shift leave.

[11] The relevant parts of the leave policy provisions in the staff manual as at July 2007 provide:

1. *Annual Leave Entitlements*

1.1 *All employees on completing twelve (12) months service with the Company will be entitled to a minimum of four (4) weeks annual leave.*

...

1.8 *Shift workers will be entitled to an additional one (1) week annual leave – “Shift Leave.”*

...

1.10 *Annual entitlements will be increased according to length of service as follows:*

1.10.1 *Fortnightly salaried employees who have completed ten (10) or more years continuous service and joined the Company before July 1999 will begin to accrue leave at the rate of five weeks per annum.*

[12] Mr Sullivan commenced employment with Bridgestone on 23 September 1974. He was appointed as a salaried staff member on 16 August 1982 and is currently employed as a Final Inspection Co-ordinator. Mr Sullivan signed an individual employment agreement dated 22 August 1997 which was effective from 1 September 1997. Prior to signing his individual employment agreement, Mr Sullivan’s terms and conditions of employment were in the main contained in a written letter of appointment. The provisions in Mr Sullivan’s individual employment agreement relating to annual leave provide him with six weeks annual leave which includes one week shift leave. The provisions about annual leave are the same in his individual employment agreement as those set out above for Mr Smith.

[13] Mr Cowlshaw commenced his employment with Bridgestone on 3 March 1975. He is currently employed by Bridgestone as an Industrial Engineer. Mr Cowlshaw entered into an individual employment agreement with Bridgestone dated 27 August 1997 which was effective from 1 September 1997. Prior to signing his individual employment agreement Mr Cowlshaw’s terms and conditions were in the main contained in a written letter of appointment. The provisions in Mr Cowlshaw’s employment agreement for annual leave are the same as those in Mr Smith’s individual employment agreement. Mr Cowlshaw, does not currently work shifts and has an entitlement therefore of five weeks annual leave.

[14] The leave entitlements of all three applicants as at September 1997 were based on three weeks annual leave, an additional week's annual leave at six years service and a further week's annual leave after ten years continuous service. The applicants all had ten years continuous service when they signed their individual employment agreement. On top of the five weeks annual leave entitlement there was an additional week for shift leave if performed.

Why do the applicants claim that benefits in the collective agreement would be automatically passed on to them?

[15] The Authority must be satisfied from the evidence that there was an offer made by Bridgestone to the applicants that Bridgestone pass on any benefits in the collective agreement and that such offer was accepted. The other indicia of a binding and enforceable agreement must also be established in that there must be sufficient certainty of the terms of such agreement; consideration and evidence that the parties intended to create an agreement that had contractual force.

[16] Mr Smith said in his evidence at the investigation meeting that historically salaried staff at Bridgestone have retained relativity with rubber workers. Mr Sullivan said in his evidence that there was always a relationship between the terms and conditions provided to those in salaried positions and those provided to the rubber workers.

[17] Mr Cowlshaw in his evidence accepted that the relativity was not absolute. This is supported by a letter to Mr Cowlshaw dated 21 May 1984 from Mr Lubinecky, who was the Factory Manager. Mr Lubinecky was not prepared to give to Mr Cowlshaw and the other salaried staff a seven year time study holiday which was a benefit that Union members received. Mr Lubinecky did not agree that it should be passed on to the salaried staff.

[18] Barry O'Connor has been the Employee Relations Manager at Bridgestone at Langdons Road, Papanui, for 25 years. Mr O'Connor did not accept that during the time he has been in his position there was any agreement that conditions in the collective agreement would be automatically passed on to the salaried staff.

[19] Colin Dunn who is the General Manager of Manufacturing gave evidence at the investigation meeting. Mr Dunn did not accept that there was agreement that any benefits in the collective agreement would be automatically passed on to salaried

staff. Mr Dunn gave evidence of a time when the rubber workers were paid more than salaried staff. He explained that is not the situation now and salaried staff are now paid more. Mr Dunn felt that the relativity issue was dealt with by the 1997 restructure which I shall come to.

[20] I accept there was, in all likelihood relativity between the terms and conditions of the different groups of employees at Bridgestone. There were also some differences such as the seven year holiday already referred to. I am not satisfied that there is evidence in terms of relativity that enables a conclusion to be reached that there was an express verbal agreement between the applicants and Bridgestone to automatically pass on benefits in the collective agreement.

[21] I now turn to the time of the 1997 restructuring when the applicants say they were given an assurance that terms and conditions reached with the Union would be passed on to them.

[22] In 1997 there was significant restructuring of Bridgestone as a result of financial difficulties experienced by the company. The then Managing Director of Bridgestone/Firestone, Mr Jenkins, advised that costs had to be reduced by 20% in order for the company to stay in business.

[23] There was a meeting held in early 1997 involving all staff, including the site Union representatives from the Engineers and Rubberworkers Union. The applicants, as part of the salaried staff, were understandably concerned and wanted to be involved in the negotiations for changed terms and conditions required to ensure viability of the plant for the future.

[24] The salaried staff decided to engage an industrial advocate, Mr Ian Thompson, to represent their interests. I have placed weight, given the passage of time and impact on memory since 1997, on the documents that existed at that time.

[25] Mr Thompson wrote to the General Manager of Human Resources at that time, Jim Maloney, on 14 April 1997. A copy of that letter was not available but Mr Maloney's facsimile reply dated 24 April 1997 was provided. Mr Maloney said in his response to Mr Thompson:

Dear Ian,

Your letter of 14 April 97 is acknowledged. As explained in our conversation this morning I intend meeting with our Team Leaders on Thursday 1 May at 2pm. I intend explaining to them once again that the company has no intention of disadvantaging them by insisting they participate any new or future collective employment contract. They are currently on individual contracts and will remain so if that is their wish.

If they require your presence at the meeting on Thursday next you will certainly be welcome.

[26] Mr Thompson wrote again to Mr Maloney by letter dated 1 July 1997. It is clear from the letter that the meeting referred to in Mr Maloney's facsimile had taken place. Mr Thompson's letter provided:

Dear Sir,

We refer to our letter of 14 April 1997 and your response of 24 April 1997.

We record our clients were very receptive to your meeting with them on 1 May 1997 at 2pm. The report to our office, from our clients, was that they felt part of the management team, and felt trust and confidence in yourself and local management.

It would appear, for some unknown reason, the attitude has changed towards our clients as they believe they are in a take it or leave it situation. The other employees were given the opportunity to discuss their terms of employment (contract) but it is believed our clients are being told accept or be dismissed.

Our clients are loyal to Firestone and do not expect to be treated in a different manner. We trust their choice to appoint a bargaining agent is not the problem.

We look forward to our clients career paths being secured to the benefit of both equal parties to their contract of employment.

[27] As a result of the 1997 restructure there was agreement reached with the Site Unions to a wage reduction of 15% and removal of the one week's annual leave that I have referred to earlier in this determination as the time study holiday. Union members had a one month holiday before the new terms and conditions came into force and there was an option of redundancy for employees who did not wish to start under the new terms and conditions of employment. That redundancy was also available to salaried staff. The evidence was that there was agreement reached between Bridgestone and the union in 1997 to a collective contract with a five year

term and corresponding wage freeze. There was also a lump sum payment made to union members at that time.

[28] The evidence from the applicants as to what was said to them at this time and by whom about passing on benefits was vague. Put shortly there was no clear statement about an offer to pass on benefits. Mr O'Connor said that he did not hear Mr Maloney say that the salaried staff would get what the Rubber Workers got.

[29] I prefer the evidence of Mr O'Connor because it is to some extent supported by the applicants own evidence and the correspondence at the time, that the concern for the salaried staff was that they would be asked to reduce their entitlements and salaries in line with those on the collective agreements.

[30] All three applicants said that they were reassured they would not be disadvantaged. I find any discussion of that nature was most likely about reassuring salaried staff that they would not be asked to reduce their entitlements and salaries as those on collective agreements had been required to or have those reductions simply imposed on them without the ability to negotiate.

[31] It is most unlikely, in my view, where there were no benefits likely to be obtained by the rubber workers that the salaried staff would have been given an assurance that all terms and conditions would be passed on. I accept Mr Harrison's submission that that would be the last thing the salaried staff would want, where it must have been clear to them that the terms and conditions of Union members were being reduced.

[32] I am not satisfied that Bridgestone discouraged the salaried staff from organising and negotiating a collective agreement at the time of the 1997 restructuring. The correspondence from Mr Maloney supports that the concern for the salaried staff was that the company not insist that they participate in new or further collective employment contracts and he specifically stated that they could remain on individual contracts if they wished. That was simply a choice that the applicants made. I do not accept the submissions from Mr Davidson that the applicants conceded that right in return for an undertaking that all benefits negotiated would be passed on to them. There is no evidence to support that.

[33] The evidence supports that there was an opportunity for the applicants to take some advice from Mr Thompson on their individual employment agreements before they signed them.

[34] The applicants were represented when they signed their individual employment agreements. The agreements were signed after the applicants say they were given an assurance that benefits in the collective contract would be passed on to them. There is no reference in the written agreements to passing on of benefits or any evidence that there was any discussion with Bridgestone about a pass on clause being inserted into the individual employment agreements.

[35] There is also the entire agreement clause in each of the applicants individual employment agreements which provides:

This contract, the Schedules attached to it, and the Firestone Staff Manual represents the entire agreement between yourself and the Company, and therefore replaces any previous contract, agreement or arrangement (written or verbal) that you may have had with the Company.

[36] In terms of future conduct between the parties, the applicants rely on three matters. The first is the offer of redundancy in the redundancy package which included unused frozen sick leave as at May 1997. Both the redundancy formula and frozen sick leave are contained in the applicants' individual employment agreements. The only other benefit identified was the gain share arrangements. The evidence supported that this was an across the board initiative which was made available to all staff. The gain share arrangement that was applied to the applicants and other salaried staff was more beneficial than that applied to wage workers.

[37] A further difficulty for the applicants is the lack of any certainty about the agreement they say they had with Bridgestone. There is a lack of certainty about the nature of the agreement itself and there have been several attempts on behalf of the applicants to frame what they say the agreement was. There is also a lack of certainty from the evidence about what it is that should be passed on in terms of any agreement. Mr Smith said in his evidence that he thought general conditions should be passed on, not salaries and not one off benefits. Had the Authority reached the point of being able to conclude from the evidence that there was agreement about passing on benefits

it could not have concluded with any certainty what the obligations of Bridgestone were and what was to be passed on.

Determination

[38] I am not satisfied from the evidence that there was an express verbal agreement between the applicants and Bridgestone that any benefits in the collective agreement would be automatically passed on to the applicants. Historically there has been relativity between the groups of workers and there is currently a relativity between the collective agreement and the applicants in terms of annual leave entitlements. I accept Mr Harrison's submission that relativity is not the same as an express agreement to automatically pass-on any benefit from collective negotiations to those on individual employment agreements.

[39] The applicants' claim is dismissed. The parties still have the opportunity to meet and negotiate. The effect of this determination is that any benefits in the collective agreement about annual leave will not automatically apply to the applicants.

Costs

[40] I reserve the issue of costs.

[41] This may be the sort of case where costs should be left to lie where they fall.

Helen Doyle
Member of the Employment Relations Authority