

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 165
5519282

BETWEEN GEERT VELTHUIS
Applicant

A N D MILMEQ LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Applicant in person
Rachel Brazil, Counsel for the Respondent

Investigation Meeting: 26 May 2015 at Dunedin

Submissions Received: 26 May and 22 September 2015 from the Applicant
31 July 2015 from the Respondent

Date of Determination: 2 November 2015

DETERMINATION OF THE AUTHORITY

- A. The respondent has not breached the terms of the 2013-2014 or the 2014-2015 collective agreements in failing to grant Mr Velthuis four weeks' special leave.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Velthuis contends that the respondent has breached and continues to breach the terms of applicable collective employment agreements in not granting him long service leave following the introduction of additional long service rights in March 2013. Mr Velthuis contends that he satisfies the criteria for being granted such long service leave on a plain reading of the wording of the relevant clause.

[2] The respondent denies that Mr Velthuis is entitled to be granted the additional long service leave on the basis that the relevant clause upon which he seeks to rely was varied by agreement between the parties on 21 March 2013 so that employees only become entitled to long service leave when they have been both continuously employed by the respondent and been continuously a union member for five years.

[3] The release of this determination has been delayed by a month because it is understood that Mr Velthuis, who is unrepresented in these proceedings, was overseas throughout October 2015 and not in a position to receive it remotely.

Events leading to the dispute

[4] Mr Velthuis commenced employment with the respondent (then known as Millers Mechanical (NZ) Limited) in June 1995 and joined the New Zealand Amalgamated Engineering Printing & Manufacturing Union Inc (the EPMU) either at the same time or shortly afterwards. The EPMU remains active within the company, although other employees at the respondent company are members of the Manufacturing and Construction Workers' Union (MCWU).

[5] The respondent company changed its name at least twice over the years but Mr Velthuis has continued in employment with it without interruption until the current date. Mr Velthuis also remained a member of the EPMU until around 13 April 2011, when he resigned from the union. Mr Velthuis re-joined the EPMU on 5 February 2014. Mr Velthuis did have two weeks' special leave granted to him at the point when he reached 15 years' continuous service, which would have been in 2010. This would have been granted under the terms of the collective agreement that was in force at that time.

[6] When the Holidays Act 2003 was amended with effect from 1 April 2007 to provide a right to all employees of not less than four weeks' paid annual holidays after they had completed 12 months of continuous employment (increasing the entitlement from three weeks), the EPMU entered into negotiations with the respondent company to give some or all of its members an extra week's leave as, up to that point, they had enjoyed an extra week's leave of four weeks.

[7] It was the evidence of Mr Michael Kirwood, an EPMU union organiser, that proceedings were initiated against the respondent company arguing that its members (and possibly the members of the MCWU) were entitled to be granted an extra week's

leave. A mediation process was entered into, and agreement was reached in March 2013 between the respondent, the EPMU and the MCWU that, after five years' continuous employment, members would receive an additional two weeks' leave and after 10 years' continuous employment, they would get a further two weeks' leave.

[8] It was Mr Kirwood's evidence that, as Mr Velthuis was not a union member at the time of the negotiations, and did not vote on the variation, he is not entitled to what the union members received at that time. He says that it was the intention of both parties at the time of settling the issue that only employees who were union members at the time of the agreement became entitled to the agreed arrangement.

[9] Mr Kirwood's evidence is that the relevant clause that was incorporated into the relevant collective employment agreement of the time (covering the period 1 July 2013 to 30 June 2014) caused confusion amongst union members and that it was re-worded in the following collective agreement (1 July 2014 to 30 June 2015). Mr Kirwood's view is that Mr Velthuis will become entitled to two weeks' long service leave after having completed five years' continuous employment and continuous membership of the union.

[10] Evidence was also heard from Mr Michael Lightfoot, the chief executive officer of the respondent company. Mr Lightfoot leads the collective bargaining with the EPMU and the MCWU on behalf of the respondent company each year and states in his evidence that, as part of the bargaining process in relation to the 1 July 2013 to 30 June 2014 collective employment agreement, a variation was agreed between the parties that all employees bound at that time by the collective employment agreement, who had previously served five years with the company on or before 21 March 2013, would be entitled to a special holiday of two weeks and those who served 10 years on or before 21 March 2013 would be entitled to a special holiday of four weeks.

[11] Mr Lightfoot says that an amendment to clause 8.13 of that collective agreement was agreed to and reflected in a document (called the March 2013 variation in this determination), which was signed by Mr Lightfoot, Mr Kirwood and Mr Scandrett, on behalf of the MCWU, as a result of the March 2013 mediation.

[12] Mr Lightfoot says that, during the negotiations concerning this variation, it was agreed by the unions and the company that the amendment to clause 8.13 would

only apply to employees who were union members at the time the agreement was made, being 21 March 2013.

[13] Mr Lightfoot says that, during the bargaining process for the 1 July 2014 to 30 July 2015 collective employment agreement, the eligibility criteria around clause 8.13 were again discussed, and the parties to the negotiation agreed that the five and 10 year special holiday rules should be granted in future for all employees who had served the required period of service as both an employee of the company and *a continuous union member*. Clause 8.13 was amended, he says, to reflect that agreement in the 1 July 2014 to 30 June 2015 collective employment agreement. Therefore, according to Mr Lightfoot, Mr Velthuis would not become eligible for the five year special holiday award until he had served the required time as *a continuous union member*.

[14] The Authority was shown a number of documents, as follows:

- (a) A collective employment agreement covering the period 6 May 2010 to 5 May 2011 (when the respondent was known as Realcold Milmech Limited);
- (b) A collective employment agreement covering the period 6 May 2011 to 30 June 2012;
- (c) A collective employment agreement covering the period 1 July 2012 to 30 July 2013;
- (d) Two variations to two of the collective employment agreements which are not relevant to the issue in question;
- (e) A collective employment agreement covering the period 1 July 2013 to 30 June 2014;
- (f) A collective employment agreement covering the period 1 July 2014 to 30 June 2015;
- (g) An individual employment agreement between Mr Velthuis and the respondent company dated 26 October 2011, but not signed by Mr Velthuis until 1 December 2011;

- (h) The March 2013 variation document; and
- (i) A letter dated 1 October 2014 signed by Mr Lightfoot, and addressed to Mr Kirwood and Mr Scandrett setting out the terms of settlement for ratification by the respective unions of the collective agreement for the period 1 July 2014 to 30 June 2015, which included the amended wording to clause 8.13.

[15] Mr Velthuis also sent to the Authority with his final submissions copies of the collective employment agreement covering the period 1 July 2015 to 30 June 2016 and the collective employment agreement under which Mr Velthuis became originally employed in June 1995.

[16] It is necessary to set out the terms of clause 8.13 in the various collective agreements that Mr Velthuis was either wholly or partially employed under. In the 6 May 2010 to 5 May 2011 collective agreement, under which Mr Velthuis was employed until he resigned from the EPMU in April 2011, clause 8.13 provided as follows:

8.13 *Holidays for Long Service*

Special holidays for continuous service with Millers Mechanical/ Realcold Milmech are provided on the following basis:

After 15 years' service 1 special holiday of 2 weeks;

After 25 years' service 1 special holiday of 3 weeks;

After 35 years' service 1 special holiday of 4 weeks;

After 40 years' service 1 special holiday of 5 weeks

Special holidays may be taken in one or more periods at a time agreed upon by Realcold Milmech and the employee.

Employees who leave their employment without having taken a special holiday to which they are entitled shall be paid in lieu of.

Such holiday pay shall be calculated on the basis of average earnings (as defined in the Holidays Act) during the year of qualification. Provided this is not less than the ordinary rate of pay at the time the holiday is taken.

[17] The terms of clause 8.13 in the collective agreements for the period when Mr Velthuis was employed under the individual employment agreement are not relevant. However, I note that clause 12 of the individual employment agreement provides that long service leave is an entitlement after 15 years' continuous service

after which a special one-off holiday of two weeks is granted. Subsequent long service leave then accrued at 25, 35 and 40 years of continuous service for which the employee would be entitled to take special one-off holidays of three, four or five weeks respectively.

[18] The wording of the March 2013 variation states as follows:

There is an agreement to recommend the following amendments by way of a variation to the collective agreement:

[Irrelevant wording omitted]

Clause 13 Holidays for Long Service shall have the following additions:

*After 5 years' service 1 special holiday of 2 weeks.
After 10 years' of service 1 special holiday of 2 weeks.*

To avoid misunderstanding: All employees who have previously served 5 years with the company on or before 21/03/2013 shall be entitled to 1 the [sic] special holiday of two weeks; all employees who have previously served on or before 21/03/2013 10 year's [sic] shall be entitled to 1 special holiday of four weeks.

For and On Behalf of Unions
[signed by Mike Kirwood and Mr Scandrett]

For and On Behalf of the Employer
[signed by Mr Lightfoot]

[19] Clause 8.13 of the collective agreement covering the period 1 July 2013 to 30 June 2014, under which Mr Velthuis was employed with effect from 5 February 2014, incorporated this change, and provided as follows:

8.13 Holidays for long service

Special holidays for continuous service with Millers Mechanical/Realcold Milmech/Milmeq are provided on the following basis:

- *After 5 years' service 1 special holiday of 2 weeks;*
- *After 10 years' service 1 special holiday of 2 weeks;*
- *After 15 years' service 1 special holiday of 2 weeks;*
- *After 25 years' service 1 special holiday of 3 weeks;*
- *After 35 years' service 1 special holiday of 4 weeks;*
- *After 40 years' service 1 special holiday of 5 weeks*

To avoid confusion: All employees who have already completed five years' service with the company on or before 21 March 2013 shall be entitled to a special holiday of 2 weeks. All employees who have previously served ten years' service on or before 21 March 2013 shall be entitled to one special holiday of four weeks.

[The remaining three paragraphs of clause 8.13 are substantially identical to the paragraphs cited above from the 6 May 2010 to 5 May 2011 collective employment agreement.]

[20] The relevant wording of the 1 October 2014 letter includes a section that sets out the new wording for clause 8.13 as follows:

8.13 *Holidays for long service*

Special holidays for continuous service with Millers Mechanical/Realcold Milmech/Milmeq are provided on the following basis:-

- *After 5 years' service 1 special holiday of 2 weeks;*
- *After 10 years' service 1 special holiday of 2 weeks;*
- *After 15 years' service 1 special holiday of 2 weeks;*
- *After 25 years' service 1 special holiday of 3 weeks;*
- *After 35 years' service 1 special holiday of 4 weeks;*
- *After 40 years' service 1 special holiday of 5 weeks.*

To avoid confusion: All employees who have already completed five years' service with the company on or before 21 March 2013 shall be entitled to a special holiday of two weeks. All employees who have previously served ten years' service on or before 21 March 2013 shall be entitled to one special holiday of four weeks. In order to receive the entitlements in this clause, it is not sufficient to have been an employee for five or ten years and so on. The employee must have completed as an example, 5 years' continuous service as a union member as well as to be entitled to the special holiday of two weeks.

[21] Clause 8.13 of the 1 July 2014 to 30 June 2015 collective employment agreement sets out exactly those words that were set out in the 1 October 2014 letter. Clause 8.13 of the 1 July 2015 to 30 June 2016 collective agreement has different wording again, and this time is unambiguous, stating:

To avoid confusion: To become entitled to the 5 and 10 year long service leave awards, the employee must:

- *Have been employed for a continuous period at each incremental stage; and*
- *Been a union member for the same continuous period at each incremental stage.*

To become eligible for the 15, 25, 35 and 40 year awards the employee must have been employed for a continuous period at each incremental stage however it is not a requirement for these awards that the employee was also a union member for the continuous period.

[22] I am satisfied that Mr Velthuis is not entitled to receive a 5 year long service award under a plain reading of the terms of the 1 July 2015 to 30 June 2016 collective agreement.

[23] Mr Velthuis made the point, which is not contested, that the special leave arrangements had been agreed in order to compensate employees who had been in receipt of the right to four weeks' annual leave when the statutory minimum right under the Holidays Act increased from three weeks to four weeks. He said that, as he had been adversely affected by that change, he should be able to take advantage of that compensatory measure as well.

[24] It was also Mr Velthuis' evidence that, although he was not a member of the union when the compensatory right to extra special paid leave was agreed, when he re-joined the union on 5 February 2014 and came immediately under the aegis of the collective agreement containing that compensatory right, no one from either the company or the union explained to him that the wording of clause 8.13 had to be interpreted so that only employees who were members of the respective unions on 21 March 2013 would be entitled to the additional special paid leave.

[25] Mr Velthuis gave evidence that he had ready access to the collective agreements and that he had been given copies of the March 2013 variation and the October 2014 letter but that, again, no one had advised him that there was a requirement to be a member of the union on 21 March 2013 in order to gain the benefit of the new right.

The issues

[26] The issue to be determined is whether Mr Velthuis is entitled to receive special leave by reference to his continuous service with the company under the terms of the respective clauses 8.13 as set out in the 1 July 2013 to 30 June 2014 and 1 July 2014 to 30 June 2015 collective employment agreements.

[27] A sub issue which is necessary to resolve is whether the Authority can take into account evidence from representatives of the respondent and the EPMU as to what their intention was regarding the meaning of clause 8.13 in these two collective agreements.

The principles of contractual interpretation to be applied

[28] His Honour Judge Ford set these principles out in the Employment Court case of *Progressive Meats Limited v. Pohio & Ors* [2012] NZEmpC 103 where, at [29], he stated as follows:

There was no dispute between counsel as to the applicable legal principles in the interpretation of collective agreements. Mr Cleary referred to the well-known five principles of contractual interpretation articulated by Lord Hoffmann in Investors Compensation Scheme Limited v West Bromwich Building Society¹ which were adopted in New Zealand in Boat Park Ltd v Hutchinson² and recently reaffirmed in Vector Gas Ltd v Bay of Plenty Energy Limited.³ As both counsel relied on the stated principles, I set them out in full:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the “matrix of fact,” but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as a meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945)

(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera SA v Salen Rederierna AB [1985] 1 AC 191,201:

“... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”.

[29] I also refer to the Court of Appeal case of *Silver Fern Farms Limited v. New Zealand Meat Workers & Related Trade Unions Inc.* [2010] NZCA 317 in which it

¹ [1997] UKHL 28

² [1999] 2 NZLR 74.

³ [2012] NZSC 5

confirmed that extrinsic material can be used to clarify an agreement's meaning, even if the terms were unambiguous.

Discussion

[30] First, I am satisfied, having heard the evidence of both Mr Kirwood and Mr Lightfoot, that the intention of both the EPMU and the respondent company was for clause 8.13 of the respective collective agreements to give the right to additional special leave after five and 10 years' service only to employees who were members of the EPMU and the MCWU on the date the agreement was reached (21 March 2013).

[31] This evidence of the parties' intention is central to the respondent's defence of Mr Velthuis' claim, as a plain reading of the words used in the clauses 8.13 of the two collective agreements under scrutiny does not naturally lend itself to an interpretation that employees covered by the agreements needed to have been a member of one of the two unions on 21 March 2013. However, as was stated in *Pohio*, evidence about intention is inadmissible in interpreting the meaning of a contractual clause.

[32] The present case is unusual in that the Authority and the Courts must usually apply the principles of contractual interpretation when the parties to the contract in question disagree as to the meaning of a particular clause. In this case, however, the parties to the collective agreements agree as to the intended meaning of clause 8.13. A key question to determine, therefore, is whether the general principle that evidence about parties' intentions is inadmissible still holds true when a representative from the union party and the representative from the employer party to a collective agreement agree as to the intended meaning but a member of that union who is bound by those terms does not agree.

[33] Whilst the normal rules of contractual interpretation prevent the Courts and Authority from taking into account evidence about the subjective intentions of a party to a contract, an analysis of basic principles would suggest that this rule does not apply when all parties to a contract are in agreement as to the meaning of a clause of a collective agreement, and that *Vector Gas* and *Pohio* should be distinguished as they concern situations where the parties to the agreement were in dispute as to the meaning of a clause.

[34] It is perfectly possible for a clause in an employment contract to have a meaning which is entirely hidden to third parties. Whilst I am clear in my conclusion

that the respective wording of clauses 8.13 in both the 2013-2014 and 2014-2015 collective agreements do not, on their face, convey the specific requirement that an employee covered by the collective agreement must have been a union member on 21 March 2013, that requirement was expressly discussed and agreed upon between the named parties of the collective agreements. The parties, therefore, are entirely clear, and in agreement, as to the meaning of the clauses 8.13.

[35] It is not for the Authority to seek to interfere in the bargain reached between the parties to the collective agreements, nor to rewrite the terms of an agreement between parties. Indeed, s.163 of the Employment Relations Act 2000 (the Act) expressly provides that the Authority may not, under any provision of the Act, make in respect of a collective agreement an order cancelling or varying the agreement or any term of the agreement.

[36] When the EPMU and the MCWU entered into negotiations with the respondent company to attempt to fix the disadvantage that members perceived they had suffered upon the increase of the statutory minimum holiday entitlement, officials from those unions took part in those negotiations specifically on behalf of the members of those unions at the time. Section 12 of the Act recognises that unions have a role in promoting their members' collective employment interests and confers on registered unions the right to represent their members in collective bargaining.

[37] Section 51 of the Act provides that a union must not sign a collective agreement or a variation of it unless the agreement or variation has been ratified in accordance with the ratification procedure notified in subsection (2) of that section. Mr Velthuis has not suggested that a proper ratification process did not take place with respect to either the 2013-2014 or 2014-2015 collective agreements. He was not a member of the EPMU when the earlier collective agreement was ratified and so would not have been at the ratification meeting. His evidence was that he recalls the ratification meeting in respect of the 2014-2015 collective agreement but did not attend it.

Determination

[38] Having analysed the events that took place which led to the amendments to clause 8.13 in the 2013-2014 collective agreement and the subsequent 2014-2015 collective agreement, I am satisfied that the parties to those collective agreements (the

EPMU, the MCWU and the respondent company) were *ad idem* with respect to the meaning of clause 8.13.

[39] Whilst it is unfortunate that the wording of clause 8.13 in both the 2013-2014 and 2014-2015 collective agreements does not accurately reflect what they agreed, that failure to ensure it did does not amount to an unlawful act of any kind. Whilst it is good practice for contractual clauses to be carefully, accurately and unambiguously drafted so as to avoid just this sort of dispute, it is not a legal requirement for that to be the case.

[40] The employees who were members of the respective unions were represented in the March 2013 negotiations. Mr Velthuis was not a member at that time. Therefore, when he re-joined the union in February 2014, he could only accept the terms of the collective agreement as they existed at that time.

[41] Whilst I fully appreciate that Mr Velthuis feels that he has been hard done by because he sees employees with only five years' service getting two weeks' special leave, whilst he has been employed for 20 years continuously and will not get the four weeks special leave he seeks, that sense of grievance arises not from any act of bad faith by the respondent company. The respondent company did not breach the terms of the respective collective agreements by refusing to give Mr Velthuis the special leave he seeks.

[42] I must also conclude that there has been no breach of good faith by the EPMU (although it is not a party to these proceedings) in failing to advise Mr Velthuis of the precise meaning of clause 8.13 when it was entered into as he was not, of course, a member of that union when its special meaning was agreed. Furthermore, it is my understanding from the evidence given at the investigation meeting that, by the time the 2014-2015 collective agreement had been agreed, with its additional amendment to clause 8.13, Mr Velthuis had already raised his request for special leave of four weeks and that Mr Kirwood had already explained to him why he would not be eligible.

[43] In conclusion, I am satisfied that Mr Velthuis is not entitled to special leave of four weeks in accordance with clause 8.13 of either the 2013-2014 or 2014-2015 collective agreement.

Costs

[44] Costs are reserved. If the respondent wishes to receive a contribution to its legal costs from Mr Velthuis, the parties are to first seek to agree that contribution between them. However, if they have been unable to do so within 14 days of the date of this determination, the respondent may serve and lodge a memorandum of counsel seeking a contribution towards its costs from Mr Velthuis and Mr Velthuis will have a further 14 days thereafter within which to serve and lodge his reply. The Authority will then make a determination on the papers.

David Appleton
Member of the Employment Relations Authority