

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Rota Roiri, Hayley Kennedy, Malcolm McCallum and nine others, Applicants

AND Asure New Zealand Limited, Respondent

REPRESENTATIVES Mr I Finlayson and Mr A McKenzie, for Applicants
Ms J M Appleyard and Ms J Pearson, for Respondent

MEMBER OF AUTHORITY A Dumbleton

DATE OF INVESTIGATION MEETINGS 20 December 2000 and 25 January 2001

DATE OF DETERMINATION 25 January 2001

DETERMINATION OF THE AUTHORITY

Determination in summary form

This determination is in summary form only. It has been prepared in this way to allow the Authority to personally address in more detail with the parties and their representatives the main points of the determination, it being the view of the Authority that further negotiation between the parties will be necessary if their dispute is to be resolved in any constructive or practical way.

Issues arising from this determination, including the further use of mediation are more conveniently able to be discussed between the representatives and the Authority and for this purpose the investigation meeting that was commenced on 20 December 2001 has been resumed on 25 January 2001.

Notice to PSA

I consider that the Public Service Association, through Mr Ian Baldick, has been given notice of the existence of the dispute which is at the heart of this employment relationship problem, and that accordingly the requirements of s129(2) of the Employment Relations Act 2000 in this regard have been met. Mr Baldick, an organiser employed by the PSA, was a witness (under subpoena) when the investigation commenced on 20 December 2000 and was invited by me to be present at the resumed investigation meeting on 25 January 2001.

Although none of the applicants in this case remained members of the PSA at the time this dispute arose, the Association is expressed to be a party to the collective agreement in dispute. The applicants are now members of the National Union of Public Employees, NUPE, which union was not and has not become a party to the contract. I accept the assurance of Mr Baldick that the PSA has no wish to obstruct the applicants, some or all of whom are former members, in seeking to obtain or enforce certain working conditions in ways which have led to this dispute. He has said that if the NUPE applicants can get a better deal out of this dispute than their PSA colleagues, the Association will be supportive of that outcome.

Statement of employment relationship problem

A dispute concerning the correct interpretation, application and operation of clause 8.2 of the operative Collective Employment Contract.

(See para 1 of Statement.)

Remedies Sought

- (a) *...an interim determination restraining the respondent from further continuing with the Management of Change until such time as the Authority has had the opportunity to fully consider the correct interpretation, application and operation of clause 8.2 of the Collective Employment Contract.*
- (b) *...a determination as to the correct interpretation, application and operation of clause 8.2 of the Collective Employment Contract, clearly setting out the respective obligations of the applicant, its members and the respondent, including, but not limited to, the correct interpretation of “best endeavours”, “not unreasonably withhold their agreement” and “practical alternative”.*
- (c) *An order for costs pursuant to Clause 15 of the 2nd schedule to the Act.*

Written submissions on behalf of the parties have concentrated on the meaning of the expressions “best endeavours”, “practical alternatives” and “unreasonably”. Argument has also been directed at the provisions of Chapter 7 of the collective agreement, which relate to management of change. In particular the question is whether Asure is able to invoke those provisions. It has purported to do so by notices given to NUPE on 27 and 28 November 2000.

Under the Chapter 7 provisions, following extensive consultation a decision resulting in redundancy may be made, although only *...as a last resort*.

Task of Authority is interpretation, not reconstruction

Principles are not in dispute. They are as submitted on behalf of Asure.

Although the Authority is not bound to treat this case as a dispute about the interpretation, application or operation of the employment contract but may look more broadly to resolving the employment relationship problem (s160(3)) of the Employment Relations Act), in delivering practical justice (s162) the Authority cannot re-write the contract, especially where the contract is a collective agreement (s163).

Interpretation of clause 8.2 of Asure NZ Collective Employment Contract – 1998 – 2001

Contract is now to be treated as if it is a collective agreement; s244 of ERA.

The wording of clause 8.2 was settled between the parties on or before 3 November 1998, the date on which the agreement was signed. The agreement was expressed to commence on 11 November 1998 and to expire on 30 August 2001.

The parties to the agreement are expressed to be Asure, company employees who were PSA members and who had authorised the PSA to negotiate the agreement, and the Association itself. NUPE is not a party.

Although the applicants have subsequently cancelled their membership of the PSA and are now members of NUPE, there is no suggestion that as a result they have ceased to be parties to the agreement. Their party status is to be determined as at the date of formation of the contract, at which time they were members of the PSA.

Much of clause 8.2 is addressed at future events and circumstances which the parties would not become fully aware of until 90 days before 1 November 2000 at the earliest. Employees working outside the 1 November 2000 hours were required to give 90 days notice to Asure if they did not intend to continue to work such hours after that date.

NUPE gave, or purported to give, notice on behalf of the applicants on 28 July 2000, a date more than 90 days before 1 November 2000.

The third paragraph of clause 8.2 is addressed to the ability of the employer, in certain circumstances, to continue to run its business without undue disruption to workflows, particularly as dictated by client requirements, until practical measures can be put in place for the duration of the contract. The parties are dealing with an interim situation.

The Asure agreement was expressed to remain in force until 30 August 2001. Its terms will continue to form the basis of an employment contract even after the expiry date, until any new individual or collective agreements are made. It could not have been intended that the employer would require the employees to agree to an extension of the pre-1 November 2000 arrangements indefinitely, or at least until the renegotiation of a new employment agreement. In that situation the benefit conferred on the employees by the second paragraph of clause 8.2 would be totally negated; they would have no opportunity to exercise the qualified right to work the 1 November 2000 hours after that date, if they wished.

Variation of the collective agreement

In my view, the parties' intention at formation of the collective agreement was to commence negotiations around 1 November 2000, with a view to entering into a variation of the collective agreement. The parties have subsequently confirmed that intention by their own conduct and most of the meat inspectors employed by Asure have now accepted a variation.

The effect of this variation is not to provide a price for giving agreement to an extension of existing arrangements under clause 8.2, but to vary the substantive content itself of the contract. The applicants have also been offered the same variation.

It is in this context that the PSA negotiators' statements made in writing to members on 25 September 1998 are to be explained. Under the name of Mr Ian Baldick and several other negotiators, the written statements refer to, an *...opportunity to revisit appropriate payments for work done outside normal hours...in two years if not before*, and to an *...ability to reassess such issues during the term of the contract*, and also an ability under the contract for *...real input from you*.

There has been entry into negotiations with the applicants for a variation of the Asure collective agreement. Those negotiations must be conducted in accordance with the requirements of the Employment Relations Act, including the obligation of good faith on the part of Asure, NUPE and the affected members of that union. The parties are not however required to conclude an agreement.

NUPE has criticised Asure for offering the PSA variation on a take it or leave it basis. Asure, however, has said that it is willing to negotiate on other terms so long as there is no greater cost to the company financially. In considering whether Asure has acted in good faith, it is likely to be relevant that the great majority of its employees have accepted a particular variation on certain terms. It seems reasonable for the employer to seek to maintain some degree of uniformity in this respect, particularly where there is a large number of employees engaged in the same occupation. The employer may reasonably consider that introducing disparity of conditions in this respect may be undesirable for maintaining good relations overall with its work force.

The case for the applicants has been squarely put by Mr Finlayson, that the applicants wish to put a price or cost on their labour for working outside the 1 November 2000 hours. The view of the applicants and NUPE is that under clause 8.2, the third paragraph in particular, negotiations may be entered into for terms under which employees will agree to an extension of pre - 1 November 2000 arrangements with regard to hours of work.

In my view, however, the entry into negotiations for a variation of the agreement has been done on a consensual basis and not pursuant to any obligation under the agreement itself. When the collective agreement was settled in or around November 1998, the parties could have had no real certainty as to how well clause 8.2 would work in practice two years in the future. Their conduct in entering into negotiations over a variation confirms that they must have contemplated overcoming any operational problems with a variation having the effect of re-writing clause 8.2. The parties were always entitled, as a matter of law, to enter into negotiations for a variation at any time and the collective contract expressly provided for a variation during the term (clause 4).

It is not expressed and cannot be reasonably implied into clause 8.2 that the giving of agreement by the employees to an extension of existing arrangements, is subject to the negotiation and settlement of terms or conditions for that agreement.

There would not be an extension of "existing arrangements" if employees were entitled, under clause 8.2, to negotiate a price for giving their agreement.

That price or cost or reward may be a product of negotiation for a variation of the collective agreement. It is not, however, something the employer is required to bargain for and pay under clause 8.2 itself.

The purpose of the disputed provisions is to prevent undue disruption to the employer's business while at the same time to preserve as far as possible the employee's right or entitlement to work, should they wish, 1 November 2000 hours after that date. Where necessary, and only to the extent necessary under the provisions, an extension to existing arrangements may be obtained.

Best endeavours

Question of the party's intention in using this expression. Other cases only a guide. When measured against the serious consequences of removing or reducing an employee's right to work certain hours, the standard must be a correspondingly high one. A duty to do all that can reasonably be done in the circumstances – first class as opposed to second-class, efforts – to leave no reasonable stone unturned in discharging the duty. An objective and not a subjective test. The standard is high but well short of an absolute obligation or guarantee.

Practical alternative

Respondent's submissions, paras 16 – 19, are accepted as to the meaning of the phrase practical alternative. Clearly a question of fact and degree.

Cannot be implied from this expression that a negotiation of terms for the giving of agreement is a practical alternative. If that were the case, the provisions would in effect be an agreement to agree and as such unenforceable. In the event that the parties reach an impasse in such negotiations, the scheme of the contract would require some means of assessing the quality of the negotiation to see which of the parties was being less reasonable than the other in their stance. Parties bargaining for a collective agreement are now required to do so in good faith but they are not required to conclude or settle an agreement. The employer could not be held to be acting contrary to good faith for the reason alone that it does not finally agree to terms under which the employees will extend existing arrangements. In this respect the meaning of clause 8.2, as contended by the applicants and NUPE, could lead to a deadlock, an unworkable situation the parties could not have intended.

Unreasonably withhold

At the time the collective agreement was settled and executed between the parties, clause 8.2 conferred a right, a benefit or an entitlement on the employees. This was to work only the 1 November 2000 hours from that date onwards if they wished to do so.

The exercise of the right or entitlement was subject to the giving of the requisite 90 days' notice. The right of the employees was not to diminish a right of Asure to manage its business by determining the hours needed to meet client requirements and by organising labour to work those hours.

There is a further qualification to the exercise by employees of their right to work 1 November 2000 hours. Where despite best endeavours Asure is unable to identify a practical alternative, the employees are not to unreasonably withhold their agreement to an extension of the then existing arrangements.

Again, a question of fact whether it is reasonable to withhold. Circumstances of the individual employee must be looked at. An objective test of reasonableness. Must look at all relevant factors, including personal considerations which may arise out of any requirement to work the hours.

There is nothing in the contract to limit the factors which might apply and there will be different considerations as between different employees. These factors may include personal considerations which might arise, for example, from the employee having anticipated the use of time freed up through the exercise of a right to decline to work extended hours after 1 November. Some employees may have made commitments to take advantage of the new hours and it may now be unreasonable for them to change those arrangements. The reasonableness or otherwise of the withholding of consent will also have to be measured against the degree of extension required by

the employer. The longer the extension the more reasonable it may be for the employee to withhold consent.

It is reasonable for Asure in the first place to have to seek the agreement of employees to an extension, because any extension detracts from the right of an employee to work the 1 November 2000 hours. It could not have been intended that an employee would be precluded from enjoying the benefits of working those hours indefinitely, either until the collective agreement expired or a new contract in some form was renegotiated. The parties could not have intended that situation which would in effect entirely negate the right or benefit given to the employees under clause 8.2.

Clause 8.2 is clearly addressed at a temporary or interim situation. The use of the word extension implies that such can occur only for a finite period, being one that is shorter than the remainder of the life of the collective agreement.

Because the employee's rights and entitlements may be adversely affected under the operation of clause 8.2, the term "best endeavours" has been used to impose a high standard on the employer when seeking practical alternatives. The corollary of this is that if the employer discharges that high standard, employees will not unreasonably withhold their agreement to an extension of existing arrangements.

In the third paragraph of 8.2, the word "agreement" has the ordinary meaning of the act of agreeing, consenting or approving. It has not been used in the sense of an agreement given or reached in the form of a contract following negotiation as to terms.

To the extent that the applicants are seeking new or altered terms or conditions under which they will continue to work the pre-1 November 2000 hours, this can only be achieved by negotiation or a variation to the collective agreement. To put a price on the giving of their agreement under the third paragraph of clause 8.2, is to rely upon a condition not already part of the collective agreement.

The terms and conditions of the collective agreement can only be changed by mutual agreement – one party cannot unilaterally impose new terms. The parties can negotiate a variation of the agreement which may remove clause 8.2 completely or amend parts of it.

Strike action

If agreement is withheld by the employees on a collective basis and for the reason that the employer is refusing to meet their demands for new terms of employment in respect of the hours, this may constitute a strike under s81 of the Act. Strike includes the act of a number of employees in breaking their employment contracts, due to a combination, common understanding, or concerted action, whether express or implied, made or entered into by the employee. This would apply if the employees are in breach of contract by unreasonably withholding agreement to work the hours required by the employer.

Under s86 of the Act, participation in a strike is unlawful if it occurs while a collective agreement is in force. In that case an employer may suspend striking workers and they will not be entitled to any remuneration in respect of the period of suspension; s87 of the Act.

Management of change – Chapter 7 of Collective Agreement

Asure has notified employees that they are unreasonably withholding agreement to an extension of existing arrangements. If its conclusion is correct and any employee is in breach of the employment contract, disciplinary or enforcement proceedings can be taken in that situation. However, the employer may elect to waive the breach. If it does so it cannot then turn round and use restructuring or redundancy as a way of overcoming the problem. To do so is clearly to seek dismissal on the basis of personal factors relating to the position holder rather than to the need for the position itself.

The circumstances in which Asure may resort to Chapter 7 and commence a review with the possibility of redundancy, is limited to this extent in relation to the operation of clause 8.2. First, the employer, after making best endeavours, must have been unable to identify practical alternatives and second, the employee must not have unreasonably withheld agreement. If agreement is unreasonably withheld in those circumstances, the employer can choose to let the breach go or it can take disciplinary or enforcement steps, but it cannot side-step the situation by resorting to change management under Chapter 7.

Where, however, the withholding of agreement is reasonable, it seems to me that the employer can invoke Chapter 7 to enable it to continue to run its business. In this respect a key provision of clause 8.2 is the expressed ability of Asure, *...to determine the hours needed to meet client requirements and to introduce and staff such pattern of hours as it requires.*

Assuming both parties are properly performing the contract by exercising their rights and discharging their obligations, then it seems to me the employer is in a position to genuinely decide to make changes for commercial reasons.

Issues to be determined - respondent's submissions

8 questions set out at paras 12 and 13 of submissions.

Question 1

Reserve my opinion. Certainly sincere and earnest efforts have been made, apparently without success in finding a practical alternative.

Question 2

Withholding of agreement on the basis that terms for giving such have to be negotiated and settled with the employer, amounts to an unreasonable withholding. Not intended in clause 8.2 that the agreement is to be bargained for, or that a price for the giving of agreement may be stipulated.

Question 3

The remedy for breach of contract by any employees is disciplinary measures and/or enforcement proceedings. Employer must notify employees of the breach and warn that any continuation of it will lead to disciplinary proceedings with the possible consequence of dismissal. Alternatively, the employer may seek compliance against the employees and ask the Authority to order them to work under a particular extension of existing arrangements. The extension will need to be not unduly long with regard to the life of the current contract.

Question 4

Clause 8.2, paragraph 1, looks at the employee's collective interests on each site. The paragraph may not have much meaning now that the PSA is no longer organising the applicants. Further, the process in Schedule 2 is of no effect by operation of s.245(1)(b) of the Employment Relations Act. Section 155 of the Act also means that an arbitration could not be final and binding since neither party cannot be precluded from applying to the Authority.

Question 5

If the situation is remediable at all, it is by compliance. Whether consent has been unreasonably withheld will depend on the particular changes and degree of such sought by Asure.

Question 6

See question 4 above. Schedule 2 is no longer operative under the transitional provisions of the ERA.

Question 7

This is the employer's right to manage its business – the freedom of the company to contract with its clients or customers on such commercial basis as it sees fit, particularly with regard to the timing for delivery of services. The employer may engage labour on such terms as it sees fit and for such periods as required, provided there is no restraint under the collective agreement.

Question 8

The answer depends on whether employees are unreasonably withholding agreement. If they are, the employer can avoid a potential redundancy situation by holding the employees to their agreement, through enforcement proceedings if necessary, otherwise the employer may be considered to have brought the consequences on itself. Also, redundancy is to be used only as a last resort (Chapter 7 – Principles and Objectives) – compliance or enforcement can be resorted to before redundancy. It lies in the hands of Asure to require, or not require, performance of the contract. If the latter, the employer should not be heard to complain about the consequences and cannot embark on restructuring when other alternatives are available.

Injunction

In principle the Authority can make orders of compliance or injunction at the same time as it is determining dispute proceedings. It is, however, preferable to allow parties time to consider their rights and obligations as declared by the Authority in determining the dispute proceedings. The parties should have an opportunity to voluntarily adjust their actions in accordance with the determination before being compelled to do so by further order of the Authority.

I have found that Asure may not use Chapter 7 to remedy a situation that has arisen as a direct consequence of any breach of contract by the employee parties. I have found also that the Applicants cannot withhold consent arbitrarily or capriciously or because they are seeking to negotiate a price for giving their agreement. To withhold consent on this basis is unreasonable. It amounts to a demand for a premium in return for agreement, or an attempt to lever a collateral advantage.

Statements of PSA in 25 September 1998 newsletter

NUPE has raised the issue, without requiring it to be finally decided, of whether the statements of Mr Baldick and his co-negotiators contained in the newsletter amounted to misrepresentations. What are contained in the newsletter are statements made by the PSA to its members. They are statements made by an agent to its principals and as such there is no basis in law for saying that another contracting party, Asure, is in some way responsible if the statements were misrepresentations and that they induced entry into the contract. In those circumstances the statements cannot undermine the validity of the contract, although other remedies will be available under the law of agency between principal and agent.

Also, it is difficult to see how the statements can amount to misrepresentation when they are preceded by reproduction of the very words themselves proposed for the contract. In those circumstances the statements can be no more than an opinion of the negotiator as to what those words mean. The members were in a position to assess the meaning of the words for themselves and did not have to rely on any representations by their agents about them.

Further action

My clear view is that the parties should maintain the positions they agreed to keep at the investigation meeting of 20 December and which were to remain in effect until this determination was delivered. The parties should on that basis return immediately to mediation and, in good faith, continue negotiations towards a variation to the collective agreement on whatever terms they may agree to, or reach any other arrangement that will resolve this problem.

The nature of Clause 8.2 and Chapter 7, with the detailed requirements in respect of both parties, provides much scope for protracted and costly litigation, something both parties will be anxious to avoid. There are several points under these provisions at which decisions made by the employer will enable employees to bring a challenge by way of a personal grievance and other remedies available under the ERA. Decisions to be made in respect of best endeavours, practical alternatives, the reasonableness or otherwise of withholding consent and redundancy is a last resort, are some of the matters out of which further employment relationship problems may potentially arise.

In summary, I have found that there is no obligation under clause 8.2 upon the employer requiring it to bargain for the consent of employees to extend existing arrangements. It may, if it chooses, enter into negotiations about that. Also, if the employer despite best endeavours has been unable to identify practical alternatives, employees who unreasonably withhold agreement to work to an extension run the risk of disciplinary proceedings being taken against them. Employees who do reasonably withhold consent, may still find their jobs under threat of redundancy following a proper application of the Chapter 7 provisions.

This investigation will be suspended so that the parties can retain the ability to return to the Authority if further directions or orders are sought, depending on what is done by them in furtherance of this decision.

The question of costs is reserved and will remain so until either the matter is resolved, or until mediation attempts have been exhausted without success. Disputes about the interpretation, application or operation of employment are however a class of case where it is often fitting to let costs lie where they fall. Both parties have an interest in identifying their rights and obligations under an employment contract and both may be expected to bear the costs of doing that.

A Dumbleton
Member of Employment Relations Authority