IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 43
ARC 79/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WEERAPHONG HARRIS Plaintiff
AND	TSNZ PULP AND PAPER MAINTENANCE LIMITED Defendant

Hearing:	Rotorua and Tauranga 28-29 August (Rotorua) and 15 November (Tauranga) 2013
Appearances:	L Yukich, advocate for plaintiff G Service and J Hardacre, counsel for defendant
Judgment:	2 April 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] This challenge by hearing de novo interprets and applies the relevant provisions of an employment agreement affecting the calculation of pay for holidays and other non-working days. For reasons set out in an interlocutory judgment issued on 21 October 2013,[1] leave was granted to the defendant to call further evidence which, together with additional evidence in reply, was heard in Tauranga.

[2] The case began life as Weeraphong Harris's personal grievance which was investigated by the Employment Relations Authority in June and July 2011. The Authority's first determination was issued on 18 January 2012.[2] In the course of this determination (which is not challenged), the Authority expressed the view that the contentious issues between the parties amounted to a dispute about the meaning of

[1] *Harris v TSNZ Pulp and Paper Maintenance Ltd* [2013] NZEmpC 194
[2] *Harris v TSNZ Pulp and Paper Maintenance Ltd* [2012] NZERA Auckland 23.

provisions in their employment agreement and reserved leave to the parties to apply to the Authority resolve these. Mr Harris did so, which resulted in a further investigation meeting in the Authority on 15 August 2012 and the delivery of the determination that is now under challenge on 24 October 2012.[3]

The Authority's determination

[3] Although this case has been brought by hearing de novo, the issues for decision have been expanded and new evidence has been heard, I will summarise briefly the Authority's determination.

[4] The issue which Mr Harris brought to the Authority was whether transport, laundry and tool allowances, referred to in salary tables in the TSNZ Pulp and Paper Maintenance Limited and Eastern Bays Independent Industrial Workers Union and the Northern Boilermakers Industrial Council and the Manufacturing and Construction Workers Union Collective Agreement 2009-2010 (what I will call for convenience "the 2009-2010 CA") were to be incorporated in the employee's salary for the purpose of calculating holiday pay, relevant daily pay, payment for work done on a public holiday, and sick pay.

[5] The Authority noted that the former s 6 of the Holidays Act 1981, which excluded from an employee's remuneration non-taxable allowances to reimburse an employee for work-related expenses, was not re-enacted, at least in comparable form, in the Holidays Act 2003.

[6] After outlining the background, the Authority said that if there was an issue about the way in which a predecessor employer had applied the relevant collective provision and how the current (successor) employer had done so, the Authority would require "satisfactory evidence" of those differences.[4] It concluded that it had no evidence of how the predecessor employer had applied the same provision. It therefore addressed only the application of it by TSNZ Pulp and Paper Maintenance Limited (TSNZ) after it became Mr Harris's employer and settled a materially

[3] *Harris v TSNZ Pulp and Paper Maintenance Limited* [2012] NZERA Auckland 379.
[4] At [12].

identical collective agreement with the plaintiff's union, the Eastern Bay Independent Industrial Workers Union (the EBIIWU). That situation has changed in this Court: there is now some evidence about the previous employer's application of the relevant provisions in practice.

[7] In deciding whether these allowances were to be included in the calculation of "relevant daily pay", the Authority broke this issue down into two sub-questions. The first was what was relevant daily pay for the purpose of payment for public holidays, and the second was what was relevant daily pay for the purpose of payment of sick pay.

[8] The Authority's determination turned, in part, on whether it was right to have regard to the terms of settlement of the collective agreement that were attached to the executed collective agreement including, in particular, a note in those terms of settlement defining the phrase "personal salary". The Authority said that if the terms of settlement, including the note, could be given contractual effect (and if its conclusions about the meaning of the phrase "gross earnings" were correct), then the employer's interpretation of the phrase "personal salary" would prevail. For that and other reasons, the Authority found in favour of the employer's interpretation, that is that the relevant allowances were not included in the assessment of relevant daily pay when calculating payment for work done on public holidays.

[9] Turning to the second sub-question about relevant daily pay for the purpose of calculating sick pay, the Authority concluded that the word "pay" excluded non-taxable reimbursing payments so that Mr Harris's transport, laundry and tool allowances were not to be included in the calculation of sick pay.

[10] The Authority did not accept Mr Harris's case that his transport, laundry and tool allowances were constituents of his gross earnings or his average weekly earnings for the purposes of calculating annual leave payments.

The case for the plaintiff

[11] Mr Harris's case is that he was engaged by TSNZ on an individual employment agreement when it took over from the former mill maintenance contractor which previously employed him, ABB Limited (ABB). Mr Harris says that his terms and conditions of employment with TSNZ were originally set out in that individual agreement, and these included that he would continue to be employed on terms that were no less advantageous to him than he had enjoyed with ABB. Mr Harris's case is that although the Union of which he was a member settled a collective agreement with the defendant which covered him and others who were members of the Union, the relevant terms of his individual agreement with TSNZ were both more advantageous than those contained in the collective agreement as that was interpreted by the Authority, and were not inconsistent with it.

Relevant facts

[12] The defendant is only the latest company to have carried out its functions at the Carter Holt Harvey Tasman Ltd (CHHTL) Pulp & Paper Mill at Kawerau . Its immediate predecessor was ABB. Some employees who are affected by this case in the same way as the plaintiff, worked for a previous (pre-ABB) employer at the mill, Norske Skog Ltd. At some time before 2005, employees of that company began to work for ABB when it took over the mill maintenance contract and there were collective bargaining negotiations between the EBIIWU and ABB in 2005. One part of those negotiations was a compromise reached about how salary would be treated, both to maintain incomes for the employees and to cost ABB no more overall than it was willing to pay. After obtaining professional accounting advice, it was agreed that as with other allowances, a proportion of the employees' salaries would be treated as a non-taxable travelling allowance for all employees. So the Commissioner of Inland Revenue (in effect, taxpayers) met the cost of this compromise by employees paying less tax on the same amount of gross remuneration as they had received previously.

[13] In 2006 ABB changed the way in which it paid this non-taxable transport allowance. It ceased to be a standard allowance across all employees and changed to

a series of individual allowances based upon the actual travelling distances to and from work of those employees.

[14] Until 10 March 2009, Mr Harris was employed by ABB performing maintenance work at the CHHTL mill. He was employed under a collective agreement between ABB and his union. The last of several collective agreements between ABB and the EBIIWU had expired in August 2008. Although the Union initiated bargaining for a replacement collective agreement, by early 2009 it was clear that ABB had lost the mill maintenance contract with the owner (CHHTL) so that there was no point in bargaining for another ABB collective agreement for that site. Affected employees, including the plaintiff, continued to work for ABB under the expired collective agreement which continued in operation in accordance with s 53 of the Employment Relations Act 2000 (the Act).

[15] On 10 March 2009 ABB relinquished, and TSNZ took over, the maintenance contract at the mill. Leading up to that changeover, there were discussions between the Union and the new maintenance contractor, TSNZ, about a collective agreement with TSNZ and about the offers of employment to be made to employees such as Mr Harris. No new collective agreement was able to be concluded before the change-over between maintenance contracting companies.

[16] In anticipation of employing former ABB staff, TSNZ, began to bargain with Mr Harris's union for a collective agreement covering the plaintiff and the other union members who, it was expected, would continue to work at the mill, although for the new employer with effect from 10 March 2009. TSNZ proposed a form of collective agreement which was effectively identical to the ABB collective agreement except for three elements which are not material to this case. A prompt agreement could not be reached with the Union, however, and the date of the defendant's takeover of the maintenance operations at the mill was approaching.

[17] In these circumstances the defendant elected to offer to those ABB employees that it wished to engage (including the plaintiff), individual employment agreements which incorporated, and consisted largely of, the provisions of its form of proposed collective agreement. This was done to attempt to ensure that there would be

sufficient employees to assume the defendant's maintenance obligations at the mill from 10 March 2009 pending the settlement of a new collective agreement with the Union. So the individual agreement offered to Mr Harris was materially identical to both the expired ABB collective agreement and the defendant's preferred form of collective agreement for the future.

[18] In the weeks leading up to the changeover, the defendant was at pains to assure ABB employees whom it wished to continue in their jobs and work for it (including the plaintiff), that they would not be affected adversely in their employment by the change from ABB to TSNZ. These assurances were conveyed to the relevant employees personally by Stephen Webster, TSNZ's Executive General Manager – Facilities Management, at meetings and also in letters written to the plaintiff, his union, and other employees. I deal later in more detail with the controversial evidence about oral assurances because the case turns on these representations and their effects in law.

[19] On 25 February 2009 Mr Yukich, for the Union, corresponded with TSNZ's industrial relations manager, Carol Moodie, inquiring whether TSNZ proposed that affected ABB employees would have continuity of employment between the two employers. Ms Moodie's response was dated 26 February 2009 and said:

> It is the intention of TSNZ to ensure continuity of employment for your members without disruption or disadvantage, and I trust that now you have a copy of the proposed Collective Agreement, we can move to a smooth transition. Accordingly, we will now be providing offers of employment to your members based on the proposed Collective Agreement between EBIIWU and TSNZ which ensures there is full continuity of employment. …
>
> I can confirm that the proposed Collective Agreement is the same as the expired EBIIWU Collective Agreement with ABB Limited, …

[20] TSNZ's first offer of employment to Mr Harris directly was contained in a letter dated 27 February 2009 which included the following:

> This offer is on the same or similar capacity on similar terms and conditions of employment and will recognise your prior service with ABB Limited.

COLLECTIVE AGREEMENT

> As a result of the correspondence between TSNZ and … the [EBIIWU], the employment offer by TSNZ to you is intended to preserve your existing terms and conditions of employment so that there is continuity of employment for you from ABB Limited to TSNZ. It is TSNZ's preference that the collective relationship which the EBIIWU has with ABB Limited continues with TSNZ, to that end TSNZ has proposed to your union that the parties enter into a new Collective Agreement which is the same as your current agreement.
>
> …

[21] As already noted, Mr Harris eventually accepted this offer of employment. Although he had made a series of counter-offers between 27 February and 6 March 2009, none of these was acceptable to the company. It was the re-statement by TSNZ of its 27 February 2009 offer, set out above, which Mr Harris accepted and which therefore constituted the terms of his individual employment agreement with the defendant as from 10 March 2009.

[22] The defendant found it difficult to ascertain sufficiently or precisely the employment obligations that it was taking on by engaging ABB staff, at least until very shortly before the changeover date of 10 March 2009. ABB was not agreeable to providing information about its employees to the company to whom it had lost its contract, at least without express authority to do so from each of the employees. For their part, the employees and their union were reluctant to authorise ABB to hand over to TSNZ the employees' personal files held by ABB. The employees were concerned that in the past, personal information had been given out inappropriately by their previous employers and they wished for that not to be repeated. That reluctance, combined with the tight takeover timeframe, precluded the timely transfer of factual information on those files including the positions held, the employees' qualifications, their rates of remuneration and the like, which was ABB's information that TSNZ needed.

[23] The labour costs of a maintenance contractor at the CHHTL mill were a substantial proportion of the maintenance contract for which the defendant had bid successfully. It appears, however, that the defendant did not do much, if any, relevant due diligence inquiry as part of its tender preparation about the nature and extent of its employment obligations and, therefore, of the likely employment costs

to it. That was because TSNZ's maintenance contract with CHHTL was a "cost plus" one in which the labour costs incurred by the employer were passed on to, and met in full by, CHHTL. That arrangement also allowed TSNZ to assure those ABB employees it was taking on, that they would not be affected adversely by the change of employer.

[24] Within, a few days of Mr Harris entering into that individual employment agreement, a new collective agreement with the EBIIWU was executed and came into effect. This was the 2009-2010 CA. Its term was backdated so that it was deemed to have commenced on 10 March 2009, the date Mr Harris began to work for the defendant. He was covered by its terms.

[25] Clause 3 of this collective agreement provided materially:

> **REPLACEMENT OF PRIOR AGREEMENTS / COMPLETENESS**
>
> This Agreement rescinds and replaces any and all prior;
>
> i. agreements,
> ii. site customs and / or practices,
> iii. and / or understandings between the parties.
>
> regardless of whether or not such agreement or understanding is or was written or unwritten, registered or unregistered.
>
> …
>
> 3.4 This provision does not relate to [employees'] personal letters that provide for remuneration or reward.

[26] Correspondence between the Union (Mr Yukich) and the company (Ms Moodie) clearly indicates that, by late October 2010, they were in dispute about the issue of whether calculations of pay for non-standard circumstances should include the allowances. The Union had intended initially to try to address the issue in bargaining for another proposed collective agreement. However, its inability to obtain from ABB that former employer's records caused the Union to bring a number of personal grievances, including Mr Harris's, which was raised by letter dated 24 November 2010. It relied on the offer of employment which had been made to him by TSNZ in February 2009 and, in particular, TSNZ's assurance that the offer included: "… remuneration entitlements the same as the remuneration entitlements applicable to my employment with ABB Limited".

[27] The 2006-2008 ABB-EBIIWU collective agreement was an unusual, perhaps unique, document of this sort. That was not only because of some minor oddities like having its definitions clause at the end rather than at the beginning, but because it had attached to it the terms of settlement of the collective bargaining from which the collective agreement itself had been formulated, and the terms of settlement of a previous (2006 ABB) collective agreement. These were annexed as appendices or schedules to the agreement, but there is no indication in the body of the collective agreement as to why that may have been so, or otherwise linking these terms of settlement to the substance of the collective agreement. I deal with the significance in law of these documents later in this judgment.

[28] The ABB and TSNZ collective agreements both dealt with employee reward by a combination of taxable remuneration, non-taxable reimbursing allowances, and taxable allowances. Each employee had what was described as a "personal salary" which consisted of appropriate elements of these, part of which salary was taxable and part of which was intended to be non-taxable.

[29] Using Mr Harris as an example and dealing with all figures on an annual basis, he was paid a salary of $82,990 as a control systems technician holding a trade certificate. The non-taxable elements of this annual salary included a tool allowance of $1,729.10, a laundry allowance of $250.76, and a transport allowance based on the distance between Mr Harris's home and his place of work. In his case, this travel allowance was $9,210.76 per annum. Mr Harris's annual remuneration was broken down into weekly payments, essentially by dividing the total annual figure (including taxables and non-taxables) by 52.

[30] When employed by ABB immediately before he began work for TSNZ, Mr Harris was working varying combinations of four weekdays each calendar week, each of those days consisting of 10 hours' work. Calculating his remuneration from ABB became complex when he took paid sick leave and annual leave, when a statutory holiday fell on one of his working days, and when, on one occasion, he took a day's bereavement leave (although his ABB pay records relating to that week are missing).

[31] How the parties (Mr Harris and ABB) applied his employment agreement in practice is important to his case, determining if and how he was not to be disadvantaged as TSNZ assured him he would not be. The evidence now produced satisfies me that ABB dealt with the three non-taxable allowances in each of these variable and occasional non-standard weeks for the purpose of calculating his remuneration, as follows. When Mr Harris took a day's sick leave, ABB would deduct a sum equivalent to one-quarter of 1/52 of the taxable elements of his annual salary. It would then add back into his weekly remuneration a figure calculated by multiplying by 10 (being the hours of one working day) an hourly rate which differed marginally from week to week but which was either $40 and some cents or, frequently, $41 and some cents. It is not entirely clear why this amount differed from week to week but it is the methodology rather than the reasons for individual calculations that are important for this decision.

[32] On occasions when Mr Harris took annual leave, the employer would deduct the figure of $348.56 from that of $1,394.22 (being 1/52 of the taxable elements of the annual salary) but then add back in the figure of $426.53 as payment for the annual leave. On other occasions when annual leave was taken, however, that daily amount differed, varying (to take only some examples) between $426.53, $405.54, $405.22, $405.90, $413.11, $418.49, $431.14, $421.16, $417,76, and $415.96. There were other similar variations on other occasions. Again, the reasons for these variations are not entirely clear, but the facts of the amounts are important.

[33] Turning to Mr Harris's pay at ABB for a statutory holiday, that employer again began by deducting from his standard weekly pay the sum of $348.56, being one-quarter of 1/52nd of the sum equivalent to his taxable annual salary. It then paid him a sum calculated by multiplying either eight or 10 hours by an hourly figure which also varied between $40.51, $41.23, $40.59, $40.62, $41.20, $41.99, and $40.60. The same comments (as set out in the concluding sentences in [31] and [32]) about these variations also apply in the case of pay for statutory holidays.

[34] Neither these figures, nor the methodology behind them, was explained in any more detail to the Court, at least satisfactorily. That was despite Mr Yukich being been on notice, certainly from the delivery of the Authority's determination,

that he would need to adduce this evidence about them. The defendant's payroll manager, Rachael Parkes, who gave evidence of its pay system, was asked whether she could discern the methodology from the information supplied. She was unable to do so except to say that the variations to which I have referred may have been attributable to fluctuations in the hourly rates in the previous periods' earnings by reference to which they were calculated. That is a logical assumption.

[35] When this evidential deficiency was pointed out to Mr Yukich in the course of his case he sought, and was granted (without opposition) leave to recall the plaintiff to produce a number of documents and to attempt to explain these matters. Whilst Mr Harris produced the documents, he was unable to explain, at least satisfactorily, the reasons for the differences upon which he relies.

[36] What is clear, and I find, is that ABB calculated sick leave, annual leave, and statutory holiday remuneration, by including all of the salary components, whether taxable and non-taxable and irrespective of whether they were considered to be reimbursing payments. That was the performance by ABB of those elements of its contract with Mr Harris.

[37] The plaintiff has asserted that he was paid more by ABB for sick leave, statutory holidays, and the other contingencies, than he was when working for TSNZ, despite his contractual remuneration components being identical at material times. The plaintiff says that this discrepancy is explicable only by the different interpretation that the two employers applied to the provisions in the collective agreements governing the calculations of these sums.

[38] I am satisfied on the balance of probabilities that the lesser amounts paid to the plaintiff by TSNZ are attributable to its and ABB's different interpretation of the same relevant provisions in the collective agreements. It follows that if the plaintiff is right in law to assert that the former employer's application of the contractual provisions in practice, combined with the defendant's assurances, is determinative of, or at least persuasive, in deciding how TSNZ and the plaintiff should have interpreted and applied those relevant provisions, the plaintiff is entitled to succeed. If not, the defendant must succeed as it did in the Authority.

Discussion

[39] The first question is, did the terms and conditions of Mr Harris's very short-lived individual agreement of 9 March 2009 amount to a provision for "remuneration or reward" in a "personal letter" pursuant to cl 3.4 of the collective agreement? If they did, then cl 3 of the collective agreement is inapplicable. If they did not, the effect of cl 3 is that the collective agreement (to which Mr Harris was bound), rescinded and replaced Mr Harris's individual employment agreement of 9 March 2009 with effect from the following day, 10 March 2009, because of the backdated term of the collective agreement.

[40] In one sense, Mr Harris's individual agreement, which was in the form of a letter dated 27 February 2009 and was personal to him, did provide for remuneration or reward. It did so by incorporating the remuneration provisions of the employer's draft collective agreement. I do not consider, however, that TSNZ's letter to Mr Harris of 27 February 2009 was what was intended to have been covered by cl 3.4 of the collective agreement. What was intended to be exempted from what might be called the slate-cleaning consequences of the balance of cl 3, was any individualised letter to an employee providing for remuneration or reward that was an enhancement of the remuneration rates set by a collective agreement. That was not the nature or effect of TSNZ's letter to Mr Harris of 27 February 2009. The letter does not refer to individualised remuneration. Rather, it simply refers to the offer (subsequently accepted) that Mr Harris's entitlement to remuneration would be the same as had been the case during his employment with ABB as at the date of its cessation, 9 March 2009.

[41] The consequence of the non-application of cl 3.4 of the collective agreement, in combination with the deemed backdating of the collective agreement to the start date of Mr Harris's employment with ABB, was that the contents of the collective agreement rescinded his individual employment agreement, the TSNZ letter of 27 February 2009 accepted by Mr Harris on 9 March 2009. So his terms and conditions of employment are now ascertainable solely by reference to the collective agreement with TSNZ where that agreement deals with the questions at issue in this case.

[42] If this conclusion is determinative of the case, the defendant would be bound to succeed. However, there is another factor to consider.

Estoppel

[43] Although the case did not start out in this way, by the time of the resumed hearing, both parties had focused their submissions on such issues as pre-contractual and post-contractual representations and the equitable doctrine of estoppel.[5] The existence here of a contended estoppel in law, relates to the representation by the defendant to the plaintiff as to the content and interpretation of his employment agreements, both his very short-lived individual agreement (because of the retrospectivity of the collective agreement with the defendant), and the materially identical collective agreement which covered him subsequently. In these circumstances it is necessary to decide what was both said and written to, or otherwise came to the knowledge of, and acted influentially upon, the plaintiff about the terms and conditions of his employment with the defendant. The parties are in dispute about that, at least in relation to non-recorded communications. Those that were in writing (set out earlier) are both instructive in themselves and have assisted in determining what was said orally about those assurances.

[44] What was written to and received by Mr Harris is, of course, indisputable. But the interpretation of these communications is contested, as is the oral advice from the company (and Mr Webster in particular) to relevant employees. As counsel for the defendant, Ms Service, pointed out, correctly, some of those oral communications from Mr Webster were conveyed at meetings where Mr Harris was not present. So, counsel submitted, he cannot rely upon those representations for his own situation.

[45] However, in my assessment, the communications were intended to be received, if not heard by, all relevant employees including Mr Harris, and he did get to hear about them at the time. The other significant point about these communications is that they were made to union members and representatives. As a member of the Union, Mr Harris relied upon them as communicated to him by his

[5] See [75]-[76] for an explanation of estoppels.

union representatives and his colleagues. The defendant intended a broad distribution of its advices to employees including Mr Harris, and this intention was achieved.

[46] The first occasion on which representations are said to have been made by the defendant was a meeting at which Mr Webster addressed staff on 10 February 2009. There are different accounts of what was said at that meeting, although none is a complete transcript. Some accounts rely on the memories of attendees although, in one case, a summary in writing was prepared within a matter of hours afterwards. The background to the meeting, and the circumstances in which it was held, are relevant to assessment of what Mr Webster did or did not convey to employees present.

[47] It was an introductory meeting with staff who had very recently been advised that their employment with ABB was to end, but also that the defendant would be taking over the maintenance contract at the mill. Despite having previous experience of such transitions and having plans in place to deal with a temporary shortage of labour at the start, the defendant was under some pressure on two fronts. The first was to sign up at least a substantial number of experienced maintenance employees then still working for ABB, to ensure continuity of maintenance work. The second was to make progress in collective negotiations with the Union that represented many of those employees so that a collective agreement could be in place on or soon after the takeover date of 10 March 2009.

[48] Unsurprisingly, Mr Webster encountered a group of employees who were both anxious about their future engagement at the mill and the terms and conditions of this; and, if not cynical, then wary as a result of similar previous changes of contractor which had affected their employment or that of their predecessors. It is my assessment that Mr Webster faced a difficult task of trying to assure prospective employees in a very short period and at a time when the defendant was necessarily lacking some information, about the day to day employment environment which it was to inherit.

[49] For reasons set out in the Court's interlocutory judgment issued on 21 October 2013,[6] an issue arises as to what oral representations were made to the plaintiff (and his colleagues) by Mr Webster. He challenges the accuracy of the evidence given at the first hearing by the plaintiff's witnesses, Jon Gebert and Marc Butler. Mr Webster says that he spoke to a meeting or meetings of ABB employees on 10 February 2009. He says he advised them that the terms and conditions of employment that TSNZ was offering were the terms and conditions in the then ABB collective agreements, and that these would not change. Mr Webster says that, by using the phrase "terms and conditions", he meant to convey what was in the collective agreements. He said that: "[i]n the world that we work in, 'terms and conditions' are what's written in the collective. All the unions understand that."

[50] Mr Webster says that the only other "presentation" that he made to employees was on 10 March 2009 at an induction meeting although, as on the earlier occasion, he accepts that he may have addressed two meetings on that day to cover both shifts.

[51] Mr Webster denied Mr Gebert's evidence that he (Mr Webster) told employees that he was in receipt of payroll information from ABB. He accepted that he did advise those employees that the defendant was trying to obtain payroll information from ABB but that, at the time, it had not done so. That was because, he said in evidence, the employees had refused to sign release forms permitting the disclosure of information to the defendant. This aspect of Mr Webster's advice is, if not immaterial to decision of this question, then at least of much less importance than what he said about change.

[52] As to Mr Butler's evidence that Mr Webster advised employees that nothing was going to change for them, Mr Webster accepted that, in response to the raising of concerns about employee benefits such as superannuation and subsidised medical care that had been provided by ABB, he did say that nothing would change. He says, however, that he intended to refer to those benefits. I accept Mr Butler's evidence about what was actually said. Although Mr Webster may, even at the time, have intended to narrow significantly the scope of what would not change, the message he conveyed was that this extended to employees' terms and conditions generally.

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[6] *Harris v TSNZ Pulp and Paper Maintenance Ltd*, above n 1.

[53] What was meant by the phrase 'terms and conditions' which Mr Webster assured employees would not change if they accepted employment with the defendant? Despite Mr Webster's assertion that this meant simply the contents of the collective agreement, there is a strong body of longstanding employment case law and, thereby, practice, that this phrase has a broader meaning. In addition to meaning the written provisions of an employment agreement, its "terms and conditions" may include the circumstances and conditions in which a job is performed in practice. That has been confirmed in numerous judgments of this Court, one recent example of which is *Tan v LSG Sky Chefs New Zealand Ltd*.[7] That was a case involving a statutory transfer of employment and what constituted terms and conditions of employment in those circumstances. Other cases affirming that broad interpretation of the phrase in New Zealand employment law include *Tranz Rail Ltd v Rail & Maritime Transport Union Inc*,[8] a judgment of a full bench of the Court of Appeal, *New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v The Christchurch Press*,[9] and of the High Court (then Supreme Court) in *Elston v State Services Commission (No 3).*[10] Finally, in support of the position that the interpretation of the phrase has a broader pedigree, there is the English judgment of *British Broadcasting Corporation v Hearn.*[11]

[54] The words 'terms' and 'conditions' are not tautologous. While terms of employment encompass (but are not limited necessarily to) the written provisions of an employment agreement, 'conditions' extend more broadly to the manner in which the employment rights and obligations of the parties are performed, including the performance in practice by the employer of its obligations to pay employees. So it follows that terms and conditions of employment may include the payment in practice of holiday and other pay to employees of ABB including, necessarily, the method of calculation adopted by that former employer.

[55] Whatever Mr Webster now contends that he meant to convey by using the phrase "terms and conditions" of employment, that is neither what was understood

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[7] *Tan v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 35, [2013] ERNZ 426 at [95].
[8] *Tranz Rail Ltd v Rail & Maritime Transport Union Inc* [1999] 1 ERNZ 460 (CA) at [27].
[9] *NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Christchurch Press* [2005] ERNZ 288 (EmpC) at [35].
[10] *Elston v State Services Commission (No 3)* [1979] 1 NZLR 218 at 235.
[11] *British Broadcasting Corporation v Hearn* [1977] 1 WLR 1004 at 1009; [1978] 1 All ER 111.

by the relevant employees nor a reasonable interpretation of the phrase. Terms and conditions of employment are precisely that; they include the express written provisions of an individual agreement or applicable collective agreement, but also implied terms and conditions, statutory terms and conditions, and the manner in which the agreement operates in practice. That is a longstanding and well-understood definition of the phrase and even if Mr Webster can somehow say what "all the unions" understood (which I conclude he cannot), I do not accept his evidence now that he conveyed a significantly narrower definition of the words he used which were heard and acted upon by the employees.

[56] In the end, it is immaterial to the decision of this issue whether Mr Webster indicated to assembled employees that he and the defendant had or had not received payroll and similar information from ABB. Mr Webster appears to say, at least by implication, that if this information had been received and the defendant had seen how the relevant pay calculations were performed, he and TSNZ would not have assured what were then prospective employees that the defendant would follow the same method of calculation as had ABB. I doubt that this is correct. It is more likely to be influenced significantly by the benefit of hindsight. In any event, it is what was conveyed by Mr Webster to the employees, in the context of the circumstances then prevailing, that is important. I conclude that no such conditions or contingencies were attached to Mr Webster's advice to employees about their prospective terms and conditions.

[57] The defendant was working to a very tight timetable to take over the maintenance contract at the CHHTL mill. It wanted and needed to have at least a substantial majority of the existing ABB workforce to continue to work for it and, in effect, continuously. Negotiating a new collective agreement was not easy going and there was the prospect, as indeed transpired, that the changeover would take place before a new collective agreement was settled and in place. In these circumstances, the defendant decided to offer to potentially transferring employees, individual employment agreements which incorporated its preferred form of collective agreement in the bargaining that was still going on. That was in a form and content materially identical to the expired ABB collective agreement.

[58] In these circumstances, the defendant was at pains to reassure ABB employees that they would not be affected adversely by relinquishing their employment with ABB and taking up new jobs with the defendant. The employees, from their own past experience and that of the Union, were wary about such circumstances and the inherent potential for disadvantage to them.

[59] By advising the employees that their terms and conditions of employment would not change, Mr Webster and the defendant assured them that they would not suffer any detriment in any respect in comparison to their employment with ABB in their new employment. One element of this was that they would be paid no less than they were then being paid by ABB. These were the understandings that the plaintiff and his colleagues took from the defendant's and Mr Webster's assurances to them and which, I am satisfied, he and the company intended to convey to achieve the necessary agreement of ABB employees to continue maintenance work at the plant on and after the changeover day.

[60] There was another relevant contextual feature affecting representations made to the employees. It was TSNZ's insistence that ABB staff taking up employment with the defendant would not also receive redundancy compensation from their former employer. The defendant's insistence on its prospective employees not receiving redundancy compensation was a significant part of their negotiations over new individual employment agreements. ABB would have been liable to pay redundancy compensation (and CHHTL liable to reimburse ABB for that liability) if the new terms and conditions of employment with the defendant had not been substantially the same as with ABB. That was a further and significant factor in the negotiations and assurances given about the terms and conditions of employment of the plaintiff and his colleagues with the defendant.

[61] Taking into account those contextual elements and preferring necessarily the accounts of some witnesses to those of others, I find that on 10 February 2009, Mr Webster conveyed an assurance that employee engagement by the defendant would be on the same terms and conditions of employment (as defined in [53] and [54]) as they had enjoyed with ABB and that they would not be affected disadvantageously by the change of employer. That was, in addition to, and consistent with, the

defendant's written advice to the Union about the continuation of employment on terms no less advantageous to the employees.

Significance of attachments to the 2009-2010 CA

[62] The TSNZ collective agreement includes two documents as attachments, described as Appendix 4. These are the terms of the settlement of the collective bargaining which resulted in the creation of that collective agreement, and the terms of settlement of collective bargaining in 2006 which carried through to the predecessor collective agreement although with ABB as the employer party.

[63] When the parties' representatives came to sign the collective agreement on 12 March 2009, the employer's representatives were surprised to find these documents attached to the collective agreement, and at Mr Yukich's insistence that they be so because it was said to have been part of his practice. This was not something that the defendant's very experienced human resources manager had encountered previously. It was also described as very unusual by another very experienced human resources practitioner, Tony Teesdale, who gave evidence for the defendant in the case. I have not seen, before this case, such an attachment to a collective agreement or other inclusion of a terms of settlement document in one. Nevertheless, the meaning and significance of this novelty must be determined.

[64] There is no substantive provision in the collective agreement which refers to either of these appendices. There is no evidence as to whether they formed part of the draft collective agreement settled between the parties when, as I assume it was, that draft agreement was ratified by the affected employees as it had to be. It appears that Mr Yukich created the final form of the collective agreement for signing by the parties. Despite some initial puzzled hesitation, the employer's representatives were persuaded by Mr Yukich to execute the form of collective agreement including these additional appendices, and they initialled the pages on which those appendices were included.

[65] For completeness, I record also that there is no evidence about the parties' bargaining process agreement or arrangement which is required by statute and which

would probably have included the method by which terms of settlement would be recorded and by which a draft collective agreement would be executed.

[66] Turning to the first of those appendices, the December 2006 terms of settlement between ABB and the EBIIWU, several features are notable. Whether its six pages are even included within the collective agreement's sequentially numbered pages is not entirely clear because these go from "page 41 of 41" through to "page 49 of 41". Next, unlike the 2009 collective bargaining terms of settlement which were initialled and dated by the parties' representatives on 12 March 2009, the 2006 ABB terms of settlement are not so signed/initialled or dated. Further, in the common bundle of documents these two attachments making up Appendix 4 appear to be out of sequence. Following the execution pages of the substantive collective agreement (pages 43 and 44 of 41), there first appears Appendix 5 (Utility Shift Guidelines), then the six pages of the 2006 terms of settlement, followed by Appendix 6 which is, in turn, followed by the 2009 terms of settlement.

[67] The part of the 2006 terms of settlement attached to the collective agreement on which the Authority focused, is on the second page of these and states as follows:

> (d) Calculation of relevant daily pay (public holidays only)
>
> Relevant daily pay for public holidays will be calculated as follows:
>
> $$\frac{\text{Personal Salary}}{\text{Number of days scheduled to be worked by the employee per year.}}$$
>
> Note: Personal salary is gross earnings for the preceding 12 months, with exceptions dealt with on a case by case basis.
>
> The number of days in the above calculation will be 183 for shift employees, 208 for employees on the alternative day roster and 260 days for employees working the standard day work hours
>
> Note: Due to the shift change times on public holidays, the amount calculated above for shift employees shall be further multiplied by the following fractions to determine the actual payment due:
>
> > 5/12 in the case of employees working 5 hours on the actual holiday, 7/12 in the case of employees working 7 hours on the actual holiday and 12/12 in the case of employees working 12 hours on the actual holiday.

[68] Turning to the second appendage to the collective agreement (the terms of settlement of the 2009-2010 CA, the difficulty with incorporating into the

substantive provisions of a collective agreement the terms of settlement agreed upon by the bargaining representatives, is that the collective agreement itself should reflect those terms of settlement. If it does not, then this would tend to indicate that for some reason the terms of settlement have not been carried over into the collective agreement that is then ratified and executed. If they have been, what is the need for the terms of settlement to be displayed? The form of collective agreement adopted in this case is problematic.

[69] Despite their annexure to the body of the 2009 collective agreement, I am not satisfied that either the 2009 bargaining terms of settlement or, in particular, the 2006 bargaining terms of settlement with ABB, constitute operative or substantive parts of the collective agreement. It follows, in particular, that it is not open to the parties or to the Court to have regard to the parts of the 2006 terms of settlement relating to "[c]alculation of relevant daily pay (public holidays only)" set out above including the reference to "[p]ersonal salary", in interpreting and applying the collective agreement itself; its relevant terms and conditions are unambiguous.

[70] Decision of the case now comes down to the following issues. The first is whether, unlike in the Authority, the plaintiff has now established that what were essentially the same terms and conditions of his employment were applied in practice differently by ABB and by the defendant. Next, if so, is the defendant bound to continue to interpret and apply the relevant provisions in the way that ABB did and which is more favourable to Mr Harris in the calculation of his various leave payments? Finally, even if the defendant is not bound to interpret and apply the relevant provisions in the same way that ABB did, is the defendant nevertheless estopped in equity from changing the ABB interpretation and application of the same collective provisions?

[71] There is now more evidence about ABB's practice than was provided to the Authority. This satisfies me that, in practice, beginning in 2005 or 2006, ABB interpreted and applied the collective agreement covering Mr Harris's employment so that his non-taxable allowances were included in the calculation of leave payments. That the defendant may not have been aware of this when it committed to providing the plaintiff with continuity of employment (and, in particular, assuring

him that in taking up employment with it, he would be no worse off than he had been with ABB) is a matter of the sufficiency of its information to give such assurances. If, it was, as I conclude, under pressure to reach agreement leading up to takeover day, and had encountered difficulties in obtaining payroll information from ABB, it may perhaps now wish, in retrospect, that it was more circumspect in the assurances it provided (both in writing and orally) to prospective employees. But the consequences of its giving those assurances, when less than fully informed about how ABB had dealt with these issues, should not be visited on the plaintiff.

[72] The coming into effect of the 2009-2010 CA, with effect backdated to the commencement of Mr Harris's employment with the defendant, is determinative of his claims in law, if not in equity. Because of that retrospectivity of application, it is immaterial to the position between Mr Harris and TSNZ how ABB may have interpreted and applied its collective agreement governing Mr Harris's employment with it. Combined with my conclusion that the annexures to that new collective agreement did not affect its substantive contents, Mr Harris cannot rely on the manner in which his previous terms and conditions were applied by ABB to establish the same interpretation of them with the defendant.

[73] But for the question of estoppel, that conclusion would have resulted in my dismissal of the challenge.

Estoppel – decision

[74] Though it may have been open to him, there is no claim by the plaintiff of breach by the defendant of s 12 of the Fair Trading Act 1986 and so I will not speculate on that possibility. The only issue in this regard is whether the defendant is estopped in equity from now asserting that its interpretation of the collective agreement is determinative of the case, despite the application of this meaning that Mr Harris is worse off in remuneration than he had been previously with ABB.

[75] The equitable doctrine of estoppel applies where it would be unconscionable to allow a party to succeed in light of its previous stance which has induced the other party to act, or to omit to act, in a manner which is now compromised. Estoppel can

operate as a sword (cause of action) as well as a shield (a defence to a cause of action).[12] An estoppel may provide a remedy to prevent unconscionable conduct by another party including the enforcement of that other party's representations made to the claimant.[13]

[76] There are four essential constituents of an estoppel:[14]

- a belief or expectation must have been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged;

- the party relying on the estoppel must establish that the belief or expectation has been reasonably relied on by that party alleging the estoppels;

- detriment will be suffered if the belief or expectation is departed from; and

- it must be unconscionable for the party against whom the estoppel is alleged to depart from that belief or expectation.

[77] Dealing with each of these requirements, I conclude that the defendant's representations about the terms and conditions of employment on which he would be engaged created a belief or expectation in Mr Harris that these would be the same as those on which he worked for ABB; and that he would not be disadvantaged, including in receipt of remuneration, by transferring to the employment of the defendant.

[78] As to the second requirement for reasonable reliance on the representation, this must be reasonable (judged objectively) in three senses. These are, first, that the belief or expectation must have been reasonably held; second, it must have been

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[12] *Clark v NCR (NZ) Corporation* [2006] ERNZ 401 (EmpC) at [38].
[13] *Commonwealth of Australia v Verwayen* [1990] 170 CLR 394 at 450.
[14] James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trust in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 613-4.

reasonable for the plaintiff to have relied on the belief or representation; and, third, ongoing reliance on it must also have been reasonable.[15] The representation must be clear and unambiguous although it is not necessary for it to be susceptible of only one interpretation.[16] It is not necessary to show that the defendant had the influencing of the plaintiff, in any particular manner, as an object, nor that it proposed deliberately to mislead or deceive the plaintiff. Rather, it is sufficient if the defendant so conducted itself that a reasonable entity in the plaintiff's position would take the representation to be true and believe that it was meant to induce him to act in that manner.[17]

[79] Next, I conclude that Mr Harris relied reasonably on that belief or expectation when he eventually agreed to be employed by the defendant. There is no doubt that for Mr Harris and his colleagues, the defendant's representation about the continuation of their terms and conditions, in a manner that would not be detrimental to them, were significant factors in reliance on which he agreed to employment with the defendant.

[80] Next, Mr Harris's belief, which encompassed the manner in which his pay for leave periods would be calculated, meant that he suffered detrimentally when the defendant departed from that expectation by calculating and paying him less, albeit under identical contractual provisions, than he had received previously from ABB for those different periods of leave.

[81] Finally, I consider that it would be unconscionable for the defendant, in all the circumstances, to be permitted to now apply an interpretation to the parties' collective agreement which means that Mr Harris is affected detrimentally in his employment contrary to the defendant's contractual assurances. Responsibility for that state of affairs lies with the defendant and not with the plaintiff, in the sense that it entered into its employment agreement with Mr Harris without ascertaining the relevant information that it could have obtained from ABB about its interpretation

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[15] At 615.
[16] *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Product Marketing Co Ltd* [1972] AC 741 (HL) at 756.
[17] *Freeman v Cooke* [1848] 154 ER 652 at 659-661, [1843-60] All ER Rep 185 at189.

and application of its collective agreement which the defendant effectively replicated in relation to Mr Harris.

[82] For these reasons, the defendant is estopped from asserting an application of the collective agreement which contradicts the assurances given to the plaintiff.

Summary of judgment

[83] The Authority's determination is set aside and this judgment stands in its place under s 183(2) of the Act. Mr Harris is entitled to have included in leave pay calculations, both taxable and non-taxable elements of his salary, including where those represent reimbursing allowances, as he had enjoyed with ABB. Mr Harris is also entitled to interest on those arrears of remuneration calculated from the date of his eligibility for them to the date of their payment to him by the defendant. Interest is to be at the current Judicature Act 1908 rate. If the parties are unable to agree on the methodology for calculating these payments or the amounts due, leave is reserved for the Court to fix them although the parties are encouraged to attempt to undertake this mathematical exercise themselves.

[84] Mr Harris may be entitled to costs and disbursements, if he has incurred these, in both the Court and in the Authority. In this regard, also, I offer the parties an opportunity to settle these themselves but leave is likewise reserved for Mr Harris to apply to the Court to fix costs and disbursements.

GL Colgan
Chief Judge

Judgment signed at 5.30 pm on Thursday 2 April 2015