

Determination Number: WA 155/05

File Number: WEA 98/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	The New Zealand Meat Workers and Related Trades Union Inc (applicant)
AND	AFFCO New Zealand Limited (respondent)
REPRESENTATIVES	John Unsworth for the applicant Garry Pollak for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wanganui, 23 August 2005
DATE OF DETERMINATION	26 September 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. The Union says the Company is in breach of the department agreement (DA) relating to the payment of smokos for its members working in the latter's Imlay Plant lamb cutting department – statement of problem received on 30 March 2005. The Union seeks a declaration in favour of its interpretation of the agreement, back pay and costs.

2. The Company denies it is in breach of the DA – statement in reply received on 20 April.
3. The parties underwent mediation but their employment relationship problem remained unresolved. They subsequently agreed to a one-day investigation in Wanganui on 23 August. An agreed statement of facts, issues and bundle of relevant documents and witness statements were usefully provided in advance. Efforts by the party during the investigation to settle the matter on their own terms were not successful. The parties agreed that no closing submissions were required. Some subsequent communication with the parties proved useful so as to confirm the background facts.

Background

4. The parties agree that the following are the relevant facts.
5. The Company operates a number of meat processing plants including the Imlay Plant, outside of Wanganui.
6. The terms and conditions of its Imlay Plant employees are typically set by the combined effect of a core collective employment agreement (CEA) and departmental agreements, i.e. agreements whereby employees bound by an applicable collective agreed to additional terms and conditions of employment per s. 61 of the Act.
7. Negotiations between the parties saw the Imlay Plant reopen in October 2002 after a seasonal shutdown of 3 - 4 months.
8. A condition of the plant reopening was a significant reduction of terms and conditions previously applying at the site. The reduction was effected by way of new DAs including the one applying to the lamb cutting department.
9. The parties also agreed that the CEA that came into force on 2 October 2000, and which expired on 30 September 2002, would be rolled over: it continues to apply at the plant (agreed document 1).

10. A feature of the new lamb cutting DA was that, at the recommencement of work in October 2002, those covered by it became hourly rate employees. The parties agree that, as a result, the lamb cutting department employees were thereby covered by clause 14 of the CEA and were eligible for paid smokos. Previously, they and other plant employees paid by way of piece rate arrangements were not eligible for paid smoko breaks as they were not covered by clause 14 of the CEA.
11. Clause 14 provides as follows:

SMOKO

Provided that two hours work has been performed since commencing work or since a meal interval, all hourly paid workers shall be allowed a paid 15 minute smoko break each morning and afternoon, and when working overtime and on shift at intervals of approximately two hours.

Where mechanical, organisational or hygiene hold-ups occur such breaks may be moved up to 30 minutes either side of the usual break to minimise the affect on wages and production while the cause of the stoppage is rectified.

When work is continued for more than an hour after the ordinary time of ceasing work, the smoko shall be allowed on the expiration of two hours from the last smoko in ordinary time. No smoko is allowable upon cessation of work either in ordinary time or overtime.

12. By application of the new DA, lamb cutting department employees are now paid in the following way:
- Lamb cuts fall into approximately 6 broad specifications depending upon the degree of difficulty of the cutting required.
 - Each specification has a carcass rate allocated to it (e.g. \$4.50).
 - A total, daily amount is arrived at by determining the number of carcasses cut that day.
 - From that amount a deduction is made. The deduction is made up of 8 hours (i.e. the normal working 'day') X \$11.30 (the hourly base rate paid to the lamb

cutting department employees) X the number of employees working in the department for that 8 hour period.

- The amount left over after the deduction is made is known as the incentive pool: it is distributed amongst the cutting room employees (e.g. sawmen, cutters and assistants) on a skill basis.

E.g. Number of carcasses cut = 2500 X \$4.50 = \$11,250.00 ('A');

Less numbers of employees in lamb cutting room, in this example, 40
X 8 hours X \$11.30 = \$3,616.00 ('B');

A – B = \$7,634.00, the incentive pool, for distribution to lamb cutting employees on basis of skill.

13. The Company is currently paying the smokos of lamb cutting department employees from their incentive pool.
14. The parties did not record in writing the new lamb cutting department DA nor did they detail exactly how employees covered by it were to be paid their smoko breaks. While meetings involving Company and union representatives took place the participants dispute what was agreed at those meetings.
15. At the time of negotiating the reopening of the plant and the reduction of terms and conditions of employment the Union summarised its position in writing on several occasions (refer to agreed documents 2, 3 & 4). However, the Company either responded orally or not at all.
16. The Union records do not in any way address how lamb cutting department employees were to be paid their smoko breaks, i.e. from or outside of the incentive pool.
17. Notwithstanding their method of communication, the parties agree that they finalised a new DA for lamb cutting department employees.

18. They also agree there is no legal issue about the interpretation of a written agreement which recorded the parties' understandings as at October 2002 as no such written agreement exists.
19. Instead, what is required is a finding of fact and law as to:
 - a. Whether Affco is complying with its obligations to pay for smokos by way of its current method of payment, by effecting payment from the incentive pool; or
 - b. Must Affco pay for smokos over and above and not out of the incentive pool?
20. Put another way: should the lamb cutting department employees be paid their smoko breaks as all or most other workers at the plant are paid, or should payment continue to be made from the incentive pool?
21. The difference between the parties did not arise until sometime after the implementation of the DA: various explanations are offered for the delay but the parties accept that the matter is not relevant to the issue to be determined.
22. The question to be determined is: what was agreed under the DA regarding lamb cutting department employees and the method of payment for their smokos?
23. The parties naturally dispute the other's recollection of the terms of the agreement.

Applicant's Position

24. The Union and its witnesses are all insistent that, as a way of softening the effect of the substantial cut backs to their terms and conditions of employment, the Company promised – and the Union accepted – that they would be paid smokos separate from the incentive pool.
25. The Union understood they would be treated no differently than the other plant employees who – via similarly new DAs – went from being piece rate workers to hourly employees and are now paid in the way that the lamb cutting employees wish to be paid, i.e. not from their incentive pool.

Respondent's Position

26. The Company is adamant that the arrangement currently in place for payment of smokos to lamb cutting department employees was part of the agreed package of cut backs to its staff's terms and conditions, without which the plant would not have reopened.
27. The Company says its lamb cutting department employees are being paid for their smokos, consistent with the requirements of the CEA and DA. It says the breaks are properly being paid for, as agreed, out of the workers' incentive pool.
28. To accept the Union payment requirement would have the effect of paying each employee 8.5 hours per day and not 8 (as at present). It would amount to a prohibitive additional cost for the Company.

Discussion and Findings

29. I am satisfied that the applicant has successfully met the burden of proving the terms of the contract it argues for and that the Company's current practice of paying smoko to the lamb cutting department employees from their incentive pool is in breach of the relevant DA. I reach this conclusion for the following reasons.
30. An employee bound by a collective employment agreement may agree to additional terms and conditions of employment provided they are mutually agreed by the employee and the employer and are not inconsistent with the terms and conditions in the collective agreement: s. 61 of the Act.
31. Unlike the requirements of ss. 54 & 65 of the Act that collective and individual agreements be set out in writing, s. 61 of the Act does not require these additional terms and conditions to be recorded in writing.
32. In this instance Company employees/Union members working in the lamb cutting department at the Imlay Plant have agreed to additional terms and conditions of employment over and above their applicable collective employment agreement by

way of a departmental agreement. The fact that those terms were not set out in writing is not a breach of s. 61 of the Act.

33. The collective agreement provides at clause 14 for a paid 15 minute smoke break each morning and afternoon and when working overtime and on shifts at intervals of approximately two hours. The Company accepts that other employees bound by the collective are paid their smoko in an ordinary sense and not from any incentive pools.
34. There is no written evidence of the Company putting to the Union or the affected workers the proposal to, unlike other workers at the Plant, pay the smoko break for lamb cutting department employees from the incentive pool: there is no evidence of that term and condition being "*mutually agreed*" by the parties (s. 61 of the Act).
35. By contrast, I am satisfied from the Union's written records that they amount to the best evidence of the agreement reached by the parties. The fact that they are silent on the employer's claim that the smoko breaks of its lamb cutting department employees would be paid for out of their incentive pool is reliable evidence – I find – that agreement was not reached that they would, as the Company contends. In other words, it is silent evidence that agreement was reached to pay smokos to lamb cutting department employees outside of their incentive pool, like other employees at the plant. I am satisfied, on a balance of probabilities basis that, had such a significant term been argued by the Company, then it would have featured in the Union's record.
36. While this is not an argument about interpretation I add here that there is no evidence of the practical effect of the agreement argued for by the Union resulting in an unreasonable or absurd outcome.
37. Finally, I hold that, in the context of how this employment relationship problem has developed, it would be contrary to the principles of good faith to permit the Company to benefit from its failure to clearly communicate to the employees concerned the scope and detail of what amounted to a significantly different, new term and condition of employment.

Determination

38. For the reasons set out above I find in favour of the applicant, the New Zealand Meat Workers and Related Trades Union Inc, and against the respondent, AFFCO New Zealand Limited.
39. The Company must cease paying smoko to its lamb cutting department employees by deduction from their incentive pool and instead pay those workers in the same manner that other hourly employees are being paid for smokos.
40. Compensation is owed by the Company to the affected employees: leave is reserved to the parties to return the quantum to the Authority if agreement cannot be reached on the correct amount owed to the relevant employees.
41. The parties are to attempt to reach agreement on the matter of costs failing which leave is reserved for the matter to be put to the Authority.

Denis Asher

Member of Employment Relations Authority