Determination Number: AA 98/06
File Number: AEA 657/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	The Bakers & Pastrycooks Union & 11 others (Applicant)
AND	George Weston Foods (NZ) Ltd t/a Tip Top Bread Auckland (Respondent)
REPRESENTATIVES	Ian McGovern, for Applicant Emma Butcher, for Respondent
MEMBER OF AUTHORITY	Vicki Campbell
INVESTIGATION MEETING	4 October 2005
SUBMISSIONS RECEIVED	17 February 2006
DATE OF DETERMINATION	30 March 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Bakers & Pastrycooks Union (the Union), together with 11 of its members has raised a dispute over the application, operation and interpretation of the collective employment agreement between the union and George Weston Foods Limited t/a Tip Top Bread Auckland ("Tip Top"). The dispute arose when Tip Top changed the rostered working hours for its employees. The union are seeking a direction from the Authority that the provisions of the collective agreement does not allow Tip Top Bread the right to make the changes to the working hours and that the employer must take into account the employees' view of the change.

[2] The 11 employees say they have been unjustifiably disadvantaged by the change as it has resulted in a loss of earnings. The employees are seeking an order from the Authority that wages be reinstated, compensation paid, and a penalty be applied for each breach of the employment agreement.

[3] In reply Tip Top says the need to change the rosters was driven by market needs in accordance with the collective agreement and that the terms of the collective agreement were adhered to.

Mr Johnston

[4] At the time the events giving rise to this employment relationship problem occurred, Mr Ian Johnston was the union delegate on site. Mr Johnston provided a witness statement for the Investigation Meeting but did not attend as he was overseas and was not due to return until after the investigation date. Arrangements were made with Mr McGovern to have Mr Johnston appear at the Authority at a later date in order for him to answer questions and to clarify evidence where there were conflicts. In November 2005, Mr McGovern advised the Authority that Mr Johnston would not be providing evidence after all. Given the contradictions contained in the evidence of the applicant and of the respondent witnesses, and Mr Johnston's role in the initial discussions with the company over the changes to the rosters and which led to this matter coming before the Authority, I determined it was imperative for Mr Johnston to attend and answer questions. Numerous attempts were then made by the Authority to compel Mr Johnston to attend and answer questions. Mr Johnston has avoided all attempts to be served with a summons to attend an Investigation Meeting consequently his witness statement has been given no weight by the Authority.

Collective Employment Agreement

[5] Clause 5 of the collective agreement sets out the provisions relating to hours of work. The clause states:

> *The ordinary hours of work shall not exceed 40 hours in any five day period.*
>
> *An employee's normal days and hours of work will be determined by a roster that is posted on a regular basis. Where it is necessary to change the work schedule to suit market conditions and/or production requirements, the employer shall endeavour to provide the employee with at least one week's notice, and more if practicable.*
>
> *The days off each week shall be consecutive unless the employer and the employee otherwise agree.*
>
> *In the case of a major change to hours of work being necessary because of a change in market requirements or some uncontrollable event, the hours of employees can be changed in accordance with the following procedures:*
>
> > *The employer shall first present the proposal for the changed hours, together with all necessary information and reasons, to the delegates for discussion.*
> >
> > *After satisfactory discussions, the proposal will be presented to a meeting of all employees for their consideration.*
> >
> > *After a minimum of one week has passed, a second meeting will be held to enable all employees to vote on whether the change of hours is agreeable and note any difficulties that may arise from the change.*
> >
> > *In making its decision, the employer must take due account of the employees views.*
>
> *Employees accept as a condition of this agreement, that the employer may require any employee to change their existing hours of work.* [my emphasis]

[6] Clause 31 provides for consultation between the parties to the agreement. The clause states:

> *Tip Top Bread Auckland and the employees bound by this agreement acknowledge that their interests are mutually dependent. The parties have committed themselves to promoting harmony and ensuring that consultation and co-operation are the basis for relationships between them.*

[7] The stated objectives of consultation include the possibility of increasing the efficiency, flexibility and competitiveness of the business.

Events giving rise to this dispute

[8] Staff employed at Tip Top regularly worked in excess of the stated 40 hour week. From evidence provided to the Authority I have concluded that it was not uncommon for employees to regularly work up to 11 hours overtime in any one week.

[9] Tip Top's clients include the long haul operators who receive and distribute Tip Top's product to supermarkets, suppliers and bakeries. A number of complaints were received from customers regarding incorrect packing details. Errors were being picked up which showed that the documents provided by Tip Top itemising the product loaded out of Auckland did not correspond with the product actually being delivered.

[10] Mr Dean Martin, Operations Manager met with his despatch manager, Mr Max Guyatt, to discuss the issues regarding the loading out and also issues he had identified with the roster system. Mr Martin and Mr Guyatt determined that the roster system had lead to staffing levels being inefficient. It was agreed that a "pack to order" roster would overcome the inefficiencies and the difficulties being experienced by suppliers and bakeries.

[11] Mr Martin says that on 29 March 2005 he met with Mr Johnston, discussed the changes with him and provided him with documentation about the changes. Mr Martin says the documentation included a proposed roster and the reasons for the changes to the roster system.

[12] It was common ground that a meeting of all dispatch staff was held the next day on 1 April 2005 where Mr Martin outlined the suggested changes as he had discussed with Mr Johnston the previous day. Mr Martin says he distributed copies of the proposal (the one provided to Mr Johnston the previous day) to the staff present at the meeting for their consideration. He advised that a further meeting would be held a week later to listen to any concerns raised by the staff.

[13] A further meeting was held on 14 April 2005 to allow the employees to discuss with Mr Martin, any concerns they had with the proposed changes. At the meeting staff members outlined their concerns about the reduction in overtime and the subsequent loss of income. It was common ground that Mr Martin advised the staff that the company would consider making a one off payment as compensation in respect of the lost overtime. Following the meeting Mr Martin received a call from Mr McGovern from the Union. Mr Martin outlined for Mr McGovern the need for the change and the two agreed to meet to discuss the proposal.

[14] A meeting was held on 19 April at 11am where employees were provided with an opportunity to vote on the proposed changes. The overwhelming response at the meeting was employees opposition to the changes.

[15] On 20 April, Mr Martin and Mr McGovern met once again to discuss the concerns raised about loss of take home pay. It was agreed at that meeting to postpone the implementation of the changed rosters until 2 May 2005.

[16] On 21 April 2005 Mr Martin wrote to each of the applicants and advised them of their new take home pay and confirmed that a one off payment would be made to them. Each letter also set out the amount the employee would receive. The letters reminded all employees of the existence of clause 5.5 and the recognition that the employer may change existing hours of work. Employees were advised that the start date for the new roster was 2 May 2005.

Determination

Dispute

[17] Tip Top says the reason for the change in the rosters was to meet the changed requirements of the market as per the collective agreement. However, I have concluded that the reasons for the change in the rosters arose as a direct result of the need for Tip Top to make efficiencies in their business operations and to rectify the errors being made in the packing of orders. These measures equate to business efficacy and not to "*changes in market requirements*". The market had always required orders to be packed accurately, product to be the freshest possible and for the product to be delivered in a timely fashion. The initiation of the changes came from the complaints received from customers and a review of the rosters as opposed to a change in what the market required from Tip Top.

[18] With regard to the process used, I am not satisfied that Tip Top met all the requirements set out in the collective agreement. It was the unchallenged evidence from the applicants that night shift staff were not informed about the meetings and therefore were not included in the initial consultation meeting. I am satisfied that the only meeting attended by the 11 applicants in this matter was the final meeting with Mr McGovern, and where a vote was taken as to whether the staff would accept the change in the roster.

[19] Employment agreements must be read as a whole when considering whether there has been compliance (*Service & Food Workers Union Inc v Vice Chancellor of the University of Otago* [2003] 2 ERNZ 156). Clause 5 of the agreement provides, as a condition of the agreement, that the employer may require any employee to change their existing hours of work. Clause 31 also contemplates changes in the business efficiency, flexibility and competitiveness and identifies that as an objective for consultation.

[20] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429, the Court had this to say about consultation:

> Consultation does not require agreement but more than mere notification. Relevant to the present case there must be sufficiently precise information to allow a reasonable opportunity to respond. Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done. The party obliged to consult must keep its mind open and be ready to start afresh. Genuine effort must be made to accommodate the views of those being consulted; consultation is to be a reality, not a charade.

[21] I am satisfied Tip Top consulted with the union regarding the proposal to change the rosters but has failed to consult with all the employees bound by the agreement as required in clause 31. Mr Martin met with Mr Johnston on 29 March where he outlined the proposal and provided information including a draft of the new roster. Mr Martin then met with most staff and provided the same information. Unfortunately the night shift staff were not advised of the meeting and therefore did not attend. A further meeting was held two weeks later, at which time Mr Martin listened to the concerns of the employees. The evidence of the applicants was that although they heard from other staff that the rosters might be changing, as they hadn't been involved in the first meeting they decided it couldn't happen.

[22] At the second meeting the most pressing concern raised by the employees was the possible reduction in overtime and therefore the take home pay. To address this Mr Martin offered to consider making a one off payment as compensation for the loss of the hours. Mr Martin then met with Mr McGovern from the union and discussed the proposal with him before Mr McGovern

attended a meeting of all the staff where a vote was taken on the proposal. The employees voted unanimously to reject the proposal.

[23] Mr McGovern submitted that the provision at clause 5.5 of the collective agreement allows for a …change… of hours but does not allow a reduction. There is some merit in his argument. I am satisfied that the collective agreement does not allow the employer to unilaterally reduce the hours of work and even if it did, any change required proper consultation with all the employees bound by the collective employment agreement pursuant to clause 31. Tip Top failed in this regard when it did not include the night shift staff on the first meeting at which time the proposals were discussed and documentation provided for consideration. Tip Top has therefore breached its employment agreement with the applicants.

Unjustified disadvantage

[24] The eleven applicants claim they have suffered a disadvantage in their employment with Tip Top as a result of Tip Top changing the roster system. The change to the roster resulted in less overtime being available for work.

[25] Ms Butcher, on behalf of Tip Top submitted that a personal grievance for unjustified disadvantage is precluded by section 103(3) of the Employment Relations Act. That section precludes disadvantage grievances where the action is derived …solely from the interpretation, application, or operation, or disputed interpretation, application or operation… of the agreement.

[26] The issue for the Authority is whether the actions relied on by the applicants is derived …solely… from the disputed application of the employment agreement (see *Mattes v NZ Post Ltd (no 3)* [1992] 3 ERNZ 853; *Principal of Auckland College of Education v Hagg* [1996] 1 ERNZ 150).

[27] The issue raised by the dispute was whether or not the collective agreement allowed Tip Top to change the roster even though the staff voted to reject the proposed changes. In the claim for disadvantage the union relies on the change implemented by Tip Top to the roster and the reduced availability for overtime.

[28] I have found that the change in rosters was a breach of the employment agreement. Tip Top believed the employment agreement allowed for the changes to be made. I find that the

employers actions were derived solely from the interpretation, application or operation of the employment agreement. Accordingly it comes within the section 103(3) exclusion.

[29] The applicants claim for compensation for unjustified disadvantage must therefore fail.

Remedies

[30] Since this matter was filed in the Authority the parties have successfully negotiated and settled a new employment agreement. However, Tip Top is liable for a penalty for the breach of the applicant's agreement. Taking into account all the circumstances of the case, I consider a penalty at a modest level is warranted.

The respondent is ordered to pay a penalty of $1,000 for breaching the collective agreement. The penalty is to be paid to the Crown within 28 days of the date of this determination.

Costs

[31] The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority