

Determination Number: WA 33/06

File Number: WEA 422/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

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|--------------------------------|--|
| BETWEEN | Chipo Chikoora (first applicant) |
| AND | New Zealand Amalgamated Engineering, Printing and Manufacturing Union (second applicant) |
| AND | The Dominion Post, a division of Fairfax New Zealand Limited (respondent) |
| REPRESENTATIVES | Tony Wilton for the applicant Rosalind Webby for the respondent |
| MEMBER OF THE AUTHORITY | Denis Asher |
| SUBMISSIONS RECEIVED | 9 February 2006 |
| DATE OF DETERMINATION | 1 March 2006 |

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. The applicants dispute whether the Dominion Post can require Ms Chikoora to work an afternoon shift on four days a week and a night shift on the fifth day of her working

week – statement of problem received on 7 November 2005. A relevant determination is sought as well as costs.

2. The Dominion Post says the collective employment agreement (CEA) binding itself and the Union, and covering Ms Chikooro, gives the respondent the flexibility to require the first applicant to work the shift pattern described above – statement in reply received on 23 November. It says that Ms Chikooro's individual terms of employment (IEA) can also be read as consistent with the CEA.
3. The parties did not settle their employment relationship problem in mediation. Agreement was subsequently reached on the Authority determining the matter by way of an agreed statement of facts and submissions from the parties to be submitted by 9 February 2006.

Agreed Statement of Facts

4. The agreed facts are as follows:
5. Ms Chikooro was appointed to the position of maintenance electrician at the Dominion Post's Petone printing plant in April 2003, originally for a fixed term.
6. The hours of work were set out in a job advertisement, at the interview and in the letter of offer accepted by the applicant: they were 2.30 p.m. to 11.00 p.m. Monday to Thursday and 10.30 p.m to 7.00 a.m. Friday/Saturday.
7. The work of electricians at the Petone plant is covered by the CEA although not all electricians are Union members.
8. The CEA includes the following provisions relating to hours of work for electricians:

46.2 For all full-time ... electrical ... (employee) the ordinary hours of work shall be 8 per day counted continuously from the time of starting work, excluding one meal break The meal break shall be paid at the ordinary time rate but does not count as time worked.

46.3 Unless changed in accordance with clause 46.3.6.1 below, the hours of work will be:

46.3.1 **Day Shift**

...

46.3.1.2 From 6.30 a.m. to 3.00 p.m. Monday to Friday for all full-time electricians ...

...

46.3.2 **Evening Shift**

...

46.3.2.2 From 2.30 p.m. to 11 p.m. Monday to Friday for all full-time electricians.

...

46.3.3 **Night Shift**

...

46.3.3.2 From 10.30 p.m. to 7 a.m. for all full-time electricians ...

46.3.3.3 The normal days of working will be pursuant to a forward rotating roster, i.e. a roster providing for five shifts worked over six days per week so arranged that a second working day in any period of the roster becomes an employee's first working day in the next period of the roster.

...

46.3.6 End of Shift

43.3.6.1 Notwithstanding the provisions contained in sub-clauses 46.3.1 to 46.3.5, the end of any shift will be determined by the completion of all scheduled work which in addition to printing, may include maintenance, cleaning and pre-setting. It is accepted in the event of a breakdown or other unforeseen problem, the work schedule is liable to change.

46.3.7 In the case of all shifts specified above actual times of starting and stopping work shall be set in accordance with production requirements and shall be set by the Plant Manager who will have the final determination in these matters. A week's notice shall be given of any change in the hours of work.

46.3.8 Notwithstanding the provisions of Clause 46.3.7 above the parties can at any time agree to vary these hours so as to suit production requirements and the individual staff members affected by such variations, provided however that such variations of hours shall be by agreement of 60 percent of the employees directly affected by such change.

9. Ms Chikoorra joined the Union and became collectively covered by the CEA.
10. Two electricians work on the evening shift and one on the night shift.
11. Ms Chikoorra was not initially required to work the hours stipulated in her letter of appointment, etc while she undertook initial training on day shifts.
12. While Ms Chikoorra was in training the other evening shift electrician temporarily covered the Friday night shift.
13. After being deemed competent to begin working evening shifts, on 15 August 2003, Ms Chikoorra gradually began to work the Friday night shift on a "turn about" basis.

14. In April 2005 the Dominion Post deemed Ms Chikoorā competent to begin sole charge work on the Friday night shift and required her to do so.

Applicants' Position

15. For the applicants, the question is whether the Dominion Post can rely on the hours of work stipulated and agreed to at the time Ms Chikoorā commenced her employment so as to require her to work an afternoon shift from Monday to Thursday each week, but a night shift on Friday.
16. The applicants say it cannot because the individual term incorporating those hours is inconsistent with the terms of the CEA by which Ms Chikoorā and the Dominion Post are now bound. The terms of the CEA must prevail.
17. Case law relied on by the applicants in respect of "*inconsistent*" include: *EPMU v Christchurch Press* [2005] 1 ERNZ 288 and approved by the Court of Appeal in *Christchurch Press v EPMU*, CA 102/05, 1 August 2005.
18. The applicants say Ms Chikoorā's individual term setting out the four evening shifts/one night shift is inconsistent with the CEA because the latter provides for three separate shift regimes – day, afternoon, and night – and requires employees to be engaged exclusively under one of them. An employee can be required to work a different shift on a temporary basis (see clause 50.12) but this does not mean an employee can be required to work a mixture of shifts on a regular or permanent basis.
19. The CEA makes no provision for rotating or alternating shifts or for 'mixing' shifts. Instead it provides that each of the three shifts – day, evening and night – are self-contained, each with its own conditions and staff roster. The mandatory shift roster arrangements are not freely interchangeable.
20. Fixed roster arrangements can be varied by the Union and the Dominion Post, by agreement, subject to a 60% majority of affected staff, to meet "*production requirements and the individual staff member*" (clause 46.3.8) and for special

arrangements (clause 46.3.9). In other words, variation is a collective process and not by individual agreement.

21. Individual arrangements would make otiose the shift provisions set out in clause 46.3. The parties cannot have intended such an outcome.
22. Clause 50.12 makes clear that shift changes are temporary and attract a penal rate. There are other indicia in the CEA including various references to classes of employees and differing definitions and/or provisions for matters such as 'day' and 'Sunday' for the three categories of shift employees, etc. The result is that, in a number of significant areas, employees on different shifts receive differing treatment and benefits. These arrangements sit uncomfortably with the concept of an employee moving from shift to shift within the same week.
23. Shift work is acknowledged as being disruptive of the 'work-life' balance: it imposes extra stressors on employees. Changing shifts necessarily exacerbate those effects, particularly when the changes occur within a short time period. The parties to the CEA have gone to considerable lengths to mitigate the undesirable effects of shift-work. Those efforts would be undermined were the Dominion Post to succeed in this matter.

Respondent's Position

24. The issue is one of contractual interpretation. Argument regarding personal difficulties associated with shift work may be valid from a wider perspective but if the governing agreement permits – or does not prevent – such arrangements then the Authority must respect the parties' agreement. The principles to be applied are well-settled: *Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558, etc.
25. The phrase "*not inconsistent*" was addressed in *NZ Meat Processors IOUW v Alliance Freezing Co (Southland) Ltd* [1991] 1 NZLR 143 (CA), at p 150:

... there is no inconsistency with the award if employer and employee agree on higher rates ... In many other cases the award may be silent on a matter provided for in the contract. There, too, no question of inconsistency arises. But where there is a true

inconsistency, where the contractual provision and the award cannot stand together, the award must prevail ...

26. This is not a case where the CEA contains any ambiguity. The CEA is permissive of a working week comprised of mixed shifts. The CEA contains several relevant provisions which support the respondent's view that it and its employees have a large degree of flexibility in relation to hours of work, within certain parameters.
27. It is accepted that clause 46.3 provides for three separate shifts or discrete work periods. While clearly and simply defining the shifts themselves, and the hours within which an employee who may be employed to work one or more those shifts may be required to work, clause 46.3 does not set individual employees' hours of work or weekly work patterns. Nothing in this clause suggests that a full time employee must only work five night shifts or five day shifts, etc. Placing the three shifts in separate sub-clauses is not indicative of any prohibition on an employee agreeing to work a combination of those shifts within a working week.
28. Other related clauses similarly set no prohibition on possible working hours being made up of or worked across or into the various shifts. The whole thrust and nature of the CEA's hours of work and related provisions is flexible and permissive. There is nothing prohibiting the working of mixed shifts.
29. The Dominion Post says the agreement reached between it and Ms Chikoora, via her IEA, which incorporated a mix of four days shifts and one night shift is not inconsistent with the CEA. Nor is there any legal basis for implying such a prohibition into the CEA. When the applicant joined the Union and became collectively covered by the CEA that individual term continued to exist by the effect of clause 4 of the CEA (which deals with the transition of an employee from individual to collective coverage).
30. The only way in which the applicants' arguments can succeed is if a term prohibiting the working of mixed shifts is to be implied into the CEA. The Dominion Post does not accept it would give the contract business efficacy nor be so obvious that it goes without saying, to import the term sought by the applicants.

Discussion and Findings

31. I accept that respondent's argument that the CEA does not bar a mix of different shifts and that the parties to the CEA can agree, subject to the outcome not being 'inconsistent with', to such an outcome.
32. But in this case the applicant and her Union clearly do not consent to Ms Chikooro working a mixed shift arrangement. Is her IEA consistent with the CEA? Is she obliged to do a mixed-shift? To both questions I consider the answer to be no. I reach my conclusion for the following reasons.
33. The relevant provisions in the CEA are plainly and coherently stated. Clause 45 of the CEA provides for, amongst other things, "*Occupational Groups*", including electricians.
34. Clause 46 of the CEA provides for the various categories of employees' "*Hours of Work*". It says that,
- Employment shall be on a **weekly basis** and the minimum wages ... shall be paid for 40 hours work.*
- (emphasis added)
35. Sub-clause 46.2 stipulates that, for those groups including electricians, their ordinary hours of work are 8 per day.
36. Successive sub-clauses go on to stipulate the actual hours to be worked by the day, evening and night shifts. For the day and evening shift, they are identified as falling within specified hours, Monday to Friday. As is explained above, the night shift is not confined to any set days of the week but it too works specified hours for five shifts worked over six days per week by way of a forward rotating roster.
37. It can be seen that the parties intended, and unambiguously provided for, full-time work to be undertaken by way of successive shifts. I am satisfied that Ms Chikooro – from the time she became eligible for CEA coverage – was plainly entitled to work

one of these shift patterns on a full-time or entire basis, and to be a full member of one of those shifts. From that date Ms Chikoorā was entitled to decline her employer's request that she work a night shift outside of the contracted shift work pattern.

38. Given that she continues to work four days of the evening shift already it would seem obvious that Ms Chikoorā is in reality a full-time employee member of that shift.
39. I am reinforced in this finding by the significance of clause 50.12 of the CEA which makes it clear that temporary changes to shifts attract a penalty, of time in lieu. In other words, variations from whole shifts are discouraged.

Determination

40. For the reasons set out above, I find in favour of Ms Chipo Chikoorā and the New Zealand Amalgamated Engineering, Printing and Manufacturing Union's claim against the respondent, the Dominion Post, a division of Fairfax New Zealand Limited, that the latter is in breach of the parties' collective employment agreement in requiring Ms Chikoorā to work a night shift on the fifth day of her working week.
41. At the parties' request, costs are reserved.

Denis Asher

Member of Employment Relations Authority

