

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN New Zealand Dairy Workers Union (Applicant)
AND Fonterra Co-operative Group Limited (Respondent)
REPRESENTATIVES Rose Alchin, Counsel for Applicant
Garry Pollak, Counsel for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 1 November 2005
DATE OF DETERMINATION 10 February 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Fonterra Co-operative Group Limited operates an employee productivity scheme. This scheme was extended to temporary staff following the 2003 collective bargaining round. The cut off date for lodging claims for payment of the productivity scheme by temporary employees is the central dispute between the parties and which they seek the Authority's assistance to resolve.

[2] Fonterra says it can set a cut off date; that the productivity scheme is discretionary, that the cut off date was discussed and agreed with Dairy Workers' Union representatives and for practical purposes there must be a cut off date for lodging claims.

[3] The DWU says that in bargaining for the productivity scheme to be extended to temporary employees no cut off date was agreed, that not having a cut off date was expressly discussed and agreed between DWU and Fonterra representatives in September 2004 and notwithstanding, any payment under the productivity scheme is wages and cannot be lawfully subject to a cut off date.

The term in dispute

[4] On 9 September 2003 Max Parkin, Director Operations Fonterra, wrote to James Ritchie, National Secretary DWU, setting out the proposed terms of settlement for the 2003 Fonterra/DWU collective employment agreement. In relation to the productivity incentive scheme the proposed terms of settlement include (emphasis added):

“24. **SCHEDULE 4 – PRODUCTIVITY INCENTIVE**

The productivity incentive targets are as presented and attached. The productivity incentive will be calculated on:

- The % achievement (against set targets) x [individual worker's printed rate plus their long service bonus] x the annual contracted hours, and paid by the end of August.

The productivity incentive will be extended to permanent staff who leave during the year and temporary workers who have worked more than 640 hours between 3 August 03 and 1 August 04 in a salary year. The productivity incentive will be calculated at the % achievement (against set targets) x the worker's hourly rate x total hours worked. The payment will be made upon application by the worker concerned. Application should be made to the site payroll officer before the last Friday of July each year. It will be paid on a pro-rated basis, by the end of August."

[5] These terms of settlement were duly voted on and ratified by DWU member employees of Fonterra. The wording of paragraph 24 of the proposed terms of settlement became a term of employment.

[6] In mid-2004 Fonterra advised the DWU that all temporary employee incentive payment applications must be received by the last Friday of July 2004 and that these payments would be made by the second week of August 2004. The DWU challenged this advice saying it improperly prevented temporary employees lodging an incentive pay application after the last Friday of July and that this was not what had been agreed during the 2003 collective bargaining round.

[7] Following discussion with the DWU Fonterra extended the deadline by two weeks.

[8] The recollection of the parties of the negotiations around this issue was vague. However, the witnesses agreed that there was no specific agreement on what has now become the central issue - whether a cut off date meant no more applications from temporary employees would be processed after that date (Fonterra's view) or applications from temporary employees received after that date would be processed in due course (DWU's view).

What does the disputed clause mean?

[9] The use of the word "should" in the emphasised sentence at paragraph 4 above leaves that sentence open to more than one interpretation. The "should" can be read as definite or indefinite – applications must be made by the last Friday of July or it is desirable that applications are made by the last week of July.

[10] Looking at clause 24 as a whole it is artificial to say that the timeframe established in the final two sentences of the clause establishes a cut off date for applications to be lodged. The purpose of clause 24 is to extend the productivity incentive scheme to permanent and temporary employees – that is plainly stated. The clause does not contain an express statement that a cut off date will apply to applications by temporary employees. That the clause does not contain a cut-off date is emphasised by the contrasting unequivocal "will" in the third to last sentence and the equivocal "should" in the second to last sentence.

[11] Clause 24 is the parties' agreement. They have agreed to introduce an equivocation to the timeframe for lodging applications immediately following unequivocal statements as to who the incentive scheme may apply to, how the incentive scheme will be calculated and an application for payment will trigger the process of calculating the incentive entitlement. If the parties intended to introduce a cut-off date for such applications to be lodged then they would have used unequivocal language. For these reasons the clause cannot be interpreted as containing a cut off date for filing.

Conclusion

[11] Clause 24 extends the productivity bonus to temporary employees. If they lodge an application before the last Friday of July in any given year they will be paid out by the end of August. If they fail to lodge an application by the last Friday of July they will be paid however, the clause is silent as to when they can expect to receive that payment.

Costs

[12] I am of the view that costs should lie where they fall. However, the parties have leave to apply to the Authority to set costs if they so wish.

Marija Urlich
Member of Employment Relations Authority