

Determination Number: CA 152/06

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File Number: 5046398

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Stephen Watson, Gary McLean and Adrian Melief (First Applicants)
AND The Rail and Maritime Transport Union (Second Applicant)
AND Toll NZ Consolidated Limited (Respondent)
REPRESENTATIVES Geoff Davenport for First and Second Applicants
Richard Harrison for Respondent
MEMBER OF AUTHORITY Robin Arthur
INVESTIGATION MEETING 12 September 2006
DATE OF DETERMINATION 3 November 2006

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] This matter is a dispute about whether the respondent may use a particular term of an applicable collective employment agreement to change the present work arrangements of the first applicants.

[2] The first applicants work as shunters, primarily at the Port of Lyttleton yard ("the Lyttleton yard") and on the line between Lyttleton and the respondent's main Christchurch shunting yard in the south Christchurch suburb of Middleton ("the Middleton yard"). The two yards are around 15 kilometres apart.

[3] The applicants say that a proposal by the respondent that would require the present three Lyttleton shunters to work under an integrated Christchurch-wide roster, working mostly from the Middleton yard, is outside the terms of their collective agreement. They say this would increase safety hazards and breaches earlier assurances that their "identity" as Lyttleton shunters would be preserved.

[4] They seek a declaration that their identity as Lyttleton shunters is a term of employment which should not be changed without their express agreement; compensation for distress caused by the dispute over this issue; and their costs.

[5] The respondent ("Toll") says a change of hours clause and an agreed operations manual entitles it to require the first applicants to work under an integrated roster, that it has followed agreed consultation procedures in changing rosters, and that earlier arrangements with the first applicants do not preclude further changes of hours and work requirements now. It denies that work in the two yards is different or that the change of work location is significant. It seeks dismissal of the applicants' claims.

Investigation

[6] This matter was not resolved in mediation and required investigation. Witness statements were provided by each of the first applicants, Toll's Lyttleton team leader Ian Wilkie, Toll's Christchurch Rail Manager Richard Priddle and a Middleton shunter, Greg Burgess. Each of these men attended the investigation meeting and answered questions along with the following witnesses who gave sworn oral evidence only: Bruce Cronin of the Rail and Maritime Transport Union ("RMTU"), Toll's South Island Regional Manager Craig Nelson, and Toll's National Resource Manager Paul Ashton. Counsel spoke to written submissions at the close of the meeting.

The facts

[7] The first applicants are employed under the terms of a collective agreement between the respondent and the second applicant, their union. The agreement, running from 2005 to 2008, is expressed as setting out "the general terms and conditions of employment to provide a foundation for [the employment] relationship" (clause 1.3). It also incorporates the provisions of the Rail Operating Manual, a compilation of agreements on various issues as amended from time to time through a joint employer-union council or at collective agreement negotiations (clause 15.5).

[8] Each of three men have worked for Toll (or its predecessors) at Lyttleton for a number of years – Mr Watson for 24 years; Mr McLean for 23 years and Mr Melief for seven years.

[9] They are each employed as a Remote Control Operator ("RCO"), a job title describing the technology now used in railway marshalling yards to control locomotive engines along "roads" (tracks) to make up and break down "rakes" of wagons. The witnesses largely described these positions as shunters and the work as shunting. The shunters work in pairs using a remote control device (to move the engine and wagons) and a radio telephone to keep in touch with their partner and the yard control centre.

[10] The first applicants currently work on a roster described as the "Lyttleton Shunt" or "Port Shunt" roster working either an early shift (from 5am to 1pm) or a late shift (from 12 noon to 8pm). Shunters at the Middleton yard work a night shift. Lyttleton shunters do not.

[11] In April this year Mr Priddle wrote to each of the first applicants advising that the company wanted to integrate the Port Shunt into its Christchurch roster. He said Toll's monitoring of the Port Shunt had found a number of inefficiencies in the operation. It intended to discontinue having "dedicated people" for the port shunt and for their roles to become part of "the main Christchurch shunt roster".

[12] Those letters began a consultation process by the company which gave rise to the present dispute. The company says it is entitled to require the first applicants to work under an integrated roster through the application of an Hours of Work clause in the collective agreement ("clause 11.5") which states:

In setting the planned hours or days, the employer will give you as much notice as possible of a proposal to change them (in any case at least 14 days unless you agree otherwise). It will consult you or the union in accordance with the administrative instructions (e.g. the Rail Operating Manual) applicable to your work area which are developed in consultation with the Union from time to time.

[13] The Rail Operating Manual includes a section headed "Rostering Yard Operating Staff". It states that "[r]osters are to be constructed on the basis of work being performed in a shunting yard and adjacent sidings". The company is entitled to propose a new roster where there are, amongst other things, "variations in shunting yard work loads". Consultation on a proposed roster is required, with provision for a response by the employees' representative within two weeks and a meeting. However the company is given an express right to go ahead and implement a new roster without agreement provided it has provided "sufficient opportunity for consultation". A final new roster must be posted at least 14 days before implementation.

[14] The integrated roster proposed by the company would operate on an 11 week cycle. It would require the first applicants to work nine out of 11 weeks at the Middleton yard. For two weeks in 11 they would work at the Lyttleton yard. They would also be required to work night shifts for two weeks in 11. They would also work on Sundays, a day they would not usually work at present.

[15] The applicants dispute that clause 11.5 and the Rail Operating Manual provisions allow Toll to require the first applicants to work under the integrated roster. They say this breaches both the terms of the collective agreement and a specific undertaking given to them by Mr Priddle in November 2004 that they would continue to maintain their "identity as Lyttleton shunters".

The issues

[16] The issues for resolution in this matter are:

- (i) whether there is a term of the first applicants' employment preserving their identity as Lyttleton shunters, and if so, what does that term mean?
- (ii) Whether the work of Lyttleton and Middleton shunters is different?
- (iii) Whether the collective employment agreement allows the respondent to require the change sought, and whether that is in any way limited by the purported 'identity' term?

Whether there was an 'identity' term

[17] The confirmation of Lyttleton shunters "identity" given by Mr Priddle in November 2004 arose from arrangements made for better use of a DSG shunting engine ("the DSG"). In October 2004 Toll proposed relocating the Lyttleton shunters to the Middleton yard saying the primary reason was that the DSG used at Lyttleton could then be used during the hours it was not needed at Lyttleton – that is during the night shift hours.

[18] The Lyttleton shunters were unhappy with that proposal. In what Mr Priddle describes as a compromise, it was arranged that the Lyttleton shunters would "book on and off" at the Middleton yard. That involved travelling to the Middleton yard at the beginning of each shift to sign in. At the start of each shift the shunters would then take their DSG locomotive (and any wagons consigned to Lyttleton or Woolston, a siding enroute to the Port) and travel to Lyttleton to do their work. At the end of each shift the DSG was to be driven back to the Middleton yard, either for the next shift of Lyttleton shunters to use or to leave it for use by the Middleton night shift.

[19] Under this arrangement each of the three Lyttleton shunters had to travel further to start their working day from the Middleton yard. Two out of the three had to travel sufficient additional distance to qualify for a one-off relocation allowance which they were paid. Otherwise, however, their work remained unchanged but for the arrangement for "booking on" at the Middleton yard.

[20] On that basis I do not accept the applicants' submission that this arrangement – with its confirmation of the Lyttleton shunters' "identity" by Mr Priddle in November 2004 – constituted a new individual term for each of the first applicants. Rather, as the respondent submits, Mr Priddle's statement was confirmation of the previous basis of their employment continuing. Their roster was to continue and they would not be required to work at Middleton. At that point the company did not intend to change that arrangement and it did not. However it cannot reasonably be taken to have waived any rights to make changes as provided for in the collective agreement at any time in the future.

[21] The real issue for the Lyttleton shunters is not whether their job has a particular "identity" but the extent and basis on which their collective agreement allows for the changes to their hours and location of work. Before considering this question, it is

necessary to consider what would be changed by the Lyttleton shunters having to work under an integrated roster – is it just hours, or would changes to the location and work requirements amount to being required to do a different job?

Is the shunting job the same at the two yards?

- [22] The respondent argues that “shunting is shunting”. The first applicants are each certified RCOs and do not require any additional skills or training to work 9 out of 11 weeks at the Middleton yard. It accepts they will need time to develop ‘know how’ about the particular work at Middleton but otherwise the differences between the two jobs are only a change in hours.
- [23] The applicants’ argue that the work environment is significantly different. The Lyttleton yard is a railway head with 10 roads. The Middleton yard is a major rail hub with 42 roads and operates as two yards requiring 42 shunters working in three shifts round the clock, seven days a week. The work at Middleton is described as more intense or pressured with rakes of wagons arriving and having to be broken down and made up for the next stage of their journey according to deadlines in order to meet timetables for freight trains along lines south, west and north from Christchurch.
- [24] While Middleton shunters have some contact with freight forwarders, the Lyttleton shunters have more contact with the representatives of road freight and shipping companies either at the Woolston siding or the Port.
- [25] The Lyttleton shunters are not familiar with the Middleton yard work. While their present roles involve starting and finishing each day at Middleton, they generally do no more in that yard than hook up one or two rakes of wagons already marshalled by the Middleton shunters and haul them to the Port.
- [26] Toll acknowledges that the Port environment is less pressured than working in the Middleton yard. One of the reasons it wants an integrated roster is that this would give all Christchurch shunters the opportunity to work 2 out of 11 weeks at the Port, an area where, in its submission, the workload is lower with more downtime.
- [27] The company also accepts the Lyttleton work as a discrete job. The proposed integrated roster keeps the same level of staffing and hours on Lyttleton shunt work. It accepts it will still need four staff rostered on in each week for the same two early and late shifts at the Port. That work is not proposed to be integrated into daily work done from the Middleton yard.
- [28] On this basis I accept that the applicants’ submission that the change sought by the respondent is more than a change of hours. Rather it is a change in the working environment and requirements of the position which are part of the conditions of employment. While shunters at both the Lyttleton and Middleton yards are employed as RCOs, the location and demands of the job make the positions different.

Change under the collective agreement

- [29] I agree with the applicants’ submission that the terms of the collective agreement and the Rail Operating Manual regarding yard rostering must be construed strictly in respect of the provisions for changes of hours. Otherwise Toll would be able to unilaterally impose what amounts to a change in the conditions of employment in a situation where the hours required to be worked and duties to be carried out at Lyttleton (whether by the first applicants or other Toll shunters) remain unchanged as a result of the integrated roster.
- [30] Such an outcome would not be consistent with the intention of the collective employment agreement as is made clear by other terms relating to changes in work requirements.

- [31] Clause 11.5 refers to changes of hours of work. On its plain meaning it does not provide for changes of work location or type of work. That is, I find on the intention evident from a plain reading of the provisions, because other terms of the collective agreement provide for necessary changes of that type.
- [32] Similarly the terms of section 9 of the Rail Operating Manual expressly provide for rosters to be constructed on the basis of work being performed in a singular shunting yard and adjacent sidings. On its plain meaning it does not provide for rosters to be constructed on the basis of requiring yard staff to move from one yard to another. That is, I find on the intention evident from a plain reading of the provisions, because other terms of the collective agreement provide for necessary changes of that type.
- [33] In discussion at the investigation meeting Mr Harrison helpfully set out three means by which Toll could implement an integrated Christchurch roster if it were not able to do so by application of clause 11.5. These were, firstly, by agreement (which remains open at any stage as a result of consultation and negotiation with the employees on any particular issues of concern); secondly, by application of the redeployment and redundancy provisions of the collective agreement; or, thirdly, by application of the 'change during currency' provisions of the collective agreement.
- [34] My conclusion that the change sought cannot be required under clause 11.5 is strengthened by considering the redeployment and redundancy provision in the collective agreement. It has the standard definition of redundancy as a situation where employment is terminated because the position filled by the employee is or will be superfluous to the needs of the company and no alternatives to termination are available. A Redeployment and Redundancy Schedule to the collective agreement sets out a series of steps on considering alternatives to termination.
- [35] The key step in that Schedule is a requirement that the employer must endeavour to place any worker in a position declared redundant in either alternative employment or provide retraining.
- [36] Alternative employment opportunities are described as suitable if they do not require employees to move their residence, accept lower pay, or perform substantially different duties on a permanent basis and the alternative is within their skills and ability ("Schedule clause 3.2").
- [37] Where alternative employment cannot be offered, the employer is required to offer "redeployment and/or relocation". Where the employer cannot offer alternative employment and the offer of redeployment or relocation is refused, the worker is entitled to redundancy compensation.
- [38] Mr Priddle says that Toll does not want to make the first applicants' positions redundant. However he also identified company concerns over dropping freight volumes through the Port, uncertainty over whether some shipping companies would continue to use the Port and the prospect of seasonalising the shunting work at Lyttleton. The proposal for roster changes put to the first applicants also suggested there were "inefficiencies" in the operation of the Port Shunt.
- [39] If that amount to those positions being superfluous to the needs of the company, that should be addressed through the redundancy and redeployment provisions of the agreement, not clause 11.5 on change of hours. As Mr Harrison correctly submitted the law recognises the right of Toll to manage its business subject to its express contractual obligations. It must have the flexibility in order to do so and this is clearly recognised in the redundancy and redeployment terms negotiated.
- [40] If Toll opts to disestablish the Port Shunt positions for reasons of redundancy, it would need to make its case through the consultation requirements in the collective

agreement. If the present Lyttleton shunters' positions were decided to be redundant, the first applicants would have the benefit of the criteria for assessing the suitability of alternative employment set in Schedule clause 3.2 if they were offered jobs working from the Middleton yard. Those criteria, I find from a plain reading of the provisions, were intended to give an agreed standard by which to evaluate such changes. That they are not present in clause 11.5 confirms it was not intended for such purposes.

- [41] Toll may also have an additional means of achieving change in work arrangements, the third identified by Mr Harrison. That is the provision in clause 15.2 to allow changes in its terms during the currency of the collective agreement. A detailed procedure requires agreement between the employer, the union and any directly affected employees. Proposed changes may not be implemented unless at least 70 per cent of the employees directly affected agree to them. I do not make any finding as to whether Toll's proposal for an integrated roster could be achieved through that procedure but simply note that it confirms my view that the collective agreement provides for changes in wider work arrangements through terms other than clause 11.5 on changes of hours.

Determination

- [42] For the foregoing reasons I find that the applicants are entitled to a declaration on the application of clause 11.5 to the proposal by Toll for the introduction of an integrated Christchurch roster. It is that the first applicants cannot be required by the terms of clause 11.5 of the collective agreement to work under the integrated Christchurch roster proposed by Toll.
- [43] In light of the conclusion reached and the declaration made, I do not find it necessary to consider the somewhat technical estoppel and unjustified disadvantage arguments also advanced by the applicants, or the issue of whether the proposed roster change would expose the first applicants to additional health and safety hazards.
- [44] Similarly I have not found it necessary to consider further the respondent's argument regarding the 'relocation cases'. If those were to apply, it would be to any issue as to whether employees could be required to relocate under the provisions of the agreed Redeployment and Redundancy Schedule, not clause 11.5 which I have found does not allow for what would amount to 'relocation' in this case.

Other remedies

- [45] The first applicants have also sought compensation for distress caused by what they say was the respondent's actions in "effecting its unilateral decision and its refusal to take part in the legitimate statutory process for the resolution of such matters". They seek \$10,000 each or such other sums as the Authority considers appropriate. In closing submissions they say the distress has arisen from facing the anxiety of losing their identity and their working environment. Each gave evidence of being upset both by the prospect of a roster change and this dispute.
- [46] The respondent says that this matter is really a "dispute of rights" regarding the interpretation and operation of an employment agreement. As such the remedy is limited to a declaration on the application of 11.5. I accept that submission. Although the respondent may technically have breached the employment agreement by using the consultation provisions of clause 11.5 to consult on a change to hours which it has been found not entitled to make by that means, the proposed integrated roster has not been implemented. Rather the proposal was put on hold awaiting this determination. The respondent did attend mediation prior to investigation in an attempt to resolve the dispute.
- [47] This dispute has no doubt been distressing for the three first applicants. They were clearly upset about what they saw as the prospect of substantial changes to their

working lives. However it was clear from their evidence that they remain proud of their jobs and the work they do and have had the support of their union representatives throughout. While no-one's working life is immune from the prospect of change, for the moment, they have the benefit of vindication of their view of the application of clause 11.5.

[48] In these circumstances I make no order for compensation for distress.

Costs

[49] Costs are reserved. The parties are encouraged to agree any costs issues between themselves. If they are unable to do so, leave is reserved for either party to apply to the Authority for a determination as to costs in this matter.

Robin Arthur
Member of Employment Relations Authority