Determination Number: AA 2/07
File Number: 5050309

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE**

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| **BETWEEN** | CSR Building Products (NZ) Limited |
| **AND** | Northern Amalgamated Workers Union Inc |
| **REPRESENTATIVES** | Parvez Akbar for Applicant<br>Simon Mitchell for Respondent |
| **MEMBER OF AUTHORITY** | Y S Oldfield |
| **INVESTIGATION MEETING** | 22 November 2006 |
| **DATE OF DETERMINATION** | 8 January 2007 |

# DETERMINATION OF THE AUTHORITY

## Employment Relationship Problem

[1] The applicant, CSR Building Products Limited (CSR), is the largest clay brick manufacturer in the country and its New Lynn plant employs of total of 44 staff. The plant currently runs a 12 hour four day on/four day off day roster but is not meeting production requirements. To enable it do so, CSR wishes to change to a 24 hour operation and to place current employees on rotating day and night shifts. It first proposed this to the respondent union, the Northern Amalgamated Workers Union, in March 2006 and has since put up successive proposals for alternative roster arrangements. However the union will not agree to the changes. It says that the collective agreement between the parties[1] cannot accommodate rotating rosters. In addition it says that most existing staff (who were employed to work days only and in many cases have been doing so for years) cannot be required to start working night shifts without their agreement.

[2] The company has come to the Authority asking that it resolve the issue of the proper interpretation of the relevant provision, clause 7 of the collective agreement. CSR would like the Authority to make a declaration that:

*"clause 7 of the collective agreement enables the company to require the factory employees to work rotating rosters without obtaining their consent."*

## Issues for determination

[3] As I advised the parties during my investigation, I saw it as appropriate to deal with this employment relationship problem in two parts:

i. whether the collective agreement provides for or can accommodate rotating rosters;
ii. if it does, whether individual employees can be required to change to a rotating roster.

The MonierBrick New Lynn Clay Brick and Paver Plant Agreement for the term from 1 April 2006 to 31 March 2008.

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[1] The MonierBrick New Lynn Clay Brick and Paver Plant Agreement for the term from 1 April 2006 to 31 March 2008.

## (i) What does the collective agreement provide for?

[4] The relevant term of the agreement, Clause 7, reads as follows:

*"7.1 Rosters may be worked as required by the employer.*

*7.2 In order to spread production work loads evenly over the seven days of a week in line with the requirements (push rate) of the continuous Tunnel Kiln operation a roster of four days on and four days off shall apply as follows:*

| | *Week* | *Week* | *Week* | *Week* | *Week* | *Week* | *Week* | *Week* |
|---|---|---|---|---|---|---|---|---|
| *Days of Week* | *1* | *2* | *3* | *4* | *5* | *6* | *7* | *8* |
| *Monday* | *W* | *O* | *O* | *O* | *O* | *W* | *W* | *W* |
| *Tuesday* | *W* | *W* | *O* | *O* | *O* | *O* | *W* | *W* |
| *Wednesday* | *W* | *W* | *W* | *O* | *O* | *O* | *O* | *W* |
| *Thursday* | *W* | *W* | *W* | *W* | *O* | *O* | *O* | *O* |
| *Friday* | *O* | *W* | *W* | *W* | *W* | *O* | *O* | *O* |
| *Saturday* | *O* | *O* | *W* | *W* | *W* | *W* | *O* | *O* |
| *Sunday* | *O* | *O* | *O* | *W* | *W* | *W* | *W* | *O* |
| | | | | | | | | |

*W=work O=off*

*7.3 Hours of Work –*

*The ordinary time hours of work shall be in accordance with the following:*

*(i) 12 hours per roster, 4 days on, 4 days off.*

*(A) Day roster to commence at*
*(i) 5.00am and finish at 5.00pm (inclusive of half hour meal break)*
*(ii) 7.00am and finish at 7.00pm (inclusive of half hour meal break)*
*(iii) 9.00am and finish at 9.00pm (inclusive of half hour meal break)*

*(B) Evening roster to commence at 7.00pm and finish at 7.00am (inclusive of half hour meal break).*

[5] Union members at the plant currently work a 12 hour four day on four day off 'Day roster' in the pattern set out at 7.2. They have done so for at least ten years. Witnesses for both parties told me that they understood that previously, during the building boom of the nineteen eighties, the plant had run a 24 hour operation with a rotating roster. They did not know the form of the contractual provisions which applied at that time. As far as they were aware, Clause 7 has had its current form in successive collective agreements during the time the current roster pattern has been in place.

[6] The union's position is that the company may require staff to work shifts but may do so only on a four on/four off roster in this pattern. The union does not dispute the company's ability to place employees on an evening roster (per clause 7.2(B)) instead of the day roster which is currently in place (per clause 7.2 (A)) provided it complies with this pattern. There is currently no evening shift operating. For health and safety reasons CSR's parent company does not consider it advisable for staff to work a permanent night shift and has rejected this option. In addition difficulties are anticipated in recruiting a permanent night shift. At present day workers cover some evening work as overtime where this is necessary.

*[7]* For the company, Mr Akbar has noted that rosters: "*may be worked as required by the employer*" (7.1) and that it is recognised that there is a need to "*spread production work loads evenly over the seven days of the week"* (7.2). CSR claims that this wording indicates that clause 7 is intended to give the company the flexibility to require the employees to work rosters as the need requires, given the nature of the industry, and enables the company to require the factory employees to work rotating shifts. He submits:

*"8. The evening roster in clause 7.3(i) is not provided as an alternative but is part of the ordinary time hours of work for rostered workers working 12 hours per roster…*

*…the plain and natural meaning of the words used throughout clause 7 clearly establishes the Applicant's right to require employees currently working 12 hour four day on four day off rosters to work an evening roster as well.*

*…the provision enables the Applicant to require the relevant employees to work the evening roster within the four day on for [*sic*] day off roster pattern provided for in clause 7.2 of the CEA.*

*11. The pattern provided for in clause 7.2 of the CEA does not prevent the introduction of an evening roster so as to enable a rotation of day and evening rosters within the pattern provided. The roster pattern makes no reference to it being worked as a day roster. On the contrary clause 7.3 confirms that* 'ordinary time hours of work' *include an evening roster."*

[8] The company submits that reading clause 7 of the CEA as it interprets it accords with business common sense because of the need, in a manufacturing industry, to run a 24 hour operation. In reliance on the clause it has invested heavily in the plant to increase capacity. Now it urgently needs to increase production to match. It proposes two shifts, 7.00am to 7.00pm and 7.00pm to 7.00am, with no overlap. It plans to rotate half and full shifts, with full shifts completing maintenance work as well as running the plant. The proposed pattern will be four days on followed by 84 hours off and then four nights on, followed by 108 hours off. Over a complete eight week cycle the total hours worked, and hours off, will be the same as under the pattern in clause 7.2. The company has also noted that it is prepared to discuss and consider alternative rotating roster patterns as well as the one proposed.

[9] The union agrees that rosters may be worked as required but only as set out in 7.2. It says that the options at 7.3(i) (A) and (B) are exclusive of each other. It disputes that employees can be placed on a roster pattern working both days and evenings on a rotating basis. It says that a rotating roster which mixes evening and day shifts cannot be made to fit the pattern in clause 7.2 and so is outside the scope of the agreement. Whether or not the hours worked balance out at the end of an 8 week cycle does not matter, as Mr Mitchell explained in a written submission:

*"…in order to work rosters including both days and nights, the pattern of work providing for four days on, four days off, breaks down. Employees must then work four days on, either have three or five days off, then work four days…*

*17. The Applicant's interpretation of the agreement fails to provide employees with a full four days off as is clearly indicated by clause 7.2 of the Agreement.*

*18. It is submitted that the pattern at 7.2 is a roster arrangement that provides for either day or night rosters.*

*19. Therefore, it is submitted that the interpretation of the agreement proposed by the Applicant is clearly contrary to the terms of Clause 7.2."*

[10] I asked both parties for their comments on the fact that clause 7.2 refers to day/evening **rosters**.[2] The union argues that this is a key distinction. In the union's submission the clause is dealing with rosters and not shifts. The company, on the other hand, asserted that where appropriate "roster" must be read as "shift."

Determination

*[11]* Both parties have referred me to the decision of Judge Colgan, as he then was, in *Chief Executive Officer of the Department of Corrections v Corrections Association of New Zealand, [2005] 1 ERNZ 984.* The key principles for interpretation of employment agreements are set out there at paragraph [15] as follows:

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[2] Elsewhere, the agreement uses the term 'shift' as in clause 6.2 which includes the phrase "*to accommodate specific shift operations*" and clause 9.7 which sets out provisions for meal money for "*Shift workers."*

- *"Agreements are interpreted with reference to their factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question.*
- *One considers, first, the words used – they must obviously be a starting point – and then the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words.*
- *The Court is required to adopt an objective approach to interpretation: what matters is not what the parties say they intended the words to mean but what a reasonable person in the field, knowing all the background, would take them to mean.*
- *Evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier drafts.*
- *Evidence of relevant conduct of the parties after the contract came into existence may sometimes assist in interpreting it, at least in the case of employment agreements.*
- *Interpretation of an employment agreement should not be narrowly literal but should accord with business common sense: the "business" in this case is that of employment relations in prisons. The interpretation should fulfil the purpose of the agreement and be based not simply on dictionary meanings or grammar. Even if the drafting is inept, the Court should attempt to give effect to the underlying intent. If a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find an interpretation that satisfied business common sense and fulfils the parties' purpose.*
- *Nevertheless if the words are clear and can have only one possible meaning that should generally determine the matter. The Court will need to be very sure of what business commonsense requires when interpreting a contract if that does not accord with the clear words."*

[12] The question for determination is therefore what a reasonable person in the field, knowing all the background, and in accord with business common sense, would take the words of clause 7 to mean.

[13] Clause 7.2 provides that "*a roster of four days on and four days off shall apply as follows*" and sets out an 8 week roster. On a literal interpretation, these words do not permit of alternative rosters: one roster only is set out and it "shall" apply. Also on a literal interpretation, four days means four full days (96 hours) off. If the words of the provision are interpreted literally, therefore, the proposed rotating roster (with "off" periods of three and a half or four and a half days in turn) will not fit.

[14] The drafting of clause 7.2 is not inept or problematic in any way. The words of clause 7 (taken in its entirety) are clear and can have only one possible meaning. That interpretation, and the pattern of work provided for, do not give rise to nonsense in practice (the parties having applied them successfully for ten years or more) and are consistent with the express purpose of the provision: to "*to spread production evenly over 7 days.*"

[15] Generally, this much should determine the matter. However, as noted in the final bullet point of the passage quoted above, if we were *"very sure"* that business commonsense required an interpretation that did not *"accord with the clear words"*, such an interpretation might apply. Can this be said to be the case here?

[16] The "business" of an employment agreement relates to the bargain between the parties to it; just as the business of the contract at issue in *Department of Corrections* (above) was described there as "*employment relations in prisons*." In this case, the business is employment relations in a brick factory. Relevant background is the fact that the applicant is engaged in manufacturing for the building industry (currently experiencing high demand.) The company also says that 24 hour operation (which is normal practice in this sector and necessary to meet demand) can only be achieved by means of a rotating roster. The proposition that 24 hour operation is necessary and normal was supported by undisputed evidence, and is accepted. However I do not accept that 24 hour operation can be met only by means of a rotating roster. The company has put forward good reasons for preferring not to run permanent night shifts but such shifts are clearly permitted by the agreement and provide an alternative (albeit less desirable) means by which to run a 24 hour operation.

[17] Nothing in these circumstances requires modification of the natural meaning of the words in question. The express purpose of the clause can be met without a rotating roster. There is

no need to look further for underlying intent. The literal meaning of clause 7 accords with employment relations common sense, in the context of a brick factory.

## Can employees be required to move to rotating rosters without their consent?

[18] The conclusion I have already reached renders the answer to this question superfluous but for completeness I record my determination on this point also.

[19] Approximately ten workers are affected by this question[3]. They have worked only day shifts for years (most of them, in fact, throughout their employment.) The union has argued that the current roster is clear and predictable. It provides an ongoing pattern which enables employees to make arrangements for family and social engagements weeks ahead. It says that the Applicant now seeks to disrupt that roster by providing for a pattern of work that is changeable, providing for both day and night rosters. It says that the employees have never agreed to any such arrangement and will find it disruptive to their lives and sleeping patterns.

[20] The company does not accept that its proposal is changeable or unpredictable. Company witnesses, New Zealand General Manager Hamish Aitken and Operations Manager Alan Draisey told me that they did not believe the introduction of rotating rosters would be oppressive and that it was something that should have been envisaged by employees working in the industry. It proposes to give no less than two months notice of the introduction of rotating rosters and to publish rosters on an annual basis.

Determination

[21] Although covered by a collective employment agreement, each of the employees involved in this matter has nonetheless entered into a contract of employment as an individual, with fixed hours of work a feature of his or her personal terms of employment. Unless the collective agreement specifically provided otherwise, the consent of each of them would be required for any change to those terms. The collective agreement does not expressly provide the employer with the discretion to vary individual hours of work without agreement.

[22] Whether or not the CEA could accommodate rotating rosters, the consent of the workers affected would be required to change their hours of work.

## Summary

[23] Clause 7 of the collective agreement does not enable the company to require the factory employees to work rotating rosters without their consent. The declaration sought by the applicant is declined.

## Costs

[24] At this stage I leave it to the parties to discuss this issue between themselves. Should either party wish the Authority to determine it, it should advise of this no later than 28 days after the date of this determination.

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[1] [3] For rotating rosters to be introduced the optimum staffing level would be 30. Current production staff number 23, all union members, of whom 9 have been employed recently on the basis that they are prepared to work rotating rosters. (It is proposed to recruit further staff to cope with increased production.) The company has acknowledged that some staff will have genuine medical reasons for declining to work rotating rosters. So far it knows of four in this category.

Y S Oldfield
Member of Employment Relations Authority