

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 160/07
File Number: 5101498

BETWEEN SEALED AIR (NEW ZEALAND)
 LIMITED
 Applicant

AND NEW ZEALAND AMALGAMATED
 ENGINEERING PRINTING AND
 MANUFACTURING UNION INC
 Respondent

Member of Authority: G J Wood

Representatives: John Murdoch for Applicant
 Tony Wilton for Respondent

Investigation Meeting: By way of submissions received by 3 December 2007

Determination: 6 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Sealed Air) is in dispute with the respondent, the New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc (the EPMU) over whether or not their collective employment agreement allows Sealed Air to require EPMU member staff to take meal breaks on a staggered basis in order to improve production.

[2] The matter has been accorded urgency because Sealed Air claims that the failure to be able to implement this change is costing it over \$20,000 per month.

[3] For its part, the EPMU and its union members wish to continue to take their lunch breaks at the same time as they have done for many years.

[4] The sole issue before the Authority is whether or not the collective employment agreement and its appendices (and in particular the appendix which applies to the shift

workers in question) allows the employer to insist on working hours such that EPMU members are unable to all take their lunch breaks at the same time. This can be regarded as a classic example of what used to be known as a dispute of right and has been so dealt with by the parties, with Sealed Air properly having agreed not to implement the changes it wants unilaterally.

[5] In effect, while the workers are all covered by the Sealed Air (NZ) Porirua Plant Collective Employment Agreement, key parts of their terms and conditions of employment are contained in the annualised hours variation which is appended to the collective employment agreement.

[6] The issue for determination is whether or not clause 7 of the collective employment agreement relating to breaks and refreshments applies to workers covered by the annualised hours variation or not. If so, then the employees are entitled to a 30 minute unpaid rest period each day and the time and method of allocation of that period is to be agreed between the employer and the employees concerned. If, however, this section does not apply, then under the annualised hours variation the workers are committed to making themselves available to work such hours as are required by the employer.

[7] In the collective employment agreement Clause 3 deals with hours of work for 40 hours a week workers. Shifts are provided for as and when required by the employer in clause 4, but so far as possible they must be arranged in accordance with the wishes of the workers concerned. Such shift workers are to be afforded a reasonable opportunity to take a half hour paid meal break subject to the needs of the particular operation and the employer can require that machinery be kept fully working and production not be impeded. Ordinary hours are not to exceed 40 hours in any one week over a maximum of five of seven days and are to be fixed by roster. Clause 5 deals with overtime. Clause 6 deals with meal allowances. Clause 7 deals with breaks and refreshments. It provides for a 30 minute unpaid rest period, the time and method of allocation of which is to be agreed by the relevant employees and the employer. Clause 12 deals with statutory holidays. Clause 13 deals with annual holidays.

[8] The variation agreement, described as a Memorandum of Agreement, deals only with the workers named in the schedule, but all the workers affected by this dispute are named. The purpose of the variation is as follows:

The aim of this agreement is to enhance the productivity of the company and the job satisfaction and security of its employees. It is a fundamental principle of this agreement that employees who are a party to this variation agree to work all reasonable hours (including call backs) as required by the company and to take increased responsibility for organising and conducting manufacturing processes to match the business needs.

In turn employees who are parties to this variation will receive an all inclusive annual salary for a specified period and best endeavours shall be made to ensure flexible working arrangements to suit each individual employee as much as is reasonably possible within the constraints of the business needs.

[9] The memorandum provides for a formula for annualised hours, which is a method of calculating working hours on an annual basis, whereby each year is broken up into weeks on roster and weeks off roster, with 42 hours being the average weekly hours worked while on roster and 40 hours when off roster.

[10] Clause 5 of the memorandum sets out the agreement clauses affected by the introduction of this variation:

All of clause 3 hours of work – not applicable

All of clause 4 shifts – not applicable

All of clause 5 overtime – not applicable

All of clause 6 meal allowance – not applicable

All of clause 12 statutory holidays (except 12.1 and 12.1.1) - not applicable.

Subclause 13.1 annual holidays – not applicable

[11] Hours of work are set out in clause 6 of the variation as follows:

Workers party to this variation agree that they shall work such reasonable hours as are required by the employer and perform any and all duties that fall within the general scope of their job description, to the employer's satisfaction.

Roster patterns and daily hours will be worked as or when required by the employer, and, so far as is possible, be arranged in accordance with the wishes of the workers.

The parties are committed to undertaking the best planning possible, in order to manage the system and so that it meets the parties' needs. Managers in each department shall therefore consult with the delegates and staff when developing the roster plan for the salary year. This shall include discussion on options around the number of staff, hours available/required throughout the year, crew make up options, and related decisions around what number of additional positions, permanent and temporary, will be used.

The finalised plan should identify the forecast total contractual hours for the year and the staffing requirements that have been identified. The plan should also identify the requirements for cover days, and as much detail as possible about how these fall, taking personal circumstances into account as far as practicable

...

Workers may be required to work up to 12 hours per day without any additional payment over and above their agreed salary hourly rate.

All time in excess of 12 hours in any one day, or more than 420 hours over the eight week roster cycle, or more than 72 hours over consecutive days shall be treated as falling outside of the total contractual hours and are only to be done by agreement between the employee and employer. If agreement is reached these additional hours outside of the contracted hours shall be paid at the rate of 1.25 times the salary rate in the pay period immediately following the work. The parties shall endeavour to avoid employees working 72 hours over consecutive days

...

There is a fundamental commitment made by all workers who are party to this agreement that they will make themselves available to work such hours as are required by the employer. It is understood that this commitment includes all call back situations with or without the required notice.

[12] The memorandum also deals with changing patterns of work. It states:

At a time when it is necessary to change work patterns (ie: 4 x 12 hours, 5 x 8 hours) it is important that employees are given the chance to adjust to the change of hours and patterns and also important that the company is able to meet customer requirements.

[13] Clause 8 of the memorandum deals with agreed salary levels:

It is agreed that all workers party to this variation shall include an all inclusive salary in recognition of the flexibility given the company regarding hours of work, as well as the duties, responsibilities and working conditions that the workers may encounter in the performance of their work. Annual salaries, contractual hours and paid hours for each department are as detailed in the Schedules of this variation.

The Law

[14] In determining disputes over the meaning of employment agreements it is important not to take into account disputed views by the parties about what they meant when agreeing to a certain clause or clauses. As was stated in *ASTE Te Hau Takitini O Aotearoa Inc v. Hampton, Chief Executive Bay of Plenty Polytechnic* [2002] 1 ERNZ 491, at paragraphs 20 and 24:

The Court is required to adopt an objective approach to interpretation...a final written agreement supersedes the negotiations...

... if the words are clear and can only have one possible meaning, that should generally determine the matter. The Court will need to be very sure of what business common sense requires before so interpreting a contract if that does not accord with the clear words...It is necessary to be careful not to treat as the commercial purpose of the agreement what seems to the Court to be the decent thing to do. It is not the Court's task to re-write an agreement.

Determination

[15] This matter falls to be determined on whether or not the fact that the variation does not specifically mention the non-applicability of clause 7 overrides the provision in clause 7, which states that shift workers are not entitled to the 50 minutes rest period in each ordinary day's work that other employees are.

[16] Mr Wilton submitted on behalf of the EPMU that the exemption for shift workers in clause 7 is a lacuna, but if there is a lacuna here it would be more apt to describe the absence of the exemption of application of clause 7 in the variation as one. However the problem is described, the two sections can not be read together without conflict, according to the parties. I determine, however, that when assessing this matter one must go back to first principles. Here it is clear that the collective employment agreement stands on its own and the variation is subject to the terms of the agreement, unless otherwise stated in the variation, or it is a necessary implication of the terms of the variation that a certain part of the agreement was not meant to apply.

[17] The agreement provides for shift workers under clause 4. That there appear to be no shift workers currently employed by Sealed Air under clause 4 is not relevant for the interpretation of the agreement, however. Therefore, where in clause 7 of the agreement it states that employees other than shift workers shall be provided with

certain rest periods, which means that all employees other than shift workers under clause 4 obtain that benefit. The workers covered by the variation in fact work as a mixture of annualised hours basis calculated on the basis of the number of weeks on roster and the number of weeks off roster. There is no reference to those workers being shift workers, even though they do have to work rosters. I conclude that the EPMU members are not shift workers as defined in the agreement because clause 4 (the shifts clause) is explicitly excluded from application to the variation.

[18] As stated above, the variation is a code in itself which overrides the collective employment agreement, but only to the extent agreed explicitly or implicitly by the parties. The parties have clearly agreed that the exemptions as set out in the variation agreement, namely hours of work, shifts, overtime, meal allowance, some statutory holiday provisions and annual holidays provisions, apply. No exemption is made in the variation, however, for clause 7 (breaks and refreshments) of the agreement. If the parties had wished to do so they could have stated that clause 7 of the agreement was not applicable.

[19] Finally, I refer to the surrounding circumstances, including the overall intent of the agreement, to determine whether any modification to the most natural meaning of the words is required. I accept that the parties wanted the employer to have a great deal of flexibility in setting the hours of work. I conclude, however, that there is nothing in the agreement that would derogate from the right of employees on annualised hours covered by the variation to have 50 minutes rest per day, inclusive of a 30 minutes unpaid rest period, under the collective employment agreement. Workers can work flexibly, including on call back as required, without needing to forego rest periods, which are important in their own right for health and safety purposes.

[20] It therefore follows that Sealed Air can not rely on the terms and conditions of the variation to override the rights the EPMU members have for breaks and refreshments. There is no exemption under clause 7.1 of the collective employment agreement because workers are classified under the variation, not as shift workers under the agreement.

[21] Clearly under clause 7.2 the time and method of allocation of the break period shall be agreed between the employer and the employees concerned. In this case the employees are refusing to agree to the employer's wish to stagger their meal breaks and are entitled to so refuse because their agreement is required.

[22] I therefore dismiss the applicant's claim.

Costs

[23] Costs are reserved.

G J Wood
Member of the Employment Relations Authority