

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 114/09  
5096123

BETWEEN NEW ZEALAND  
AMALGAMATED  
ENGINEERING PRINTING  
AND MANUFACTURING  
UNION  
First Applicant

BARRY GIBSON-SMITH  
Second Applicant

AND FONTERRA COOPERATIVE  
GROUP LIMITED  
Respondent

Member of Authority: Paul Montgomery

Representatives: Tony Wilton, Counsel for Applicant  
John Rooney, Counsel for Respondent

Investigation Meeting: 17 April 2009 at Invercargill

Submissions received: 1 and 8 May 2009 from Applicant  
1 and 8 May 2009 from Respondent

Determination: 24 July 2009

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**DETERMINATION OF THE AUTHORITY**

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[1] The matter is a dispute regarding the interpretation and application of a collective employment agreement, specifically over the applicability of a qualification payment to Mr Gibson-Smith who is employed by the respondent as a maintenance fitter at the Edendale plant.

[2] The Union and Fonterra are parties to a Collective Employment Agreement (CEA) while Mr Gibson-Smith is a member of the Union and is covered by the agreement.

[3] At the heart of the matter is whether, under the CEA, the applicant is entitled to a qualification payment. The relevant clause reads:

3.2 ***SERVICE AND QUALIFICATIONS***

*The following service and qualification payments shall apply*

...

- *Dual Trade, Trade Cert plus First Class Boiler Cert or National Cert in Energy and Chemical Plant (EMCHEM/Boiler Operation), Trade Cert plus Third Marine Certificate (where relevant) ... \$2090pa.*

[4] At all material times, Mr Gibson-Smith has held both a trade certificate in mechanical engineering and the EMCHEM/Boiler Operation qualification (EMCHEM IV). The applicant says he was offered the opportunity to obtain the EMCHEM IV qualification by the company and it supported him while he completed it. The company has declined to pay the allowance as Mr Gibson-Smith is employed in maintaining high pressure steam reticulation systems and is not involved in operating the systems, and Fonterra says the qualification is not relevant to the work the applicant performs.

[5] The parties have tried to resolve the dispute but have been unable to do so.

**Primary elements**

[6] There are two elements to this dispute. The first relates to the words *where relevant* in clause 3.2 of the CEA, while the second is whether, in exercising its discretion as to whether the payment was to be made to the second applicant, the respondent acted in a principled manner and in good faith.

**The parties' positions**

[7] The Union's view is EMCHEM IV assists the second applicant in his maintenance duties as he has a fuller understanding of the operational requirements of the system. Further, it says the company is incorrect in interpreting *relevant* as meaning *necessary*. The Union takes the view that, while deciding whether a qualification is *relevant* may require Fonterra to exercise discretion, that discretion must be exercised in a principled manner and in good faith. It says, in Mr Gibson-Smith's case, discretion has not been exercised properly nor in good faith.

[8] Fonterra says it has applied the discretion correctly in deciding EMCHEM IV is not relevant to the current work performed by Mr Gibson-Smith. Its view is

EMCHEM IV is an operating qualification and is not relevant to a maintenance role. Furthermore, it says that Mr Gibson-Smith has declined to undertake duties relating to boiler operation when he has been offered them. It makes the further point, in relation to the Edendale site, that the operation of high pressure boiler equipment is a specific responsibility of the Shift Engineer. While EMCHEM IV is relevant to the duties of the Shift Engineer, a training period of six months is required to establish an employee's competence to operate the specific equipment in the Edendale energy centre.

[9] The respondent says it agrees EMCHEM IV would be relevant to Mr Gibson-Smith's role if he was required to or agreed to undertake duties involving the operation of boilers. It says it offered Mr Gibson-Smith an opportunity to apply for a vacancy in the Utilities area where EMCHEM IV is relevant to the role and a dual qualification payment applies. The offer was not accepted and other vacancies in Utilities have arisen since September 2007 and Mr Gibson-Smith has applied for none of them.

[10] The issue is somewhat complicated by the evidence of Mr Gibson-Smith who says he first approached Bob Smillie, the then Engineering Manager at Edendale, whom he says was *totally in support of me getting the allowance ... however, he was overruled by the site manager.*

### **The investigation meeting**

[11] The investigation meeting was bordering on the genial, as despite the differences, there was good humour between the parties at the table. For the applicant, evidence was provided by Mr Gibson-Smith; Mr Smillie; Mr Fell, a Team Leader and National Convenor of the Union's Fonterra delegates; and Mr Tim Snow, a Maintenance Electrician at Edendale.

[12] Evidence for the respondent was provided by Mr Kingsbury, the Edendale Maintenance Coordinator; Mr Mason, the Edendale Hub Operations Manager; Mr Pepperell, Fonterra's Employment Relations Lead; and Mr Lowe, the National Utilities Manager for the company.

[13] The Authority appreciated the straightforward approach of all witnesses and their ability to focus on the issues. The professionalism of both Mr Wilton and

Mr Rooney significantly contributed to the on-point addressing of the matters in hand and their respective submissions were consistent with that approach.

### **Analysis and discussion**

[14] The question of whether the EMCHEM IV certificate is relevant to the tasks of maintenance of the high pressure steam generating and reticulation equipment is a question of degree. It cannot be said to be essential, otherwise all maintenance fitters at the Edendale site involved in this type of work would require this certificate.

[15] I am of the view, having heard and considered the evidence before the Authority, that the certificate has provided the second applicant with a deeper understanding of the operational aspects of boilers and also the essential skill to operate such a system. I classify that understanding brought as a result of completing the certificate as potentially useful but not directly relevant to Mr Gibson-Smith's employment in a maintenance fitter's role.

[16] There was no objective evidence before the Authority that Mr Gibson-Smith, by reason of the qualification, performs his duties more effectively, more safely and more efficiently than other maintenance fitters engaged in maintaining the high pressure systems at Edendale.

[17] The inclusion of the rider *where relevant* in clause 3.2 requires an open and objective analysis of the individual's tasks in the plant and whether those tasks give rise to an entitlement to a qualification payment for a certificate held.

[18] Turning to that analysis and how the respondent evaluated Mr Gibson-Smith's role and then exercised its discretion, it is clear from both the evidence and the email traffic between the relevant managers at the time, that the issue of Mr Gibson-Smith's application for the qualification payment was taken seriously.

[19] On 4 April 2007, Mr Smillie emailed the company's maintenance managers putting before them the request the second applicant had made to him in respect of the payment. The following week, on 12 April 2007, Mr Smillie emailed Mr Mason indicating he had had a limited response on the matter from the national maintenance managers and going on to say:

*I have no problem with the mechanic's trade qualification, and am inclined to agree to payment for the EMCHEM IV qualification, on*

*the clear proviso and without prejudice, that Barry agrees in writing to provide coverage in the energy centre when required (annual leave, sick leave, etc). If he is not prepared to do this, or feels he does not have the related experience, then I don't see any reason we should pay this dual rate he has requested.*

[20] In the earlier email to the maintenance managers, Mr Smillie had stated that he had had advice from a professional assessor that EMCHEM IV is *the equivalent of first class engine driver certificate and third marine certificate, with respect to the operation of boilers and steam raising equipment.*

[21] It seems to me that, at the time and following some nine months of deliberation, Mr Smillie wanted to be able to advise Mr Gibson-Smith the outcome of his application. It is clear that Mr Mason was the final decision-maker but in the light of the information he had received from Mr Smillie, proceeded to make the decision to decline Mr Gibson-Smith's application for the dual trade allowance.

[22] There was very little evidence presented to the Authority on which the first and second applicants were founding the allegation that the company had not exercised its discretion in a principled manner nor that would underpin a claim alleging a lack of good faith in this process. There was a suggestion that the company's refusal to grant the second applicant's application was in some way motivated by pique at his declining to relieve shift engineers after the company had assisted him in gaining the qualification.

[23] Mr Gibson-Smith told the Authority that the shift work involved affected his health and he was unable to carry on in that relieving capacity. I accept that that is so. However, in retiring from the operation of the steam raising equipment on a permanent basis, the company's decision seems entirely logical and consistent with the CEA. Put simply, the payment of the qualifications allowance relating to EMCHEM IV is conditional upon the holder of the certificate operating, not maintaining, the steam raising and reticulation equipment.

### **The determination**

[24] In the light of the discussions set out above, I find:

- The respondent was entitled to determine that the EMCHEM IV qualification held by the second applicant was not relevant to his role as a maintenance fitter on the Edendale site.

- There is no evidence to sustain the allegation that the respondent exercised its discretion with anything apart from a principled approach nor did it contravene the principles of good faith while engaged in that process.

[25] The application is dismissed.

### **Costs**

[26] Costs are reserved. I encourage the parties to attempt to resolve the issue of costs between them. If that is not possible, Mr Rooney is to forward his memorandum on costs and serve it on the first applicant within 14 days of the date of this determination. The first applicant is to have a further 14 days following service of Mr Rooney's memorandum to lodge and serve its memorandum in reply.

Paul Montgomery  
Member of the Employment Relations Authority