

June 2010. To deal with the service delivery issues in the meantime PAL intends to offer fixed term employment to some members of its current established casual workforce for a finite period which will end on 30 June 2010.

[4] On 14 January 2010 PAL advised employees and union representatives at a staff briefing session of its intention and the reasons underlying the decision to appoint employees on fixed term agreements.

[5] The Union considers fixed term agreements are contrary to the provisions of the Collective Agreement which expires on 30 September 2011. The Union claims PAL has breached its obligations of good faith and is in breach of section 66 of the Employment Relations Act (“the Act”). PAL denies the claims.

[6] The issues for determination are:

- Is the engagement of employees on fixed term agreements inconsistent with the collective employment agreements?
- Has PAL breached its obligations of good faith?
- Has PAL breached section 66 of the Act?

The Collective Agreement

[7] The Collective Agreement is made up from a base document and 8 schedules. The Schedules apply to specific groups of employees and are as follows:

- Schedule 1 Stevedoring
- Schedule 2 Axis Fergusson Grandparented Leading Hand
- Schedule 3 Axis Ancillary
- Schedule 4 Axis Pack
- Schedule 5 Axis Rail and Shuttle Stevedoring
- Schedule 6 Road Office
- Schedule 7 Axis Engineering
- Schedule 8 Casual Employees

[8] Employees employed pursuant to the Axis Ancillary Schedule are permanent part time employees. They are guaranteed a minimum of three 8 hour shifts per week.

[9] The Axis Ancillary schedule includes a “click over” clause which is used to identify additional permanent full time stevedoring positions when an excess number of shifts are worked over a twelve month period by Axis Ancillary employees.

[10] Clause 3.3.9 limits the ratio of Axis Ancillary employees that can be employed to 27.5%. Currently there are 29 or 16.95% of employees employed pursuant to the Axis Ancillary Schedule.

[11] In January 2010, eight Axis Ancillary employees were made permanent stevedores in accordance with the “click over” provisions of the Axis Ancillary schedule. The corresponding eight Axis Ancillary vacancies had not been filled as at the date of the investigation meeting.

[12] The collective agreement is silent as to fixed term or temporary employees. It neither prohibits them, nor sets out the terms and conditions under which they may be employed.

[13] The collective agreement does provide for the employment of casual employees. Clause 4 of the Stevedoring Schedule limits the ratio of casual employees to 25% of the total cargo operations workforce for absenteeism.

Is employing Fixed Term Employees inconsistent with the Collective Agreement?

[14] The Employment Relations Act (“the Act”)¹ specifically allows for the engagement of fixed term employees provided the employer has genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in a specific way or at a specified time and has advised the employee of these reasons.

[15] Further, where an applicable collective agreement exists section 61 of the Act is permissive of additional terms and conditions of employment provided such additional terms and conditions are not inconsistent with the collective agreement.

[16] In *NZ Amalgamated Engineering v Energex*² Judge Shaw noted that section 61 was included in Part 6 of the Act which deals with individual employee’s terms and conditions of employment rather than in Part 5 which is about collective agreement. Judge Shaw then sets out the principles applicable to the question of inconsistency:

¹ Section 66.

² [2006] ERNZ 749, para 28.

- The question of inconsistencies between the collective employment agreement and additional terms must be resolved objectively.
- The relevant provisions are to be compared to determine whether they can live together as terms of the employment agreement.
- The definition of inconsistent is that in the Oxford English Dictionary
- Not agreeing in substance, spirit or form; not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous.
- If the additional term is more favourable to the employee than the CEA, there is usually no inconsistency.
- Where there is a true inconsistency and where the two provisions cannot stand together, the CEA must prevail whether the result is perceived as favourable or unfavourable to the employee.

[17] PAL wishes to appoint currently established casual employees who are covered by the collective agreement. It wishes to provide for increased benefits with regard to the type of work to be carried out, guaranteed shifts per week and increased wage rates. In effect the casual employees will be offered all of the benefits of the Axis Ancillary schedule except the service related benefits and the redundancy benefits.

[18] The collective agreement describes the work undertaken by each of the categories of employees. Under the Casual schedule clause 4(a) defines a casual employee as being employed on a daily basis. That it is envisaged by the collective agreement that casual employees will be employed one day at a time is further clarified by the wording in clause 4(b) which specifies starting and finishing time of each engagement and then provides the starting and finishing times of each of the three daily shifts.

[19] If PAL employs employees outside of its current established workforce, the Union argued that the fixed term agreement will establish a new category of employee. The coverage clauses of the collective agreement and its schedules specify the type of work to be carried out and whether the employees covered by the schedule are permanent fulltime, permanent part-time or casual.

[20] However, the evidence from the company is that while casual employees are engaged on a daily basis, during a busy week casual employees may be engaged on consecutive days. This type of engagement would be analogous to the engagement of a casual employee for a short temporary engagement and is of a fixed tenure i.e. a finite period of consecutive days.

[21] I find that the intention of PAL to offer its current casual employees terms and conditions which already exist within the framework of the collective agreement will not result in an inconsistency when reading the collective agreement as a whole. The only term which is additional to the collective agreement is the offer of a fixed term. I find that this is not at variance or incompatible with the collective agreement as the agreement already recognises that short term engagements are valid through its Casual schedule.

[22] One last factor which reinforces my findings in this matter is the fact that in November 2009, the Union, in response to issues raised by PAL relating to service provision, invited PAL to employ previously declared surplus staff (B List) on fixed term agreements for one week. It seems incongruous that it is the Union who is claiming that such fixed term agreements are inconsistent with the collective agreement.

I find that entering into Fixed Term employment agreements is not inconsistent with the Collective Agreement.

Has PAL breached its obligations of good faith?

[23] An employer is required to act in good faith with regard to any matter arising under or in relation to a collective agreement while the agreement is in force³.

[24] The Union claims that if PAL offer fixed term employment agreements it will breach its obligations of good faith in that it will undermine the collective agreement. In submissions the Union highlighted its concern that fixed term employment was contrary to the collective agreement which did not provide for fixed term arrangements but did provide for redundancy for those permanent employees who no longer have any work. Further that fixed term employees will have no security of engagement or the opportunity to become permanent pursuant to the “click over” clause of the Axis Ancillary schedule. The Union submitted that PAL will undermine these benefits if it is entitled to enter into fixed term employment agreements.

[25] For PAL it was submitted that the company had acted in good faith, with honesty and openness throughout with regards to the need for additional resources and the reasons for the fixed term nature of the intended agreements as well as the future possibilities for the company.

³ Employment Relations Act 2000, Section 4(4)(b).

[26] Further PAL submits that it has always been clear with the Union that the reason for the fixed term nature of the agreements is to enable PAL to address a short term issue that has arisen with the business and the need to review its business model.

I find that PAL, at the date of the investigation meeting has not breached its obligations of good faith.

Contended breach of section 66

[27] I agree with the submissions on behalf of PAL that the Union has no standing to bring this claim to the Authority. Currently no fixed term agreements have been entered into. As mentioned earlier in this determination the Act allows terms additional to the collective agreement to be entered into by virtue of section 61 of the Act. This section is notably contained within the part of the Act which deals with individual employment agreements. As the Union are not a party to such agreements it will only be those employees who enter into a fixed term with PAL that will have standing to bring such a claim to the Authority.

Costs

[28] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Ports of Auckland Limited may file and serve a memorandum as to costs within 28 days of the date of this determination with any responses to be lodged within 14 days from receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority