

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 278/10  
5291621

BETWEEN                      NEW ZEALAND DIARY  
   WORKERS UNION TE  
   RUNANGA WAI U INC  
   Applicant

AND                              FONTERRA COOPERATIVE  
   GROUP LIMITED  
   Respondent

Member of Authority:        Marija Urlich

Representatives:            Helen White, Counsel for Applicant  
   Sally Beard, Counsel for Respondent

Investigation Meeting:      26 January 2010

Information and  
Submissions Received:      26 January, 3 and 11 February 2010

Determination:              11 June 2010

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**DETERMINATION OF THE AUTHORITY**

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[1]     The parties to this employment relationship problem are in dispute as to the meaning and application of clause 10 of their employment agreement, the Fonterra Dairy Workers' Collective Agreement 2008 -2011. The dispute has crystallised over the transfer of operations from a site at Pukete Road to London Street, a distance of approximately 6 kilometers.

[2]     The DWU says this transfer of operations triggers clause 10 of the CEA the effect of which is to require Fonterra to convene a consultative committee (clause 10.1.4) and to entitle the affected workers to a disruption allowance (clause 10.3.2).

[3] Fonterra says the transfer does not trigger the clause 10 obligations because this is not a redeployment, relocation or redundancy situation. In the alternative, Fonterra says if the transfer has triggered the clause 10 obligations then all those obligations come into play including the requirement to advertise all alternative jobs.

### **The relevant provisions of the CEA**

[4] Clause 10 of the CEA deals with three situations – redeployment, relocation and redundancy. The clause contemplates these situations arising from the following scenarios:

- (i) changes in the workplace which displace jobs (clause 10.1.3); or
- (ii) changes which substantially affect the terms and conditions of employment to the workers' detriment (clause 10.1.3).

[5] In the event of either scenario the parties have agreed redundancy (that is termination of the employment agreement by way of redundancy) is the last resort and that options for redeployment or relocation must first be exhausted. It is implicit that a redundancy situation must exist before the redeployment and relocation options are triggered. This reflects the legal distinction between a worker's position being declared redundant and a worker's employment being terminated by reason of redundancy.

[6] Redeployment concerns an alternative position *on the same site or factory complex* (clause 10.2.1) and involves the exercise of discretion on the part of the employer. Relocation concerns a worker's election to move to a different site complex.

[7] The agreement provides that a consultative committee must be convened *to oversee the implementation of all redeployment, relocation and/or redundancy issues on any site where displacement of workers seems likely*<sup>1</sup>.

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<sup>1</sup> Clause 10.1.4

[8] The agreement also provides that a disruption allowance is payable *where a worker agrees to move permanently to another site location under the provisions of clause 10<sup>2</sup>*.

[9] The only provision in clause 10 which concerns a worker agreeing to move permanently to another site location is that set out in clause 10.2.3.1 of the CEA:

10.2.3 Where the Company is unable to place any redundant workers in an alternative position by use of the redeployment provisions as set out above, then the Company shall offer them the choice of:

...

10.2.3.1 any alternative employment that the Company may have available on a different site complex and which the worker is competent to perform (or could perform after suitable training); or

...

[10] The clause 10.2.3.1 election (ie the agreement to accept alternative employment on a different site) is triggered by workers being made redundant. This is the clear meaning of the clause.

[11] I have found redeployment and relocation are triggered by a redundancy situation arising. The next question is does the Pukete Road shift amount to a redundancy situation as defined in the cea?

### **Is the Pukete Road shift a redundancy situation?**

[12] There appear to be two definitions of redundancy in clause 10.

#### **(i) the first definition of redundancy**

[13] The first definition is contained in clause 10.4.1 and defines redundancy as a situation where:

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<sup>2</sup> Clause 10.3

- (i) a worker's employment is terminated by reason of the sale or closing down of the whole or part of the Company operations; or
- (ii) by the reorganisation of a factory or site complex where the worker cannot be placed in alternative employment by the Company under either the redeployment or relocation provisions; or, alternatively
- (iii) a worker's terms and conditions of employment are substantially changed to their detriment as a consequence of the need to continually upgrade plant and equipment.

- (i) sale or closing down

[14] The Company operation located at the Pukete Road site has not been sold or closed down. The operation has shifted to London Street. There is no dispute that nothing about the operation has altered other than its location – the jobs remain the same as do reporting lines and numbers of workers.

[15] This situation is not the same as that faced by workers' at Manurewa Woolworths<sup>3</sup> whose work place closed as a consequence of a lease expiry and who were offered transfers to other stores. In that case the Employment Court held the closure of the Manurewa premises was a closure of part of the Company's operation and not a move of supermarket operations.

- (ii) reorganisation

[16] This scenario contemplates a reorganisation of a factory or site complex where effected workers are not able to be redeployed in alternative jobs or do not elect relocation to a job on a different site. This scenario is site specific and not application to the Pukete Road shift.

- (iii) substantial change to terms and conditions of employment

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<sup>3</sup> *General Distributors Limited v National Distribution Union* AK AC 52/07 7 September 2007

[17] If it is accepted that the shift in operation from Pukete Road to London Street is a change to terms and conditions of employment the change cannot be said to be substantial. The information before the Authority was that for 9 affected workers the shift increased their travelling distance between 2 and 5.5 kilometers. There was no evidence that this increase in distance was caused any undue hardship or inconvenience.

**(ii) the second definition of redundancy**

[18] The second definition of redundancy is that set out in clause 10.1.3 which falls in the introductory clauses of clause 10. This definition provides that every endeavour must be made to explore the options short of redundancy where the upgrade of plant and machinery and efficiency measures<sup>4</sup> have *displace[d] the jobs or substantially affect[ed] the terms and conditions of employment of any workers to the workers' detriment...*

[19] I have stated above why I do not believe the Pukete Road shift is a substantial change to terms and conditions. Those findings apply to the application of clause 10.1.3.

[20] Turning to whether the shift has *displace[d] the jobs*. The parties have not defined *displace*. The ordinary dictionary meaning of displace is to shift something or someone from their place with a degree of force. This is not the situation faced by the workers' effected by the Pukete Road shift – they have not lost their jobs, nothing significant has changed as to how those jobs are performed and the shift has not resulted from the kind of organisational upheaval contemplated by the word displace.

**Conclusion**

[21] For the reasons set out above clause 10 of the parties cea does not apply to the Pukete Road shift. The operational shift does not meet the cea definition/s of a redundancy situation which would trigger the clause 10 provisions regarding redeployment, relocation and redundancy and in particular those concerning the consultative committee and disruption allowance.

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<sup>4</sup> Clause 10.1.1

[22] If clause 10 had applied to the Pukete Road site then all the relevant provisions would have come into effect.

### **Costs**

[23] Costs are reserved. The parties are invited to attempt to resolve this issue between them. Given this was a dispute it is likely costs will lie where they fall. However, if the parties are unable to resolve this issue then costs memoranda should be filed and served by 23 June with replies filed by 25 June. Application can be made to vary this timetable.

Marija Urlich

Member of the Employment Relations Authority