

[4] The Union and Fonterra are parties to a 2007 - 2008 collective employment agreement ("the Collective"). Clause 13 of the Collective provides:-

1.1 Objective

The objective of this Collective Agreement is to develop the prosperity of the Company and therefore its workers.

1.2 Intent

1.2.3 The parties believe that such an approach will provide a solid basis for achieving an efficient and competitive business so as to provide a rising standard of living for the workers and a safe and healthy environment to work in, a profitable and expanding business, and customer satisfaction and loyalty.

10. Redeployment and Redundancy

The parties recognise the need for the Company to continually upgrade plant and machinery and employ the most efficient means and methods of production in order to maximise competitiveness.

13.3 Temp Limits

Provided the Union is notified of such on the form prescribed herein and provided there are no more than 10% used on any one site the Company may employ up to 5% of the total contractual hours as temporary short term workers. At the commencement of the salary year the Company will notify the Union in writing of the anticipated total contractual hours to be worked by the permanent workers in that salary year. Four weekly (every second pay period) the Company will notify the Union of the temporary hours that have been used up in that period.

13.4 Temps - Over 33 continuous Weeks

After 33 continuous weeks a temporary worker (except contractors) will be deemed a permanent worker. A temporary worker will not be laid off and replaced by another temporary worker in the same position to circumvent the preceding sentence. For the purpose of this clause the permanent full time work is deemed to be those workers employed pursuant to this Collective Agreement. If a temporary worker is made a permanent then their service shall be deemed to have commenced from their last starting date.

13.5 Special Temps in excess of limits

The Company may employ temporary workers in excess of clause 13.3 above, to accommodate out of their ordinary circumstances, or out of the ordinary market requirements, which includes:

the production of short run products each year,

or to assist it to develop new products,

or add further value to existing products,

or to allow for workers to attend Manufacturing Excellence training or study leave,

to facilitate the transfer between sites of buttermilk, milk permeate, whey permeate, milk retentate, cream etc, during the 12 week flush peak or when milk demands are such that all permanent dairy workers are required to collect milk off farm.

- [6] By letter dated 10 December 2007 Mr Foureur replied to Mr Ritchie materially:-

Fonterra is not using the provisions of clause 13 to reduce the number of full time positions available. It is important to note that we do not operate a "manning scale" and as such numbers of full time positions should fluctuate to some extent from season to season.

Generally the number of full time positions available is determined by the needs of the business; final milk volumes are usually the most significant determinant of the number of permanent and temps we use. It is also important to note that there are tolerances for temporary workers, in particular, 5% of the total hours worked across Fonterra for the entire year and as much as 10% at a site level for the entire year. Currently we are well below these levels. There are also provisions for coverage of long term sickness and ACC related aspects, which you will be aware of. Fonterra have usually reviewed the permanent and temporary manning levels each year in late January or early February and see no reason that this practice would not continue for this season.

- [7] By letter dated 26 August 2008 the union's counsel wrote to Mr Foureur:-

The Union is concerned that Fonterra is wilfully breaching Clause 13 of the current Fonterra Dairy Workers Collective Agreement at both the Edgecumbe and Kauri sites. It is understood that at Kauri for example Fonterra employed ninety six permanent drivers last season, and that this year, it has employed ninety drivers permanently, but still seeks sixteen temporary drivers.

The intention and application of clause 13.9 is that the employment of temporary workers is not to be used for the purpose of reducing the number of full time positions available. Temporary workers are being employed at the cost of full time positions available. That is unacceptable. The union expressed similar concern late last year by letter to yourself dated 27 November 2007 and by letter dated 10 December 2007 you refuted any breach at that time. Regrettably the union perceives that a pattern has now emerged which is considered a serious erosion of the Collective Agreement. It is also of concern that there has already been litigation regarding the effect of this clause after breach which it seems has been ignored¹.

The merits

- [8] In *Fonterra Group v New Zealand Dairy Workers Union*² the Court said clause 13.9 was the over-arching requirement of clause 13. The Court accepted that from the Union's perspective, the purpose of Clause 13 is to resist the casualisation of the workforce and to promote the interests of a permanent unionised workforce.

¹ Employment Court litigation determined by the court's judgment in *Fonterra Group v New Zealand Dairy Workers Union*, unreported, CC5/05, 21 April 2005, Goddard CJ

² above

[9] Mr Ritchie raised a specific example of the displacement of permanent driving positions available by temporary drivers at the Kauri site. He says that while he was made aware of other examples, the Kauri site example demonstrated the observation of delegates. He says there had been 96 permanent drivers the season prior to August 2008. In August 2008 there were 90 permanent drivers but Fonterra was hiring 16 temporary drivers. He says that was more than the previous year. He gives this evidence to the Authority:-

*If there had been a reorganisation or reduction in work that meant fewer drivers were necessary then there should have been a corresponding reduction in the number of temporaries employed but instead there were increased numbers of temporaries employed as drivers. This was clearly to compensate. **I took the view that but for the non-replacement of permanents the temporary positions would not be available and but for the use of temporaries, permanents would have been replaced, In my understanding that breached clause 13.9***

(Emphasis added)

[10] Ms Cynthia Cotton a driver at Waitoa (“Ms Cotton”) gives evidence that management at Waitoa stopped employing permanent full-time tanker drivers who left. She gives specific evidence of permanent driver numbers reducing and temporary workers increasing.

[11] Mr Mark Hope union organiser tells the Authority he makes the same general observation beyond Waitoa to also include Edgecumbe and Reporoa.

[12] It is not disputed that temporary positions have increased. Fonterra’s evidence is that with the exception of 2007/08 when there was a drought, milk volumes have been steadily increasing which has meant that more drivers are needed during the peak seasons. Temporary drivers are used to cover the temporary increase in work during the peak season. Fonterra’s Regional Transport Manager for the North Island Mr Wayne Sivern gives this evidence to the Authority:-

30. The increase in temporary hours worked at some depots also reflects the fact that we have less permanent drivers at some depots, as a result of our improved scheduling system (which has reduced the amount of permanent work

available). As far as I am aware, this does not in itself breach the terms of the CEA, as we have complied with the percentage limits for using temporary drivers, and we have not used temporary drivers for the purpose of reducing the hours of work or the number of full-time positions available (rather the number of permanent positions has decreased due to better technology).

[13] The Authority finds that Fonterra has observed the contractual limits imposed at clause 13.3 of the Collective.

[14] It is not enough for the Union to simply conclude that the mere increase of temporary workers and the decline in permanent positions establishes a breach of clause 13.9.

[15] Clause 13.9 is uncompromising and informs the interpretation of the whole clause 13. It is clear that the parties have agreed Fonterra is not permitted to casualise its workforce by using temporary workers to carry out permanent work. Clause 13 is to be interpreted so as to prevent Fonterra from acting *for the purpose of reducing the hours of work of any worker or to reduce the number of full-time positions available.*

[16] The Union does not satisfy me of that Fonterra is acting for the purpose of reducing the hours of work of any worker or to reduce the number of full-time positions available.

[17] The clause itself includes the phrase “for the purpose”. That means that Fonterra must be shown to act with “an intent to achieve”. I am not persuaded that it has any such intention and there is no compelling evidence that it does. Nor I am persuaded to infer such an intention.

[18] I find that only work that exists for a temporary period during the peak season that cannot be carried out by existing permanent drivers because of roster limitations under the Collective is being carried out by temporary drivers.

[19] I find that Fonterra is not using temporary workers for the purpose of reducing the number of full time/permanent roles available. I find that it is using temporary

workers only to carry out the increase in work that exists during the peak season (flush).

The determination

[20] For the reasons set out above, I find that Fonterra is not acting in breach of clause 13.9 of the Collective. There will be no formal orders as sought by the Union.

The costs

[21] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Rooney is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms White is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority