

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 17  
5308907

BETWEEN SERVICE AND FOOD  
WORKERS UNION NGA  
RINGA TOTA  
First Applicant

KATHLEEN PAGE  
Second Applicant

A N D SEALORD GROUP LTD  
Respondent

Member of Authority: James Crichton

Representatives: Tim Oldfield, Counsel for Applicants  
Justine O'Connell, Advocate for Respondent

Investigation Meeting: 7 December 2010 at Nelson

Submissions Received: from Applicant  
from Respondent

Date of Determination: 1 February 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This is a dispute about the interpretation, application and operation of a clause in an operative collective employment agreement (the agreement). The first applicant (the Union) is a party to the agreement with the respondent (Sealord) and the second applicant (Ms Page) is employed by Sealord and covered by the agreement.

[2] Clause 12 of the agreement describes a process where a staff member such as Ms Page can move from a lower grade to a higher grade. The essence of the dispute between the parties is that Ms Page thinks she has qualified for promotion to a higher grade and Sealord think she has not. The parties seek the assistance of the Authority to resolve their differences.

[3] On 10 December 2009, Ms Page applied for re-grading from Grade 1 to Grade 2. By letter dated 17 December 2009, Sealord declined to re-grade Ms Page as requested.

[4] The relevant agreement applied from 11 May 2008 to 10 May 2009 and the provision in question is as follows:

12 GRADE ASSESSMENT CRITERIA

*The following clause allows employees to be considered for a higher grade based on the following criteria. Forms for assessment can be found on the Intranet under Processing – Nelson Factory.*

(a) *Criteria:*

- a. *No previous service required.*
- b. *Employees who wish to be considered for appointment to the next grade up.*
- c. *Employees must be currently performing to a satisfactory level, in terms of their current grade in relation to:*
  - (i) *Attendance.*
  - (ii) *Can perform consistently under minimal supervision.*
  - (iii) *Possess the skills and knowledge to perform assigned work without Supervisor presence.*
  - (iv) *Have the ability to is already performing at least two other duties within their current grade.*
  - (v) *Trains other staff as required by the Supervisor when seeking Grade 1 or higher.*
- d. *An employee who holds a merit payment at the time of seeking assessment shall not lose such as part of this process.*
- e. *Note: It is accepted between the parties that in order to retain skills and expertise in a particular processing area, and employee may be considered for a higher grade despite not meeting all the multi-skill and criteria.*

(b) *Definitions:*

- (i) *Attendance – no unreasonable unauthorised periods of absenteeism*
- (ii) *Performing under minimal supervision – can be trusted and relied upon to carry out duties in a confident way.*
- (iii) *Performing two or more roles in their current grade roles or have the ability to.*

*Supervisor can direct their staff to other roles as required.*

- (iv) *Can train other staff (isn't required to be a designated trainer). Can induct and train new staff, and operate within a buddy system.*
- (c) *Assessment/Recommendation for attainment:*
- (i) *If any employee considers themselves to be qualified for meeting the criteria, they can request an assessment by first approaching their Supervisor and Union delegate and filling in the appropriate application form.*
  - (ii) *The Supervisor will then commence the assessment process with a recommendation or explanation as to why the application was rejected.*
  - (iii) *Where an application is rejected the employee will have a right to have the decision reviewed in accordance with the on-site mediated disputes procedures.*
- (d) *Monitoring Ongoing Performance Process:*
- (i) *If performance is under question the following actions will be taken:*
    - 1. *Review of issues with staff member concerned:*
      - a. *Employee given opportunity to explain.*
      - b. *A Union delegate and the shift controller will also be present.*
      - c. *Note: This is not a disciplinary meeting (continued failure to meet standards will be need) sic (to be dealt with under disciplinary action).*
  - (ii) *If no satisfactory explanation is given and accepted, a set of agreed outcomes will be determined. This will include training and supervision requirements, timeframe in which to meet agreed criteria and any other outcomes required.*
  - (iii) *If agreed outcomes are not met the employee will lose their entitlement and cannot be considered again for a grade advancement for another three months. It is agreed that no employee can be demoted more than one grade, OR:*
  - (iv) *If agreed outcomes are met no further action will be required.*

- (e) *Clause (b) shall not apply to any employee who has not been upgraded under this provision. Employees may only receive one grade in accordance with this provision.*

[5] The position of Ms Page and the Union is that she meets the criteria for re-grading and yet was denied it by Sealord. In particular, the Union allege that Sealord, rather than applying the plain words of the clause have imported into its consideration of the matter words which are not included in the agreement and which thus do not fall for consideration.

[6] Conversely, Sealord say their obligation is to consider applications made under the section and apply the appropriate rules fairly and evenly and that they have done that in the case of Ms Page. Sealord say that they applied precisely the same criteria to Ms Page's application as they did to previous applications from other employees who were in a similar situation to Ms Page. Sealord says that ultimately, as employer it has the obligation to determine whether a particular employee has the requisite skills and ability to perform the duties required.

### **Issues**

[7] The only question for determination is whether Ms Page was properly assessed or not. If she was, then no remedies lie. If the Authority concludes that Ms Page was not properly assessed then the Authority is asked to impose a compliance order and to direct Sealord as to the appropriate criteria for them to apply in the future.

[8] Although nothing turns on this issue, Sealord maintain that, in asking the Authority to determine that the only criteria that can apply are those set out in clause 12(b) the Union and Ms Page are effectively limiting the application of the provision. There may be some force in Sealord's argument on the point but the short issue is that the Authority is asked to rule on how persons in Ms Page's position ought to have their applications for re-grading assessed. In that regard, it is important to remember the extent of the Authority's powers; s.163 of the Employment Relations Act 2000 (the Act) precludes the Authority from making any order *cancelling or varying ... any term of the (collective) agreement*. It follows that the Authority ought not to read into the agreement or its terms meanings which the parties themselves have not agreed and which are at variance to the arrangements the parties have made for themselves.

**Should Ms Page have been re-graded?**

[9] The basis on which Sealord refused Ms Page's application for re-grading was their conclusion that Ms Page did not have the ability to perform, or was not already performing at least two other duties within her current grade. Ms Page's evidence is that she has the ability to work as a qualified trimmer and a qualified packer and as a consequence she is entitled to be re-graded from her present grade 2 standard.

[10] It is common ground that Ms Page is employed by Sealord as a Kirimi Portion Cutter. Her grade is specified as grade 2 because she does not meet the specified volume of fish to receive a grade 1 payment. That volume is 170 kilograms per day on average. It is acknowledged that Ms Page has not yet achieved that volume but it is agreed that it is available to her to progress to grade 1 in terms of the provisions of clause 12 effectively by being able to offer Sealord greater flexibility of labour by being proficient in at least two other disciplines.

[11] The dispute between the parties is essentially around what is encompassed in the roles of qualified trimmer and qualified packer. These of course are the two additional roles that Ms Page claims to be adept at. The starting point must be the employment agreement. But that is of little help because neither job is defined in the agreement and the essence of Sealord's position is to quote its own submission ... *that like all the other jobs listed in clause 11, the employer has the discretion to determine the content and responsibilities of these jobs.*

[12] Conversely, while agreeing that there is no definition in the agreement, the Union says *these phrases (qualified trimmer and qualified packer) have an agreed meaning and not one assigned unilaterally by the respondent.*

**What is a qualified packer?**

[13] Ms Page gave evidence that she was a qualified packer. Sealord deny that because they identify two particular tasks which they say are part of the role of qualified packer which Ms Page cannot perform. These two duties are using the packet erector and the sealer. These are two machines used by packers in the factory. The first effectively creates the box that the fish are packed in and the second seals the box.

[14] However, Ms Page says that she does do packing work from time to time and when she does that work she gets paid a packing allowance. The Union asks why Ms Page should receive a packing allowance if she is not packing within the meaning of the document. The Union also contends that the work of operating the packet erector and the sealer is work typically performed by machine operators and so is not relevant to the present issue.

[15] As to the payment of the packing allowance, Sealord maintain that that payment is made to any worker who performs packing duties and is *entirely separate from the multi-skilled criteria* that is from the provision set out in clause 12. In fact, Sealord maintain that Ms Page actually receives payment of the packing allowance (which is paid pursuant to clause 14 of agreement) not because she is performing packing duties of the sort contemplated by clause 12, but because she receives it as of right because she is also receiving a knife allowance as part of her usual role as a Kirimi Portion Cutter.

[16] It follows that Sealord's submission is that Ms Page's entitlement to receive a packing allowance under clause 14 relates to that provision only and ought not to be brought into consideration in respect to Ms Page's entitlement or otherwise to a grade change pursuant to clause 12.

[17] On the balance of probabilities, I conclude that the Union's reliance on the clause 14 payment does not assist their argument. I am satisfied that a proper construction of the relevant paragraph in clause 14, which is clause 14(1) is that the packing allowance referred to therein is paid to employees who also receive pay based on handling a knife. It follows that the clause seems to proceed on the footing that if an employee receives payment based in part on handling a knife (as is the case with Ms Page) then that employee will also, as of right, receive the packing allowance. The sub-clause concludes with a provision which indicates that a new classification system is in the process of being implemented and that once that is complete in respect to all of the affected employees, *the packing allowance shall no longer apply*. That last provision seems to confirm the Authority's conclusion that reliance on the provision in clause 14 in respect to the payment of the so called packing allowance is, at best, transitory and ought not to be considered as a useful tool in deciding the question before the Authority.

[18] That takes us back to the question of what precisely it is that is the required scope of the position of qualified packer. As noted previously, it is common ground that Ms Page does not operate either the packer erector or the sealer. At its heart, the dispute between the parties is around whether Ms Page ought to be rewarded for performing a whole job or part of a job. Sealord say that custom and practice is that a qualified packer can run these machines and Ms Page cannot.

[19] Ms Page and the Union say that Ms Page can perform a task or a duty which forms part of the role of a qualified packer and that that ought to be enough to enable Ms Page to be re-graded upwards. But Sealord say that unless and until Ms Page is capable of having ... *the ability to or is already performing at least two other duties within their current grade* she cannot have an entitlement to re-grading. Sealord say the phrase *two other duties* must mean the complete duty and cannot mean bits of those other duties. If the latter, Sealord say the provision would be meaningless as the definition requirement in the same provision contemplates that a Supervisor would be able to direct the employee *to other roles as required*. If that is to happen then logic would suggest that the employee concerned must be able to fulfil all of that *other role* and not just parts of it.

### **What is a qualified trimmer?**

[20] Similar considerations arise in respect to this question. Again, the evidence is plain that Ms Page has some but not all of the skills which Sealord say are required to be a qualified trimmer. Ms Page can trim Hoki but not Orange Roughy or Dori species. Sealord say, in consequence, she cannot be a qualified trimmer because she can only trim one of the three species that a qualified trimmer is required to trim.

[21] Conversely, the Union argue that if Ms Page could trim all three species that Sealord require, then she would be entitled to grade 1K as of right. But that contention cannot be correct.

[22] In clause 11 of the agreement, particular jobs are allocated particular grades. Generally, the content of jobs is not defined in the agreement. Grade 2K, which is Ms Page's grade identifies just three jobs in that grade, namely qualified trimmer, qualified packer, and qualified fish filleter. Interestingly, Kirimi Portion Cutter (Ms Page's job) is not listed under grade 2K (Ms Page's grade) at all. Indeed, its only appearance in clause 11 is under the heading of the jobs in grade 1K where it is listed

but with the additional legend *cutting a set volume (currently cutting an average of 170kg per day)*. Because Ms Page does not meet the 170kg per day level of production, she does not qualify for grade 1K through her principal job and is paid at the lower level in consequence.

[23] The Union's contention that if Ms Page was able to trim all three fish species she would automatically qualify for grade 1K cannot be right. Grade 1K, as of right, is only available to a filleter with more than 10 months experience (a skill Ms Page apparently does not possess) a Kirimi Portion Cutter cutting the set volume of 170kg per day on average (again a skill Ms Page does not possess), a designated trainer (not Ms Page again) or a *trimmer with more than 10 months filleting experience (provided they are competent with Hoki, Roughy and Dori)*. Since that designation just referred to requires 10 months filleting experience, and on the evidence before the Authority filleting per se is not a skill that Ms Page has, the Union's contention that she would be entitled to be paid at grade 1K as of right if she could fillet all three species, seems to the Authority to misinterpret the relevant provision in clause 11.

[24] The argument advanced by the Union that Sealord has somehow imposed an absolute standard for the purposes of clause 12, which means there is no difference between that standard and the standard required by clause 11 for a permanent occupant of the same role also does not seem to stand up to scrutiny. The purpose of clause 12 is to provide Sealord with flexibility of labour and the relevant employees to be paid more because Sealord can deploy them in other analogous roles to their principal occupational duty as and when the dictates of the business require.

[25] However, their principal role remains their dominant employment. Pursuant to clause 11 there are references in grade 1 to a qualified packer and to a trimmer but those roles are first of all qualified by the time the employee has performed that duty (in each case more than 10 months) and particularly in the case of the trimmer, there is a requirement for 10 months *filleting experience* which is not part of Ms Page's skills and experience.

[26] It follows that I am satisfied there is a distinction between the re-grading contemplated by clause 12 and the grades system contemplated by clause 11 of the agreement. In the latter, workers were performing the role in question day in day out and they either qualify for the role or they do not. Their entitlement to that grade is a function of the length of time they have performed those duties satisfactorily and in

some cases a function of identified other skills which may be a pre-cursor to the role that they are graded for.

[27] The purpose of clause 12 of the agreement is quite different. It is designed to provide flexibility of labour for Sealord so that it can use staff members who are, for example, primarily Kirimi Portion Cutters, for instance, to work as a qualified packer or as a qualified trimmer as and when the dictates of the factory operation require. It is not intended that such employees would work continuously as either a qualified trimmer or as a qualified packer and never return to their substantive duty. Were that to become the case, the reference would appropriately be to the operation of clause 11 rather than clause 12.

### **Determination**

[28] I am satisfied on the balance of probabilities that:

- (a) There is no definition of the phrase *qualified trimmer* or the phrase *qualified packer* in the agreement; and
- (b) If the parties had wished to agree the extent of those roles they would have provided such a definition; and
- (c) It is not the role of the Authority to manufacture definitions for parties when none exists as this takes the Authority dangerously close to the restriction on its power contained by s.163 of the Act; and
- (d) It seems to be common ground that a permanently employed qualified packer for Sealord would operate the packet erector and the sealer and that a permanently employed qualified trimmer would be able to trim all three species of fish referred to in the agreement; and
- (e) As a matter of common sense the definition of *qualified trimmer* and *qualified packer* respectively used for the purposes of defining those permanently held roles pursuant to clause 11 must, of necessity, inform the definition of those same roles where they are performed only on an occasionally or part time basis pursuant to clause 12; and
- (f) The practical approach adopted by Sealord requiring as it does the same skill set for a part time occupant of either role as a full time

occupant of the same role is to be preferred to the Union's view that the nature and extent of the role contemplated in clause 12 is fundamentally different from the nature and extent of the role contemplated in clause 11.

[29] It follows from the foregoing reasoning that the Union and Ms Page's claim is unsuccessful, the Authority preferring the longstanding practice of Sealord and the practical application of assessments made in respect to Ms Page and presumably other similarly placed employees.

**Costs**

[30] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority