

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2011] NZERA Christchurch 176  
5341555

BETWEEN THE ENGINEERING PRINTING &  
MANUFACTURING UNION INC  
Applicant

A N D ALLIANCE GROUP LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Rowan Anderson, Counsel for Applicant  
Ken Smith, Counsel for Respondent

Investigation Meeting 19 October 2011 at Omaru

Date of Determination: 15 November 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant Union (EPMU) raises a dispute about the interpretation and application of a particular provision in the operative collective employment agreement (the Agreement) between itself and the respondent employer (Alliance). In simple terms, the issue between the parties is the appropriate payment for members of the Union who were either sent home from work or not called into work because of a significant flood event in South Canterbury and North Otago on 25 May 2010 which resulted in Alliance making the decision to close its Pukeuri plant.

[2] Alliance say that they have correctly applied the Agreement and that the affected employees (all members of EPMU) have been paid correctly and are not entitled to any additional payment.

[3] There is little significant factual dispute between the parties. It is agreed there was a significant flood event in South Canterbury and North Otago on 25 May 2010. Alliance's then Plant Manager, Mr Hailes (who gave evidence to the Authority at its investigation meeting), made the decision at 10.00am on the morning of 25 May 2010 to close the plant because of the flood event. Tabled in evidence at the Authority's investigation meeting was a log for the day in question obtained from the Waitaki District Council and a series of newspaper articles from the Oamaru Mail relevant to the flood event.

[4] I am satisfied on the balance of probabilities that this was a significant flood event and save for the question of Alliance's right to close the plant in the prevailing conditions, the Authority need not consider this issue in any detail.

[5] It is evident from the District Council's log that they were presiding over a dramatically worsening flood situation as the morning of 25 May 2010 wore on. The log discloses that at 9.06am, there was contact between the District Council and Alliance's Works Manager at Pukeuri; that entry records as follows:

*Pukeuri Freezing Works, evacuating now, animals being slaughtered over next 1 hour, should be completely evacuated by 10 hundred.*

[6] Mr Hailes' evidence to the Authority was that he made the decision to close the plant from 10am on 25 May 2010 to enable employees to leave the plant and get home and also to ensure that employees who would otherwise be attending at work for the night shift would not leave home and attempt the journey into Pukeuri. The reason Mr Hailes made the decision he did was to ensure that the employees who were then at the plant could get home and the employees on night shift who might otherwise attend would not attempt the journey in circumstances which might be unsafe. Mr Hailes was strongly influenced to make the decision he did by the deteriorating situation on the morning in question and the real prospect that the plant might become cut off from Oamaru township thus precluding the majority of employees from returning to the safety of their homes or indeed creating danger because employees were attempting to leave their homes in an effort to get to the plant to commence duty. Mr Hailes' principal anxiety was that the flood event would close roads which would make it difficult or dangerous for staff to either return to their homes (if they worked a normal span of hours) or conversely, would make it difficult for staff coming on to the nightshift to get to the plant without imperilling

themselves or others. Those concerns were not misplaced; in fact by two hours after the decision was taken, the plant was in fact cut off both from Oamaru township and from access both west and north of the plant. Because Alliance had been proactive in its decision making, all of the employees working on the day in question got home safely and none of the nightshift staff were endangered as a consequence of trying to report for duty.

[7] That left the question of how to pay the staff who were either sent home, having partially completed their shift, or not attended at the workplace at all, in both cases as a consequence of the decision taken by Alliance to close Pukeuri because of this weather event.

[8] Mr Hailes told the Authority that he formed a view about the correct way of paying the employees affected by the closure after discussing the matter with Alliances' Group legal counsel, who appeared for Alliance at the Authority's investigation meeting. The principal exhibit detailing Alliance's position on the matter is a letter dated 24 June 2010 written by Mr Smith to Trevor Hobbs who is the relevant EPMU organiser. In that letter, Mr Smith sets out Alliance's position and that position remains the company's view to this day.

[9] EPMU take a different stance and believe that the company has misapplied the relevant provisions of the Agreement, and it is that dispute, in essence, which the Authority is asked to resolve. The Authority notes in passing that there are other similar weather related closures of meat processing facilities which are awaiting the result of this decision.

### **Issues**

[10] There are only two issues that the Authority needs to consider. The first is whether it was available to Alliance to make the decision it did to close the plant when it did. While very much a subsidiary question, it was implicit in the Union's position before the Authority that they sought to clarify the employer's right to do what it did and accordingly, that will be the first issue that Authority considers.

[11] The second, and by far the most important issue for the Authority to consider, is the simple question of whether Alliance have correctly applied the relevant provisions in the Agreement or not when they have made payments to the affected workers. If they have, then no further payment is required. Conversely, if the

Authority finds that there is an error in the calculations made by Alliance, then further payment will be ordered.

**Could Alliance do what it did?**

[12] I am satisfied that Alliance could indeed do what it did. It is inherent in the common law right to manage that an employer may take steps to organise or direct its business so as to achieve legitimate business goals and/or comply with statutory obligations. In the present case, the legitimate business goals of Alliance would, or should, include an obligation to be a fair and just employer and if that be true, then implicit in such an obligation is a duty to protect staff from harm.

[13] That duty which I have described as a common law duty to be a good and fair employer and to provide properly for the health and safety of employees because the employer is a good and fair one, is also a statutory duty pursuant to the Health and Safety in Employment Act 1992 which provides amongst other things for employers (and their employees) to protect each other from serious harm in the workplace. It is, in my opinion, a reasonable concern for a large employer with hundreds of employees involved, to be anxious about the prospect of those workers being able to get safely back to their homes when a significant weather event of the sort involved here, makes that problematical. The very fact that within two hours of the decision to close, Pukeuri plant was effectively cut off from all directions would suggest that, had the decision not been taken by Alliance, then workers would either have had to remain at the plant until the roads became passable again, or potentially could have put themselves and perhaps others at risk by attempting the journey home over roads that were flooded and had been closed by the requisite authorities.

[14] I am satisfied then on the balance of probabilities that it is available to a good and fair employer to take the steps which Alliance took to protect its staff from potential harm and that that decision is underpinned by Alliance's common law duty to be a good and fair employer and its statutory duty to protect employees from harm in the workplace by the Health and Safety in Employment Act.

**Did Alliance correctly pay its staff?**

[15] EPMU effectively seeks two forms of relief:

- (a) a determination that Alliance must pay workers for hours they were rostered to work but could not work as a consequence of being sent home or being required not to attend at work; and
- (b) a determination that employees are entitled to receive their overtime hours as if they had worked an ordinary span of hours rather than have those overtime hours converted by the employer for the purposes of calculating payments.

[16] Alliance say that the relief sought by EPMU is not actually as broadly founded as EPMU claims because Alliance has already paid a minimum payment of 40 hours per week. Alliance suggests that the actual question is whether it is entitled to convert overtime hours into equivalent ordinary hours for the purposes of the calculation of payment. In other words, Alliance agrees with the framing of the second question by EPMU but denies that the first claim for relief logically follows from the facts.

[17] The Authority agrees with the company on that point; it is plain from the evidence that Alliance has already paid all of the affected employees 40 hours pay or more for the week in question. Alliance has already ensured that each affected employee has received a minimum of 40 hours pay for the subject week. This is so even where affected employees have not worked 40 hours. The requirement in the Agreement is for 40 hours pay for each week (critically, not 40 hours work for every week). It follows that where employees do not get paid for 40 hours in that week, Alliance has made up their pay to 40 hours pay consistent with the Agreement's requirement.

[18] Where the dispute focuses though is on the majority of staff who worked some hours at penal time when Alliance has converted that penal time entitlement into a straightforward hourly rate entitlement. For example, Mr Smith in his letter to Mr Hobbs, points out that 6 hours at time and a half is equivalent to 9 hours pay and that arithmetical calculation is fundamental to the dispute between the parties.

[19] So the real question for the Authority is whether Alliance is entitled to convert overtime hours into equivalent ordinary hours for the purposes of payment.

[20] The most important section of the Agreement is clause 15.6 and it provides as follows:

*Full time weekly workers shall receive a minimum of 40 hours pay per week ...*

[21] There is a lengthy proviso which follows, but for present purposes the Authority wishes to focus on this fundamental provision.

[22] Alliance say, in simple terms, that they have applied that principle in the calculations they have done. They have converted overtime hours to ordinary hours (because the clause entitles workers to receive a minimum of 40 hours **pay** not 40 hours **work**).

[23] The Authority's principal obligation in interpreting the Agreement is to give the words in dispute their ordinary meaning if that does not do violence to commonsense. On the face of it, the clause simply provides a guarantee of a minimum of 40 hours pay in a seasonal industry where the many vicissitudes of the meat processing business may put a range of impediments in the way of employees having access to regular work. This provision, Alliance says, provides a guarantee of a minimum wage, not a guarantee of a minimum number of hours of work.

[24] Alliance drew my attention to a similar provision in the Meat Workers Collective Agreement and call that clause in aid of their general argument. The Meat Workers provision is particularly of assistance to Alliance because unlike the subject provision in the Agreement between EPMU and Alliance, the Meat Workers clause contains a proviso which excludes overtime earnings when calculating the weekly minimum payment. Alliance observe that it would have been easy for the parties in the present dispute to have put such a proviso in their agreement when it was being negotiated, but the fact that they chose not to do so suggests that it was not in the parties' minds at the time. Of course, that may simply be because nobody thought of it at the time; it may not have the significance that Alliance place on it. Nonetheless, the reliance on the Meat Workers clause is illustrative of the sort of approach the parties might have taken.

[25] Alliance also call in aid reference to clause 8.1 of the Agreement which defines an ordinary week's work as being 40 hours. Of course, what Alliance say in that regard is that by use of the word *ordinary* the drafters are referring to the primary meaning of that word, ie common or unexceptional and not the differentiation of 40 hours ordinary **time** from penal time which is beyond 40 hours. Furthermore, the

drafting of clause 8.1 of the Agreement does not constitute a promise or undertaking that there will be 40 hours of work provided.

[26] For its part, EPMU claims simply that Alliance should pay workers for the disrupted week as if they worked their normal span of hours. They say there is no provision that covers the particular circumstances of the case ( no force majeure clause ) and the Authority must look at the terms of the agreement as a whole to reach the appropriate conclusion. EPMU says that by failing to provide the regular hours of work mandated by the agreement and then withholding payment for them, Alliance has breached the terms of the agreement.

[27] All the affected workers are “ weekly workers “ within the meaning of that term as it is defined in the agreement. Clause 8.1 defines an ordinary weeks’ work as comprising 40 hours, as I noted above. EPMU say that the reference to “ ordinary “ far from referring to “common” or “unexceptional” as Alliance claims, in fact is to differentiate from penal, that is ordinary time hours rather than penal time hours. I think EPMU’s view of the meaning of the word “ ordinary” in its context in clause 8.1 is more likely to be the drafter’s intention rather than the interpretation offered by Alliance. This is, after all, an employment agreement concerned with rates of pay and a consideration of the whole clause, as EPMU suggests, makes it as clear as can be that EPMU’s interpretation is to be preferred.

[28] That interpretation is I think, supported by the succeeding clause in the agreement ( Clause 9 ) which deals with overtime. There is a natural juxtaposition between the two clauses. This debate informs the interpretation of the central clause in dispute, Clause 15.6 which I set out in full at paragraph [20] above. By relying on the reference in that clause to 40 hours **pay** rather than 40 hours **work**, Alliance have felt able to convert overtime hours to ordinary time hours. But I am satisfied the reliance on **pay** rather than **work** is an unnatural one out of keeping with the balance of the document which, as we have noted above contemplates 40 ordinary time hours of work per week, together with penal time as required, attracting payment of 40 ordinary hours pay together with any additional penal time payments.

[29] A telling submission by EPMU is their observation that quantifying an hour’s pay is impossible without knowing when the hour was worked and how many other hours were worked that day. In other words, the concept of “ an hour’s pay” is not an absolute but rather a variable one. Yet, on the face of it, Alliance have sought to

apportion all the hours as effectively ordinary hours, when it is plain that some, anyway of those hours were in fact penal time hours.

[30] Finally, EPMU note that there is nothing in Clause 15.6 that allows Alliance to make the apportionment it has undertaken. Clause 15.6 contains a proviso the thrust of which is that deduction can be made because of the worker's default. Nothing entitles Alliance to make the deductions it has.

### **Determination**

[31] I am satisfied on the evidence heard by the Authority that the interpretation of the Agreement advanced by Alliance is a mistaken one for the reasons set out above. It follows that there are additional payments owed to members of EPMU who were affected by the flood event on 25 May 2010. I leave it to the parties to compute the entitlements of the workers concerned.

[32] The Authority is persuaded that, despite Alliance's good intentions, the approach taken by the company was mistaken. I think a proper construction of the agreement is to give workers 40 hours ordinary pay per week in the absence of their own default. Here there was no default by the workers. It is erroneous to concentrate on the "pay" aspect to the exclusion of the hours to which the pay relates. Looked at in the round, Alliance's interpretation does violence to the effect of the document as a whole and there is no contractual basis for Alliance to have done what it did.

[33] It follows that EPMU's claim for relief is successful.

### **Costs**

[34] Costs are to lie where they fall.

**James Crichton**  
**Member of the Employment Relations Authority**