

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 273
5346481

BETWEEN THE NEW ZEALAND DAIRY
WORKERS' UNION INC.
Applicant

AND TATUA CO-OPERATIVE
DAIRY COMPANY LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Helen White, counsel for Applicant
Jacquie Sherborne and Erin Burke, advocates for
Respondent

Investigation Meeting: 21 June 2011

Determination: 24 June 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The New Zealand Dairy Workers' Union Inc. and Tatua Co-operative Dairy Company Ltd are parties to a collective employment agreement covering the employment by the company of members of the union. As stated in the document, the workers "shall ... be entitled to all benefits and be bound by all obligations" under the CEA.

[2] An issue has arisen as to the operation or application of one of the CEA's provisions, Clause 7.9, which permits Tatua unilaterally to change the normal starting time of a worker. For the purposes of upgrading and achieving greater efficiencies in production, Tatua has proposed invoking Clause 7.9 to change the starting times of union members employed by the company and by doing so transform them into shift workers, which presently they are not. Tatua also proposes that from 1 July 2011 upon

becoming shift workers they will rotate every fortnight from a morning shift – 5am to 1pm – to an afternoon shift – 1pm to 9pm, Monday to Friday.

[3] As a change made to normal starting times does not require the consent or agreement of the affected process workers, Tatua contends that the terms of employment of the union's members will not be substantially effected by the change in them becoming shift workers. Therefore, in Tatua's view of Clause 7.9 and its intended operation, a redeployment situation possibly leading to redundancy will not arise under the CEA.

[4] The union's view is that Clause 7.9 cannot be used to turn an employee who is not a shift worker into one, unless that change is consented to or unless a redeployment situation has arisen. Under the CEA where plant is upgraded or production made more efficient, and where changes made for that purpose substantially effect the terms of employment of a worker to the worker's detriment, Tatua must endeavour to redeploy the worker. Where redeployment is not available or where after being tried it is found not to work, redundancy including compensation is available as a last resort.

Changing normal starting times

[5] Clause 7.9 of the CEA provides:

7.9 STARTING TIMES

Excepting when necessitated by absenteeism or in an emergency, 24 hours notice shall be given when the normal starting time of a worker is changed.

[6] It is accepted by Tatua that the process workers affected by this dispute are not currently employed on shift work. The union has described them as day workers, to distinguish them from those who work shifts which are planned and designated as such.

[7] The affected workers start at various times between 5am and 7.30am. They work eight hours until early or mid afternoon but do not start work in the afternoons at all. Tatua contends that as the workers and the union have agreed in the CEA at Clause 7.9 to the company being able to change their starting hours of work, the proposed transformation to shift work does not amount to any substantial change to current terms of employment.

Shift work

[8] Shift work is defined in the CEA as follows:

8.1.5 Shift work shall mean work which is carried out by two or more successive relays of workers performing wholly or substantially the same type of work, or shall mean work performed on a rotational basis by two or more relays of workers performing wholly or substantially the same type of work and where the work involved extends over at least 13 continuous hours in any one day and where the difference in commencement times of the relays of workers exceeds a minimum of four hours.

[9] The morning and afternoon shifts planned by Tatua will conform to this definition, as they will constitute relays of workers performing on a rotational basis the same work, doing so over at least 13 hours on any day and with more than four hours between commencement time of the relays.

[10] Tatua's view seems to be that the definition of shift work in the CEA allows for workers who are not shift workers to automatically become that if immediately before and/or after working their normal hours other workers perform the same or similar work. In this way, provided the periods of time required by Clause 8.1.5 are observed, as the workers will form part of a relay, or their work will be performed on a rotational basis by two or more relays, by absorption they become shift workers.

[11] If so workers might not know when they have become shift workers by operation of Clause 8.1.5, when they are not aware that immediately before they performed their work within their normal hours another worker had performed the same work, or that immediately after they performed that work, another worker would be performing the same work. As shift workers are entitled to an extra payment of at least \$13.05 per shift, an employee unknowingly becoming a shift worker in this way might become aware of it only when extra pay was received.

[12] The repetition of performance of work by a number of different workers within a stipulated timeframe is clearly a feature of shift work as defined by the CEA. I find that a major feature of the definition is also that a shift worker has consented or agreed to become a shift worker. The requirement for consent is to be implied from the expression "relays of workers" used in Clause 8.1.5. In the ordinary meaning of the word, a relay involving repetition of a particular performance by a number of

individuals is not created around the performance of some who have not consented to take part or do not know they are regarded as a member of a relay.

[13] I find that while Tatua under Clause 7.9 of the CEA is able unilaterally to adjust the starting time of any worker, it is not able to use that provision to make a worker a member of a relay of workers without the consent of that worker.

[14] I consider that the workers' current category (whether described as day worker or otherwise) and that of workers performing shift work are two different things and the worker cannot be transformed, or morph, from one to the other as a result of the employer changing the workers' starting times under Clause 7.9.

[15] It is also significant to the operation of Clause 7.9 that the provision is found within Part 3 "Hours of Work" but that in a separate provision, Clause 8, headed "Shift Work," there is a different clause providing for a change to the starting time of a worker employed on shift work. The main difference between Clause 7.9 and Clause 8.2 is the number of hours' notice that must usually be given of any change, 24 under the former provision and 48 under the latter. Although this difference, arithmetically at least, may only be slight the significant thing is that there is a difference, however, big or small, between the separate provisions.

[16] It is to be assumed for the purposes of construction of the CEA that the parties to it intended this difference to be meaningful or to have a purpose. Also it is assumed that this difference in the provisions reflects a difference in the categories or type of worker covered by Clause 7.9 and Clause 8.2.

[17] Clause 8.2 expressly applies to an employee who works shifts, while Clause 7.9 clearly applies to someone who is not a shift worker. In my view the latter provision cannot be invoked to convert someone who is not a shift worker into a shift worker. I find that it was not the intention of the parties to the CEA that a transition from the one category or type of work to the other could occur, without a worker's consent, simply by invoking clause 7.9 and changing the worker's starting time.

[18] Such unilateral change if justified by reorganisation of Tatua's business or quest by the company for greater efficiency in production, does I find affect the terms of employment of the worker. Where that change extends to the worker commencing work in the afternoon after a fortnightly rotation of shifts, the effects on

the terms of employment are substantial, creating a situation falling under the Redeployment and Redundancy provisions of Clause 32.

[19] Considering the example of Ms Pamela Stevenson, in June 2004 when Tatua confirmed the offer to her of a different position, her usual working day commenced in the morning and finished in the afternoon. There is no reference in the letter confirming her appointment to commencing work in the afternoon and continuing on into the evening. Ms Stevenson said that starting work in the afternoon had not been contemplated at all by her when she was offered and accepted the position. It would have been addressed with an offer of a different position for her to accept or decline.

[20] I find there will be a substantial change to Ms Stevenson's terms of employment if Tatua, by use of clause 7.9, requires her every fortnight to start shift work in the afternoon and finish in the evening. Ms Stevenson has given evidence that working afternoon shifts in particular would be to her detriment in her life outside of work. Similar evidence was given by Mr Mervyn Thomas. Tatua does not dispute the claimed detrimental effects.

[21] I find that the company is entitled to change a worker's starting time under clause 7.9, and could do so on successive occasions, but that alone is not sufficient to make Ms Stevenson or Mr Thomas shift workers, whether or not other workers work the same hours immediately after they finish or work the same hours immediately before they start. Currently their work is not being carried out as part of a planned, designed or structured relay in which they agreed to take part.

Determination

[22] For the above reasons the Authority determines this dispute in favour of the Dairy Worker's Union and its affected members. While Clause 7.9 permits Tatua to change the normal starting time of the positions union members are currently employed in it does not provide Tatua with a means of converting their current position into a quite different one.

Costs

[23] Costs are reserved. Counsel and advocates are aware that usually costs will lie where they fall if, as in this case, there has been a genuine dispute in which both have an interest in resolving quickly.

A Dumbleton
Member of the Employment Relations Authority