IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 345
5394782

	BETWEEN	MARITIME UNION OF NEW ZEALAND INCORPORATED Applicant
	A N D	PORTS OF AUCKLAND LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	S Mitchell, Counsel for Applicant R Mcllraith and K Dunn, Counsel for Respondent
Investigation meeting:	21 September 2012 at Auckland
Date of Determination:	5 October 2012

DETERMINATION OF THE AUTHORITY

The matter before the Authority

[1] On 11 September 2012, the Authority received an urgent application from the Maritime Union of New Zealand Incorporated (MUNZ/the Union). Various issues have been raised pertaining to a proposal (the Proposal) by Ports of Auckland Limited (POAL) to disestablish the role of yard foreman and the associated role of as required foreman. The Union says that if the Proposal is actioned, it would be unlawful for three reasons:

(a) The action would result in unsafe work practices that would breach the collective employment agreement;

(b) The action is a breach of good faith due to a failure to adequately consult; and

(c) The action undermines the current bargaining for a new collective employment agreement.

[2] The Union asks the Authority to resolve the matter by:

(a) A finding that the action of POAL undermines the bargaining; and

(b) Issuing a compliance order requiring POAL to cease the implementation of the Proposal regarding the yard foreman until current bargaining for the CEA is concluded.

[3] Conversely, POAL says:

(1) That following an appropriate consultation process with the Union, it has decided to disestablish the role of yard foreman;

(2) No health and safety issues arise; and

(3) The proposed change does not undermine the current collective bargaining process.

[4] The Authority has received evidence from Mr Craig Harrison and Mr Russell Mayn for MUNZ. Evidence for POAL has been provided by Mr Jonathon Hulme, Mr Sandy Clark and Mr Michael Kirwin. The parties have provided a number of relevant documents and submissions. All of the available material has been closely considered, albeit it may not be specifically referred to in this determination.

Background

[5] The port of Auckland operates 24 hours a day seven days a week. Approximately 544 people are employed, 205 of whom are stevedores and 172 of the stevedores are members of the Union; employed under the terms and conditions of the *COLLECTIVE AGREEMENT BETWEEN THE PORTS OF AUCKLAND LIMITED AND THE MARITIME UNION OF NEW ZEALAND – LOCAL 13* (the CEA).

[6] Relevant to the matter before the Authority is clause 2 of the CEA, **COVERAGE**. In particular, subclause (vii):

> An employee of Axis Intermodal or Port Services primarily employed loading and unloading of ships, including all driving of mechanical equipment, straddles, hoists, cranes, ship cranes, ship gantries, ships

> [sic] gear used in cargo handling, all work to and from rail. Stevedores, with exception of those at the Axis Terminal, are not employed to lash containers on board ships. In accordance with the appropriate schedule, Stevedores who work at Axis Terminal may lash containers onboard ships.

[7] And subclause (viii):

> An Axis Terminal employee designated by the Company to carry out Leading Hand supervisory duties in addition to the duties in [sic] clause immediately above.

[8] Also relevant to the dispute is clause 3.2, **HEALTH AND SAFETY**. Specifically, clause 3.2.1, General:

> (a) A programme to ensure a safe and healthy work environment in accordance with the Health and Safety in Employment Act 1992 has been implemented.

[9] Under clause 2(viii) of the CEA and by established practice, the role of leading hand involves specific supervisory duties being carried out by more senior stevedores, or stevedores who have been trained to carry out the relevant tasks. These duties attract a higher rate of pay. The yard foreman is one leading hand role. Other leading hand roles include: the lash leading hand, the ship foreman and the twin lift foreman. Sometimes an extra foreman (as required) is rostered on when deemed necessary, depending on the operations of the port at the time. It is the yard foreman and the as required foreman roles that POAL is proposing to disestablish. The other leading hand roles will continue.

[10] There are also General Duties Stevedores. This is not a leading hand role rather it is "a bit like an odd job man."[1] General duties stevedores carry out various tasks around the work site as they arise, including escorting visitors, ensuring areas are secure for work purposes, and refuelling vans. The general duties stevedores currently receive directions from the yard foreman, who in turn takes directions from the Ship Supervisors. The latter group report to the Shift Managers; they report to Mr Hulme, Manager – Stevedoring.

[1] The evidence of Mr Hulme.

The proposed change to the yard foreman role [2]

[11] The evidence of Mr Hulme is that POAL has been assessing its operations in an effort to improve efficiency. This has been a "company-wide" review of operations and there has to date, been a number of redundancies.

[12] Via a letter dated 8 June 2012, to Mr Mayn, the Secretary of the Union, Mr Hulme informed of a proposal to lift the yard foreman role to supervisor level. The letter informs:

> With the advent of 12 hour shifts for some stevedores and growing allocation issues arising from POAL's current no-replacement labour policy, the task of managing non-ship stevedoring is becoming increasingly complex and contentious.
>
> My shift managers and supervisors are concerned the yard foreman's role is not operating at a sufficiently high level to effectively manage this degree of complexity. The problem arises from the current practice of allocating the yard foreman's duties as an operational matter (a leading hand task rotated under the shift roster) rather than including them in the management toolbox.
>
> **Proposal**
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> To remedy this problem, POAL is proposing to lift the yard foreman's role to supervisor level and reallocate its duties to the current team of operational managers and supervisors.
>
> This would be achieved by:
>
> 1. Withdrawing the yard foreman's role from the leading hand tasks currently available for skill task allocation.
>
> 2. Reallocating the yard foreman's duties to the current team of shift managers and supervisors.
>
> 3. Restructuring the shift manager/supervisor roster schedule to provide for a yard supervisor on each shift.
>
> **Consequences**
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> Impact
>
> If this proposal is confirmed by management after consultation and implemented in full, it will have the following impact:
>
> - Current shift managers and supervisors will be allocated the additional task of yard supervision, which will need to be factored into their existing roster.

[2] Reference to the yard foreman role within this determination should also be taken to include the as required foreman role. And the singular includes the plural where relevant.

- Existing stevedores currently allocated to leading hand duties will have one less skill task available for allocation.

Mitigation

To ensure a smooth transition of this role to shift managers and supervisors, additional training and support will be provided to those supervisors most likely to be picking up these duties. There is likely to be minimal material effect on existing stevedores as those with the requisite skills will simply be allocated to other skill tasks. This includes those stevedores designated Grandparented Leading Hands who will continue to receive their grandfathered remuneration regardless.

Consultation process

Feedback and response

Before management decide whether this proposal is to be proceeded with and in what form, it is appropriate:

(i) To consult with shift managers and supervisors as to how the yard foreman's duties may be incorporated into a shift manager/supervisor's role in an efficient and effective manner.

(ii) To consult with MUNZ on behalf of potentially affected stevedores and offer the union the opportunity to express its views after liaising with members and have them considered before a final decision is made.

Response deadline and implementation timetable

We have provided for a two-week consultation process. This should allow sufficient time for all affected employees to have considered the proposal and given us their views in response, if they wish, directly or through their union representative. The response deadline is 9am Monday 25 June 2012. Subject to whatever information or issues that arise that may require further investigation we aim to be able to make a final decision on this proposal by the end of June. In the event the decision is to proceed with the proposal in some form then we would anticipate commencing implementation almost immediately. However, the union and any affected employees will be advised of any relevant change[s] before it occurs.

(Signed)
Jonathan Hulme
Manager – Stevedoring
Ports of Auckland Limited

[13] As recorded in a letter from POAL to the Union dated 2 July 2012, there was an "agreed delay" in regard to the consultation. In this letter, POAL informed the Union that the new response deadline was now 9am, Monday, 16 July 2012.

[14] On 18 July 2012, representatives of MUNZ and POAL met to discuss the proposal pertaining to the yard foreman role. An outcome of the meeting was that the Union indicated that it wanted to provide written feedback to the Proposal.

[15] By way of a document entitled *SUBMISSION AS TO THE PROPOSAL TO DO AWAY WITH FOREMEN AND YARD FOREMEN BY PORTS OF AUCKLAND LIMITED*, the Union responded to POAL. The Union objected to the Proposal on several grounds, including (summarised and paraphrased):

(a) It was the view of MUNZ that as the issue of the straddle roster was not yet resolved, the proposed change should not occur until it had been carefully assessed by the Health & Safety Committee;

(b) When the terminal is busy, the Union considers that the yard foreman and the "as-required" foreman are essential to monitor the stevedoring operation to ensure that it operates safely;

(c) The duties involved are unable to be attended to by a supervisor as the "practical functions" have to be "directed" to ensure the safety of those attending the port;

(d) The foreman duties are included as part of the coverage of the CEA under clause 2(viii). It was submitted that the issues surrounding the operation of the terminal should be part of the current collective bargaining;

(e) Removing the work involved from members of the Union would "undermine the provisions of their collective agreement during the bargaining period";

(f) The changes should be subject to a health and safety audit and the Proposal has not been the subject of discussion by the Health & Safety Committee;

(g) The Proposal is effectively an attempt to remove work from the provisions of the CEA and to provide that work to people covered by individual employment agreements. The Union had sought information regarding the employment arrangements for the supervisors but alleges

that POAL has refused this information. The Union submits that this information is relevant and important to an assessment of the Proposal;

(h) The Union recognises the need for the employees covered by the CEA and non-Union employees to work safely and cooperatively together, but says there is no evidence to support the view that the yard foreman should no longer be engaged under the provisions of the CEA.

Response to the Union's submissions

[16] The response of POAL to the Union's submissions is contained in a letter dated 31 August 2012, from Mr Hulme to Mr Gary Parsloe, the President of MUNZ. Mr Hulme informs that POAL has "given careful consideration" to the Union's submissions and that there had been consultation with shift managers, supervisors and non-Union employees potentially affected by the Proposal; and the following conclusions had been reached:

1. The yard/as required leading hand roles are historical management concepts established at the time to achieve specific operational outputs/outcomes.

2. The roles are not fixed positions to which employees are appointed as such but instead, are a conglomeration of duties to which employees may be so designated, as required.

3. With the exception of the straddle roster, none of the tasks currently identified as yard/as required leading hand duties actually require any form of leading hand supervision.

4. Further, some of these tasks have been contracted out (cleaning and major spillages) leaving the remainder being primarily the job of stevedores assigned to general duties.

5. Following the transition grid-based straddle slots on 25 June 2012, straddle allocation has been reduced to the odd occasion when a stevedore has for whatever reason no immediate access to a straddle.

6. Stevedores freed from superfluous yard/as required leading hand roles will improve productivity by undertaking duties more relevant to their skills and experience.

7. No additional health and safety issues will arise from the tasks of residual straddle allocation being reallocated to the relevant shift manager or supervisor.

8. No stevedores (including Ferguson Grandparented Leading Hands) will be adversely impacted by the disestablishment of the yard/as required leading hand roles as other opportunities

> exist for employees to be designated to other duties, as required.
>
> 9. The yard/as required leading hand roles are not positions currently specified in the collective agreement, nor are they roles included in or referred to in either party's collective agreement negotiation claims, so they cannot be considered as forming part of the collective bargaining currently being facilitated between MUNZ and the company.

[17] Further, the letter informs that POAL has decided to implement its proposal to disestablish the yard leading hand role, as well as the as required foreman role. POAL informs that enacting the proposal will result in:

> i) A more efficient supervisory process for allocating straddles where, for whatever reason, a stevedore has no access to a readily available straddle; and
>
> ii) A more productive and cost-effective process for stevedores rostered to general duties to undertake the remaining non-supervisory tasks, as required.

[18] The Union was informed that POAL intended to implement the changes at 6.30am on Monday, 10 September 2012:

> This will result in the Ferguson Grandparented Leading Hands and other employees affected by the proposal being reallocated from the first shift on this day to alternative roles within the roster for which they are suitably qualified, including designation to other leading hand duties where appropriate.
>
> Ferguson Grandparented Leading Hands will continue to receive their grandfathered remuneration regardless; other affected employees will continue to be paid for the duties they perform according to the provisions of their applicable employment agreement.

[19] In conclusion, POAL informed that the company would ensure it has sufficient stevedores capable of being rostered to general duties for the purpose of performing the range of non-supervisory tasks currently undertaken by the as required foreman and that:

> … the company will carefully monitor the implementation of this decision. It will also consider and respond to any feedback it receives from MUNZ or others concerning the impact or consequences of the decision.

[20] Following an urgent application by the Union to the Authority, POAL has agreed to delay implementing the changes in question until the issues involved are determined by the Authority.

Analysis and Conclusions

[21] As set out in the opening paragraphs of this determination, MUNZ says that if the proposed changes are implemented by POAL, they would be unlawful because:

(a) Unsafe work practices would occur and this would be a breach of the CEA;

(b) The action is a breach of good faith due to a failure by POAL to adequately consult with the Union; and

(c) The action undermines the current bargaining for a new CEA.

Issue One

Unsafe work practices breaching the CEA

[22] It is commonly accepted that the operations of the port have the potential for hazardous situations to arise and in apparent recognition of this, clause 3.2 of the CEA provides for various health and safety matters to be observed. The Union refers in particular to subclause 3.2.1:

> General
>
> (a) A programme to ensure a safe and healthy work environment in accordance with the Health and Safety in Employment Act 1992 has been implemented.

[23] A submission for the Union is that, having implemented a programme to ensure a safe and healthy work environment, pursuant to the Health and Safety in Employment Act 1992 (the HSE Act), then the programme must continue to be implemented. It is argued that the actioning of the Proposal in issue does not meet that requirement.

[24] The Authority is referred to s.6 of the HSE Act and the requirement of the employer to ensure the safety of employees; and also the requirement under s.7 of the HSE Act, to identify hazards at work. Reference is also made in the Union's submissions to s.11 of the HSE Act and the employer's obligation "to provide information to employees." Finally, the submissions refer to Part 2A of the HSE Act and the general duty to provide reasonable opportunities for employee participation in processes related to health and safety.

[25] Essentially, it is argued for the Union that POAL is not entitled to implement the decision to disestablish the roles of yard foreman and as required foreman without a "full opportunity for employee participation to address the health and safety issues." The Union alleges that POAL intends to impose a "major change" without employee participation. But the evidence and submissions for POAL inform that the company has various programmes in place to ensure a safe and healthy work environment. And in regard to the proposed changes, there is not going to be a change to *what* will be done. Rather, the change relates to *who* will be doing it.

[26] It is also submitted for POAL that there is no reference in the Union's submissions to the Proposal in regard to any specific health and safety issues. And further, the evidence to the Authority (via Mr Harrison) only refers to a general health and safety issue. In regard to the former, I accept that this is largely correct, albeit the Union advocates that the proposed changes should be subject to a health and safety audit to "determine whether or not health and safety issues are being properly addressed."

[27] In regard to the evidence of the Union before the Authority, Mr Harrison makes much of a change which has been implemented pertaining to the allocation of straddle cranes and the previous written roster that had been prepared by a yard foreman. But this does not appear to be relevant to the current matter before the Authority, apart from the fact that a process is currently in place whereby yard foremen are now not required to prepare straddle rosters, and there is no tangible evidence of any adverse health and safety consequences. Mr Harrison also attests to possible health and safety issues in regard to the supervision of visitors to the wharf environment; but no tangible evidence has been produced that indicates that the proposed change to the yard foreman roles would compromise health and safety.

[28] I also note that there is a proactive Health & Safety Committee in existence. It appears to play an important role in ensuring that health and safety issues are addressed on a mutual or bi-partisan basis involving employees and management. The minutes of the May, June, July and August 2012 committee meetings have been produced to the Authority. They reveal that many and varied issues are discussed by the committee with various actions being implemented as a result. Given the proactive approach taken by this committee and the professional format of the minutes produced for (as I understand it) general workplace viewing, it is difficult to see how

any potential breach of the HSE Act or the CEA could exist without serious attention being drawn to it and consequent rectification implemented. Indeed, it is evident from the minutes provided to the Authority, that POAL and the participating employees on the committee take health and safety issues seriously; as one would expect.

[29] In summary, upon the evidence available, I do not accept that POAL has breached, or intends to breach, the provisions of the CEA or the HSE Act.[3] I also note that neither the Union's statement of problem (nor its submissions) seek a remedy in the event that I had found otherwise.

Issue Two

The introduction of the Proposal is a breach of good faith due to a failure by POAL to adequately consult with the Union

[30] It is now well established that the requirement for parties to deal with each other in good faith is derived from s.4 of the Employment Relations Act 2000 (the Act) and the duty of good faith applies to the matters set out at subsection (4). In particular, in regard to the matters before the Authority, the duty of good faith applies to:

> (c) consultation (whether or not under a collective employment agreement) between an employer and its employees including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business:

[31] And:

> (d) a proposal by an employer that might impact on the employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business:

[32] The Union argues that POAL failed to conduct an adequate consultation process in that the Union was not informed of the details of who would carry out the work currently done by the yard foreman/as required foreman. The Union says that it was understood during the consultation process that the work would be allocated to shift supervisors. However, upon the evidence from POAL for the Authority proceedings becoming available, the Union now understands that "a large amount" of

[3] And of course in regard to the latter, this is not within the jurisdiction of the Authority.

the work will be carried out by general duties stevedores; a matter that the Union says was not discussed during consultation.

[33] Perhaps this was not discussed at the meeting on 18 July 2012, but I note that attached to POAL's response to the Union's submissions (the letter dated 31 August 2012), is an appendix: *POAL's detailed response to MUNZ submission of 22 August 2012*. Under the heading: ***The work***, in response to paras 4 and 5 of the Union's submissions, it is conveyed that:

> With the exception of straddle allocation, most of the other indicated yard/as required leading hand duties are already being undertaken in the first instance (or could be) by a mix of suitably qualified general duty stevedores and/or contractors. The importance of these tasks notwithstanding, their performance does not require front line people leadership or coordination implicit in a leading hand's role. In other words, these so called "*practical duties*" are usually only performed by a yard/as required leading hand where a general duty stevedore either is not immediately available or does not have the requisite qualifications/skills experience for the task at hand.

[34] And then further, under the heading ***The duties***:

> As explained above, the straddle roster task identified by MUNZ at para.6.3 is arguably the only duty with a people leadership component that is managerial/supervisory in nature and therefore genuinely relevant to a leading hand role.

[35] Then finally, under the heading ***Conclusion***:

> With the transition to grid-based straddle slots effectively making the yard leading hand role superfluous, the company takes the view that the remaining non-supervisory task of the as required leading hand role (the so called "practical duties") not already performed by other personnel, will in future be best undertaken by suitable stevedores assigned to general duties.

[36] Therefore, while it may not have been explained to the satisfaction of the Union that the general duties stevedores will be carrying out some (if not most) of the work currently done by a yard foreman, it is clear from the above extracts, that POAL has explained, to a reasonable degree, the effect of the proposed changes in regard to who will be doing the work of the yard foreman.

[37] But in any event, as has been alluded to in the submissions for POAL, the CEA does not make any specific mention of the work to be carried out by yard foremen. Indeed, there is no mention of this title at all in the CEA. The term "Leading Hand" is used at clause 2(viii) in reference to: "an employee designated to carry out

Leading Hand supervisory duties" in addition to the duties set out at clause 2(vii); being generic stevedoring duties. It appears that stevedores may be allocated to a particular leading hand duty or to general duties, based on the experience and knowledge accumulated by particular individuals over time.

[38] POAL has also referred the Authority to the discretion that the company has under the CEA to roster stevedores to particular stevedoring tasks. For example, under the *PORTS OF AUCKLAND LIMITED STEVEDORING SCHEDULE* to the CEA, at subclause 2.2, a leading hand is defined as:

> ... an employee designated by the company to carry out supervisory duties in addition to the duties of a stevedore.

[39] And at clause 7:

> **FLEXIBILITY OF EMPLOYEES**
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> In the interests of maintaining flexibility and maximising efficiencies and having regard to appropriate safety standards the following shall apply:
>
> (a) Any employee may be required to perform any work for which they have the necessary skills and to undertake work at any location.
>
> (b) The total number of employees making up the workforce shall be determined by the Company. The number of employees allocated to each activity shall be determined by the company.
>
> (c) While allocated to a job at the commencement of a shift any employee shall, if and when required by the Company, transfer to other activities within that same shift.
>
> (d) It is the intention of the parties that work shall proceed as required by the Company in a responsible, safe and efficient way and in accordance with the Health and Safety in Employment Act and the appropriate codes of practice as well as subsequent legislation.
>
> (e) Notwithstanding the provisions of this clause the Company guarantees to maintain a safe place of work at all times and acknowledges the obligation to ensure that manning levels are maintained at a level that ensures this.

[40] Therefore, under the above terms of the CEA, POAL has considerable discretion in regard to how it allocates the work to be carried out, provided the employees involved have the necessary skills, and health and safety requirements are observed.

[41] Nonetheless, the relevant good faith duties under s.4 of the Act and common law precedent,[4] require proper consultation to take place where a change in the employer's business may affect or impact on employees. In the *Telecom* case (below), the Chief Judge of the Employment Court (then) inquired into what is meant by "consultation." Chief Judge Goddard refers to the *Wellington International Airport* judgment of the Court of Appeal and he extracted the following propositions "…which can now be taken to enjoy the approval of that Court:

> (1) The word "consultation" does not require that there be agreement.
>
> (2) On the other hand it clearly requires more than mere prior notification.
>
> (3) If there is a proposal to make a change, and such change requires to be preceded by consultation, it must not be made until after consultation with those required to be consulted. They "must know what is proposed before they can be expected to give their views."
>
> (4) This does not involve a right to demand assurances but there must be sufficiently precise information given to enable the person to be consulted to state a view together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
>
> (5) The requirement for consultation is never to be treated perfunctorily or as a mere formality. The person or body to be consulted must be given a reasonably ample and sufficient opportunity to express views or to point to problems or difficulties: "they must be free to say what they think."
>
> (6) Consultation must be allowed sufficient time.
>
> (7) Genuine effort must be made to accommodate the views of those being consulted; consultation is to be a reality, not a charade.
>
> (8) Consultation does not necessarily involve negotiation towards an agreement although this not uncommonly can follow as the tendency in consultation is to seek at least consensus.
>
> (9) Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses, and then deciding what will be done.
>
> (10) The party obliged to consult, while quite entitled to have a working plan already in mind must keep its mind open and be ready to change and even start afresh.

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[4] *Communication and Energy Workers' Union Inc v. Telecom New Zealand Ltd* [1993] 2 ERNZ 429; and *Wellington International Airport Ltd v. Air New Zealand Ltd* [1993] 1 NZLR 671 (CA).

> (11) There are no universal requirements as to form or as to duration of consultation.
>
> (12) Consultation cannot be equated with negotiation in the sense of a process which has, as its object, arriving at agreement."

[42] In regard to the consultation between the parties, I would have expected to see some mention of the effect on individual employees, in regard to a potential loss of earnings, relevant to the pending loss of the yard foreman role, but neither party has expressed any concern about this factor; and it has not previously been raised by the Union in its submissions to the Proposal. Perhaps this is because redundancies will not arise from the proposed change and the individuals who may be affected, have sufficient seniority and/or experience to simply carry out the leading hand role associated with other stevedoring duties, and hence retain their current remuneration.

[43] In summary, on the evidence presented and taking into account the requirements of s.4 of the Act and common law precedent pertaining to the requirement to consult, I find that the claim of the Union that POAL failed to adequately consult, cannot be upheld.

Issue Three

The proposed action by POAL undermines bargaining

[44] The Union and POAL are currently engaged in facilitation with the Authority for the purpose of attempting to conclude negotiations for a new CEA.

[45] The Union refers the Authority to s.32(1)(d)(iii) of the Act. It provides that the Union and the employer:

> … must not undermine or do anything that is likely to undermine the bargaining or the authority of the other in the bargaining; …

[46] It is submitted for the Union that the action proposed by POAL (removing the role of yard foreman) has the impact of undermining the current bargaining for a new CEA. Enlarging on this proposition, the Union says firstly, that the parties are currently bargaining for a new CEA which continues to include the supervisory role of yard foreman. But the CEA makes no mention of this title. Rather, it refers to the generic term "Leading Hand", albeit it is understood that, in practice, the yard foreman role is one aspect of the leading hand duties. Nonetheless, as set out earlier in

this determination, the yard foreman role is only one of several roles carried out by leading hands. And the remaining roles will continue to exist and be recognised under the coverage of clauses 2(vii) and (viii) of the CEA.

[47] It is also the understanding of the Authority (and the evidence of Mr Mayn) that the coverage clause of the CEA is not a matter that has been the subject of bargaining during the protracted negotiations between the parties.

[48] On that matter, it is argued for the Union that a substantial (and vigorously opposed) proposal by POAL, to contract out work currently performed by Union members, has been a fundamental aspect of the current bargaining. And hence the proposal to remove the yard foreman role, whilst POAL is not intending to contract out the work; the principle of removing the role is similar.

[49] In further support of the above proposition, the Union refers the Authority to the existence of the recent interim injunction issued by the Employment Court: *Maritime Union of New Zealand Inc v. Ports of Auckland Ltd* [2012] NZEmpC 54, where (at para [24]) Judge Travis held that:

> I find that there is a seriously arguable case that the actions of the defendant in allegedly threatening to and then deciding to contract out the work on which the union employees were engaged under the expired collective agreement whilst collective bargaining was on foot for a new collective agreement was likely to undermine and arguably has undermined the bargaining. It will also, arguably, undermine the bargaining in the future. It is therefore seriously arguable that those actions have breached s.32(1)(d)(iii) of the Act.

[50] I also note, at para [31] of the judgment, the Court stated:

> As to the balance of convenience, if the dismissal proposals were allowed to proceed before the issues can be substantively resolved, this arguably would have irretrievable consequences for those dismissed employees. The injunction sought applies until the substantive hearing and may delay the defendant [POAL] exercising its contractual rights (which are also in issue). However, to permit the exercise of those rights, which are in dispute in the interim because of statutory requirements, could cause irreversible damage to the plaintiff's members.

[51] While the complex issues involved in the Employment Court proceedings are yet to be decided by a substantive hearing, it seems to me that, while an arguable case was found to exist, the circumstances involved pertaining to the interim findings are very far removed from those regarding the matter before the Authority, as to the

potential effect upon members of the Union, should the Proposal of POAL be implemented.

[52] The Authority has also been urged by counsel for the Union that, given the findings in the above interim matter, the judgment of the Employment Court in *New Zealand Amalgamated Engineering Printing & Manufacturing Union Inc v. Carter Holt Harvey Ltd* [2002] 1 ERNZ 597, can no longer be seen to be applicable or "good law."

[53] Relevant to the matter before the Authority, the Court in *CHH* made a number of findings. Firstly, (at para [253]):

> "Bargaining" is about what the parties put up to bargain over. That is potentially very broad but the parameters of what is to be bargained about are set by the parties' proposals, responses, and counter proposals.

[54] And further (at para [254]):

> Parliament has not extended "bargaining" to cover all workplace issues including "contracting out" questions. Instead, it elected to deal with such matters as ones of contract under s.54(3)(a)(ii) and, where bargaining is able to take place or is taking place, by subsection 53 and 61(2) that continue in force the terms and conditions of employment between the employer and employees individually, it is significant that c166 of the Employment Relations Bill dealing with issues of continuity of employment and contracting out was not enacted by Parliament but was left for later legislative attention as part of a minimum code of employment rights.

[55] And then at para [255]:

> Restructuring and, in particular, contracting out the mill maintenance was not an issue between the parties for collective bargaining for a new cea until made so by the unions on 18 April. The unions' proposals in collective bargaining did not address these issues by seeking to alter the existing provisions contained in cls 7, 8, 9 or 50 of the expired cea. The scheme of the Employment Relations Act 2000 is for parties to collective bargaining to define the issues in bargaining and not that, by one initiating bargaining, all terms and conditions of employment must thereby be issues in the bargaining.

[56] Judge Colgan (as he was then) went on to state that:

> I find the announcement of the proposed restructuring including the contracting out of maintenance was not a proposal in bargaining or part of the employer's proposal. Rather it was the announcement of a strategy that the New Zealand common law of employment has long regarded as being a matter ultimately for the employer's

> determination, subject only to statutory or contractual restraints upon that: see the *G N Hale* case.

[57] In regard to the matters at issue in the *CHH* case, Judge Colgan then went on to find that:

> [257] I accept it is not open to exclude from bargaining the question of future employment of its employees. But that was not on the bargaining agenda. It was not part of a proposal or a counter proposal. It did not become an issue in bargaining until 18 April. In the meantime, however, CHH had purported to exercise options open to it to restructure its business. It accepted an obligation to consult about these matters.
>
> [258] The 27 March proposals were not, in their totality, a claim or counterclaim in bargaining that had to be dealt with in bargaining. Part of them (the proposed cea) was but not the restructuring proposals to be consulted about.

[58] And then of further relevance to the matter before the Authority, is a statement by the Court (at para [261]):

> The parties to the collective bargaining have come close to settling the detail of a cea but I do not understand there to be either any issue over contracting out between them or any different provisions than those contained in the expired CEA to be included in a replacement agreement.

[59] And then finally (at para [265]), the Court concluded:

> It is not correct that unless parties specifically agree to omit or remove issues from the bargaining table, any question to do with employment is the subject of collective bargaining and therefore covered by the duty to bargain in good faith. Rather I accept the defendant's analysis of the structure of bargaining under the legislation of being one where issues are contained in proposals or counter proposals and the disposition of these by parties in bargaining. So it follows that the defendant was entitled, in the absence of restructuring or contracting out being put in issue in the bargaining before 27 March, to deal with its proposals other than in the collective bargaining negotiations, and it was entitled to at common law although subject to contractual or statutory constraints.

[60] I conclude that, contrary to the submissions by counsel for the Union, until found otherwise, the findings in the *CHH* case remain good law and entirely relevant to the current matter before the Authority. Indeed, it could be said that given there was a serious issue about contracting out involved in the *CHH* case, the relatively minor change (in comparison) being proposed by POAL, is absolutely approved by the findings in the *CHH* case, in so far that it is not a breach of good faith (undermining

the bargaining) to pursue such a matter when it has not been the subject of bargaining for a new CEA.

[61] Consistent with the findings in *CHH* (para [256]), I conclude that the "announcement" by POAL of the proposal to remove the yard foreman role "was not a proposal in bargaining or part of the employer's proposal." Rather, it was a proposal that "… the New Zealand common law of employment has long regarded as being ultimately for the employer's determination." This is particularly so given the flexibility provisions of the CEA referred to earlier in this determination.

[62] In summary, I find myself agreeing with the submission for POAL that the removal of the yard foreman role is an operational matter rather than an issue related to the current bargaining. It follows that I find that the bargaining between the parties is not undermined, or likely to be undermined, by the implementation of the Proposal by POAL to remove the role of yard foreman from its operational requirements.

Determination

[63] For the reasons set out above, I find that:

(a) The proposal by POAL to remove the role of the yard foreman/as required foreman will not result in any proven unsafe work practices that would (or could) breach clause 3.2.1(a) of the CEA;

(b) The consultation process adopted by POAL was reasonable and not in breach of the good faith provisions of s.4 of the Act; and

(c) The proposed action by POAL does not undermine, nor is it likely to undermine, the current bargaining for a new CEA.

Costs: Costs are reserved. The parties are invited to resolve that matter if they can. In the event that a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions in the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority