

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 80  
5338471

BETWEEN NEW ZEALAND AMALGAMATED  
ENGINEERING, PRINTING AND  
MANUFACTURING UNION INC  
Applicant

A N D SILVER FERN FARMS LIMITED  
Respondent

Member of Authority: M B Loftus

Representatives: Anne-Marie McNally, Counsel for the Applicant  
Gary Williams on behalf of the Respondent

Investigation Meeting: 8 July 2011 at Christchurch

Submissions Received: At the investigation meeting

Date of Determination: 2 May 2012

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] This is a dispute over the interpretation, application and operation of a collective agreement. At issue is the question of whether or not staff should receive an additional payment under a dirty work provision when engaged in soot blowing boilers on the respondent's Pareora site.

**Background**

[2] The New Zealand Amalgamated Engineering, Printing and Manufacturing Union Incorporated (EPMU) is, along with three other Unions, party to a multi-Union collective agreement with the respondent, Silver Fern Farms Limited (Silver Fern) entitled *The Tradespersons Collective Employment Agreement*.

[3] The version of the Agreement discussed in this investigation has an express term of 21 February 2009 to 20 February 2011. Clause 48 thereof is entitled *Conditions of Work Payments* and provides that:

*An Employee employed on any one of the duties prescribed in clauses 48.1 to 48.10 below of this Agreement shall receive the appropriate payment specified in addition to the rate appropriate to the time.*

[4] It is followed by a subclause, misnumbered 49.1, entitled *Dirty Work*. Subparagraph (a) thereof reads:

*When Employees are required to work in used boilers, smoke-boxes, uptakes, funnels and between any boiler and its brickwork including working inside furnaces, backends and through boiler manholes, they shall be paid half rate extra while so employed with a minimum payment of 1 hour.*

*An Employee in charge of a boiler or boilers under steam shall not be called upon at the same time to perform or assist in the performance of the foregoing work. When Employees are required to clean tubes by brush or scraper or steam jet or air jet they shall be paid half rates extra while so employed with a minimum payment of 1 hour, but this shall not apply where automatic soot blowing equipment is fitted.*

[5] These words are those that were originally agreed for inclusion in an award that came into force on 1 February 1958. Since that time the clause has been repeated in a succession of awards, employment contracts and, more recently, employment agreements, though there have been some changes in respect to the placement of commas, subclause numbering and pagination. I do, however, suspect that these changes are the result of the type of typographical error that has led to the misnumbering of clause 48.1 (identified as 49.1) in the current agreement as opposed to any deliberate change. There is certainly no evidence of a negotiated and/or deliberate amendment to the clause.

[6] Not long thereafter three new boilers were fitted and commissioned at what is now the respondent's Pareora plant. This occurred in 1961.

[7] EPMU got one of its members, Mr Alan Martin, a boilerman of some thirty years experience, to describe the process. He commenced with the following overview:

*[They are] called fire tube boilers. They have a stoker to put the coal in and you adjust the air – it's like a big furnace for boiling the water up to steam and they have[two] soot blowers connected to them,*

*which most boilers have. The boiler house is about 30 metres long by about 15 to 20 metres wide. As well as the three coal fired boilers we have an oil fired boiler in there.*

[8] He then went on to describe the soot blowing process which, on these boilers, commences with a check, by computer, of the steam pressure. This is followed by the systematic opening and closing of a series of valves and this is performed with hand turned wheels.

[9] Mr Martin then noted:

*When soot blowing you can dislodge soot from the tubes which can backfire onto the boiler and create a dust explosion, so you can get a blow back of soot. This does not happen every time the soot blowing process is performed.*

*The soot blowing function is performed at the boiler, not from a control room. It is not extremely dirty work but one is exposed to the heat noise and dust of the environment. We don a dust mask, gloves and overalls to do the job.*

[10] Under questioning Mr Martin accepted that the use of safety equipment such as dust masks was not, as might be inferred from the above paragraph, either a requirement or something that occurred as a matter of course. He accepted that the work was not dirty but that his view was that the claimed entitlement arose by virtue of the manual operation of the valves when, in his view, automation required a motor perform the task.

[11] Mr Martin closed this portion of his evidence with an observation that:

*On modern boilers – for example, at Fonterra, you open a valve to emit steam to the system and then go back to the computer and complete the soot blowing process from there, electronically. That is an automated system.*

[12] Mr Martin also refers to the fact that the boilers are stripped annually and checked for wear and tear. He notes this involves the use of brushes and water blasting and the work attracts a dirty work payment in accordance with the first paragraph of clause 49.1.

[13] Mr Martin states that he first suggested the payment applied approximately 13 years ago and has regularly done so since. He states Silver Fern's response is always along the lines of "no, its not manual" or "no, we don't pay it" before going on to note:

*About two years ago we raised this claim again and the only thing that is different this time is that we did not let it drop when the verbal response was “no”.*

[14] Silver Fern’s position may be summarised by the following statement taken from the brief of Mr Jeremy Lush, an Engineering Manager. He says:

*The reference to automatic soot blowing predates modern computer controlled boiler systems, such as the Fonterra boilers (described in the applicants briefs of evidence). The word automatic refers to the technology being applied to boilers over 30 years ago which included soot blowers that did not require the Boilerman to manually brush, scrape or air or steam lance the boiler tubes. All that has changed is the boilerman uses a computer to control the sootblower rather than operate valves on the sootblower.*

[15] Mr Lush observes that while he has been involved in negotiating this agreement and its predecessors for some eight years, he has no recollection of the issue being raised. He then comments on remunerative practices for Boilermen at other plants covered by the MUCA and how these support Silver Fern’s view the allowance is not payable at Pareora.

[16] Mr Lush’s evidence is supported by Mr Charlie Morgan, another Engineering Manager. He was previously a shift engineer who has worked on maintaining the Pareora boilers since 1984. He comments that during his time the allowance has only been paid when the boilers are shut down (generally between seasons) and manually cleaned with brushes. He says:

*The first few sentences of the clause in dispute refers to the use of brushes or scrapers or steam or air jets. These describe manual tube cleaning and require the boiler to be shut down and opened to expose the sooty tubes...*

*The soot blowing of the internal combustion areas and fire tubes in the boilers at Pareora is done by the action of the permanently mounted soot blowers... The boilerman is not directly in the zone where the soot blowing is actually happening. He is outside the boiler and not exposed to any activity as a result of the soot blowing. He does open and close the valves but does not actually perform the soot blowing himself. It is done internally by the action of the sootblower.*

## **Determination**

[17] This issue to be determined is whether or not Boilermen covered by *The Tradespersons Collective Employment Agreement* should receive a dirty work payment when soot blowing boilers at Pareora.

[18] Whilst a simplistic summary, it is Ms McNally's submission that even if seemingly inconvenient or unjust, contractual provisions should be given effect where the words are plain and unambiguous (*New Zealand Commercial Travellers and Sales Representatives IUOW v Andrew and Bevan Ltd* [1983] ACJ 557 at 560. She goes on to note, quite correctly, that the key word in this dispute is 'automatic'. She submits that the evidence of Mr Martin establishes that the sootblowing process used at Pareora was manual and that it can not be considered to comply with a plain and ordinary meaning of the word 'automatic'.

[19] Silver Fern's position is that the boilers were installed in 1961 and that the cleaning process was, by the standards of the day, automatic. Entitlement should be judged accordingly as the vintage of the boilers is contemporaneous with the provision under which payment is being claimed.

[20] In *Department of Corrections v. Corrections Association of New Zealand Incorporated* [2005] ERNZ 984 (EmpC) the Court confirmed that *the essential principles of employment contract interpretation under the former legislation had not been altered by Parliament when enacting the Employment Relations Act 2000* [refer *Tertiary Education Incorporated: ASTE Te Hau Takitini Oh Aoteroa v. Hampton, Chief Executive of the Bay of Plenty Polytechnic* (2002) 1 ERNZ 491]. The Court then went on to enunciate those principles by saying:

- *Agreements are interpreted with reference to the factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question;*
- *One considers, first, the words used – they must obviously be a starting point – and then the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that natural meaning of the words;*
- *The Court is required to adopt an objective approach to interpretation: what matters is not what the parties say they intended the words to mean but what a reasonable person in the field, knowing all the background, would take them to mean. Evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier draft;*
- *Evidence of relevant conduct of the parties after the contract came into existence may sometimes assist in interpreting it, at least in the case of employment agreements;*

- *Interpretation of an employment agreement should not be narrowly literal but should accord with business common sense: the “business” in this case is that of employment relations in prisons. The interpretation should fulfil the purpose of the agreement and be based not simply on dictionary meanings or grammar. Even if the drafting is inept, the Court should attempt to give effect to the underlying intent. If a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find an interpretation that satisfies business common sense and fulfil the parties purpose;*
- *Nevertheless, if the words are clear and can only have one possible meaning, that should generally determine the matter. The Court will need to be very sure of what business common sense requires when interpreting a contract if that does not accord with the clear words.*

[21] My initial conclusion is that the meaning of the word ‘automatic’ is, at least as it appears in this clause, not as clear as Ms McNally would urge me to believe. There is ambiguity.

[22] The New Zealand Oxford Dictionary, Oxford University Press 2005, defines ‘automatic’ as “1. (of a machine, device, etc, or its function) working by itself, without direct human intervention”.

[23] A purist would envisage something that operates by itself and without intervention but that does not, when it comes to most mechanical devices, reflect reality. Most require some human intervention. For example most automatic automotive transmissions require an initial engagement. A similar ambiguity about what constitutes direct intervention, and the permissible extent there-of, exists here.

[24] Mr Martin emphasised the fact that valves attached to the sootblower had to be turned manually and that this occurred more than once, yet the boiler he promoted as an example of modern automation (Fonterra’s) still required, according to his evidence, the manual operation of valves – albeit only once. In both instances manual operation is required, so does the number of times this occurs determine whether or not something is automatic? Arguable! Mr Martin’s view that automation required valves be mechanically operated (10 above) is opposed by his evidence that the epitome of automation still requires manual operation. This evidences ambiguity.

[25] In such a situation I must turn to the other principles enunciated in the *Department of Corrections* case (refer 20 above). To me, issues such as the factual matrix, surrounding circumstances and the behaviour of the parties determine this

matter and clarify the clauses meaning. They also support the approach taken by Silver Fern.

[26] It is clear, and uncontested, that there is a level of contemporaneousness in respect to the adoption of the clause (1958) and the installation of the boilers (1961). There is also no dispute that at that time the boilers were considered automatic and that sootblowing did not attract the payments prescribed, and now claimed, under the dirty work provision.

[27] The evidence is also clear that that remained the situation for some years and that the parties operated accordingly. That to me is a clear indication of the parties understanding of the clause, its operation and meaning – it does not, and was never meant, to apply as now claimed.

[28] Lastly I note the one evidential dispute – namely whether or not this claim has been consistently raised over recent years. I do not need to reach a conclusion to determine this matter but I do observe that if I were to accept the unions position that the issue has been raised with some frequency over recent years, I would have to question why it has not been pursued with more vigour. The lack of pursuit begs a conclusion that it is known and accepted that this work was never meant to be covered or that the claim is not, when balanced against other goals, important.

### **Conclusion**

[29] It is my conclusion, as outlined in 27 above and when considering the matters canvassed in paragraphs 24, 26 and 27 above, that Boilermen engaged in sootblowing at Pareora are not entitled to the claim the dirty work payment. The claim is therefore dismissed.

[30] Costs are reserved.