

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 359
5388701

BETWEEN NZ DAIRY WORKERS
 UNION TE RUNANGA WAI
 U INCORPORATED
 Applicant

A N D FONTERRA BRANDS
 (NZ) LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: H White, Counsel for Applicant
 S Turner and B Heenan, Counsel for Respondent

Investigation: On consideration of the papers

Date of Determination: 12 October 2012

DETERMINATION OF THE AUTHORITY

The matter before the Authority

[1] A dispute has arisen regarding the correct interpretation of clause 3.6.1.2 of the Collective Employment Agreement (the CEA) that applies to the parties. The dispute relates to workers who are members of the New Zealand Dairy Workers Union Te Runanga Wai U Incorporated (the Union). The workers are employed upon duties in the Control Room of the Foods Manufacturing Plant operated by Fonterra Brands (NZ) Limited (Fonterra/the Company). The Company and the Union agreed to a trial being undertaken in regard to a roster change. The matter that is now before the Authority pertains to the options that may be available to the affected workers concerned; upon the pending introduction and operation of the new roster.

The relevant clause of the CEA

[2] The clause that has brought about the dispute and which now requires a determination from the Authority is clause 3.6.1.2 of the CEA:

3.6.1.2 Roster and Shift Change Process

If a roster or shift pattern change proposed by the company does not receive acceptance from the affected workers and 3.6.1.1(h) is applied, the process below will be followed where the change is identified as a significant change (defined in 3.6.1.2(f)):

- a.) The Company will continue to consult with the Union and affected employees as per 3.6.1.1(a), (b) and (c) above to understand any concerns associated with the proposal;
- b.) Having discussed the proposal further with employees and the Union, the Company will call for volunteers to transfer to the new roster, then;
- c.) The process below will be followed (in the order specified) for any employees who have not volunteered to move on to the new roster:
 - i. If operationally possible, the workers remain in their current position on their current roster. If this is not practicable then:
 - ii. Begin a three month trial in their current role on the new roster pattern (exceptions may be granted by agreement under exceptional circumstances). This will not involve any loss of pay.
Then
 - iii. At the end of the three month trial period, in consultation with the worker one of the following options will be agreed:
 - (a) Confirm the move onto the new roster pattern;
 - (b) Redeployment as per Clause **6.2**.
 - (c) If i or ii are not agreed and the worker cannot be returned to their pre trial position and roster, the worker may choose to be made redundant in accordance with Clause **6.4**.
 - (d) In any case when 3.6.1.2 applies the company may hire new workers to work the proposed New Roster.
 - (e) If there is a change in pay in c)3)i) or ii) then the buy-out under **6.2.3** will apply.
 - (f) Definition of significant roster change.
For the purpose of this clause significant change is defined as any one of the following:
 - i) Change from Weekday roster to Weekend roster.
 - ii) Any loss of earnings (exclusive of overtime)
 - iii) Any change in days off in combination with ordinary hours per day.
 - iv) Or any change to a rostered shift combination (e.g. 4 days on, 4 days off, 4

nights on, 2 days on, 2 nights on, 4 days off).

Background

[3] The trial period on the proposed new roster has taken place¹. The proposed roster involved a change to the hours and days of work of Control Room Operators in the company's Foods Manufacturing Plant. For workers on a ten hour shift, the trial took place between 14 November 2011 and February 2012. For workers on a twelve hour shift, the trial took place between 14 December 2011 and 14 March 2012.

[4] At the end of the trial periods, in accordance with clause 3.6.1.2 c.)iii of the CEA, the affected workers have been consulted in order to seek their agreement in regard to accepting one of the following options:

- (a) Confirm they will move onto the new roster pattern; or
- (b) Redeployment as per clause 6.2 of the CEA.

The basis of the dispute

[5] It appears that at the conclusion of the trial period, some workers have not agreed to move onto the new roster pattern; being an option provided by clause 3.6.1.2c.)(a) of the CEA. Then there is a second option:

- (b) Redeployment as per clause 6.2.

[6] It is the view of Fonterra that the affected workers can be redeployed, under the terms of clause 6.2 of the CEA, to the role of Filler and Packer Operators at the same plant.

[7] However, the Union's view is that the workers do not have to consider and/or accept the redeployment provisions of clause 6.2 of the CEA. Rather, it is posited that the workers can instead, elect to be made redundant pursuant to clause 3.6.1.2c.)(c) of the CEA. It states that:

If i or ii are not agreed and the worker cannot be returned to their pre-trial position and roster, the worker may choose to be made redundant in accordance with clause **6.4**.

¹ As provided for by clause 3.6.1.2 c.) ii of the CEA.

[8] It is agreed that there is a drafting error in the above provision and hence; i should read (a) and ii should read (b).

The submissions for the Union

[9] In summary, the Union submits that the affected members can “choose” to be made redundant without exploring the option of redeployment, pursuant to clause 6.2 of the CEA being activated. In support of this proposition, the Union says that it is “clear” on the plain words used in the clause in question that the redeployment provisions are only intended to apply to a change in rostered hours if the affected workers “agree.”

[10] It is accepted that if the workers can return to the pre-trial roster and position, then the worker does not get to choose redundancy. But if this step is not possible, then the worker may choose to be redundant in accordance with clause 6.4 of the CEA.

The submissions for Fonterra

[11] The submissions for Fonterra also refer to the plain meaning of the words in clause 3.6.1.2 c.). Firstly, Fonterra says that there should be an initial focus on the words “in the order specified” and the natural consequences that flow from there. This means that if the “order specified” is followed, the parties must first: try to confirm the move onto the new roster pattern. Second, if that does not work, explore redeployment under clause 6.2; and finally, if the first or second options cannot be agreed, only then may a worker choose to be made redundant. In summary, it is the view of Fonterra that affected employees must “work through” the above options in the order specified and the redeployment option cannot be “skipped” in that failing a move onto the new roster pattern, an employee cannot simply refuse to consider the redeployment options and choose to be made redundant.

[12] Fonterra further says that even if it was to be accepted that the Union’s interpretation of the clause is correct (which is denied), and employees are allowed to choose the redundancy option without first exploring the redeployment option, the use of the word “agreed” in the clause means that Fonterra has to agree that the redundancy option is appropriate. And of course, Fonterra does not agree that this option should be adopted without redeployment being considered first. In summary, Fonterra says that it was the intention of the parties to the CEA that redundancy is to

be a last option that should only be resorted to, only when all other options have been exhausted. Finally, given that Fonterra has identified that there are suitable redeployment opportunities available; the Company says that these have to be considered by the affected employees before the redundancy option may come into consideration.

Analysis and conclusions

[13] Both parties have referred the Authority to the generally accepted principles pertaining to the interpretation of employment agreements, and disputes as to the meaning of particular provisions of contracts². The approach adopted by a full bench of the Employment Court in *New Zealand Tramways and Public Transport Union Inc v. Transportation Auckland Corporation Limited* [2006] ERNZ 1005, has some appeal in that the Court stated that:

The starting point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of the entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectivity, the aim of the transaction: ...

[14] Also of assistance is the view expressed by Judge Colgan (as he then was) in *ASTE v. Chief Executive of Bay of Plenty Polytechnic* [2002] 1 ERNZ 491; whereby it was held that the interpretation of a collective agreement should not be construed in a narrowly literal way but should accord with business commonsense. Judge Colgan held that:

The interpretation, rather than being based simply on dictionary meanings and grammar, should fulfil the purpose of the contract. Even if the drafting is inept, the Court should be able to give effect to the underlying intent. Moreover, if a literal interpretation gives rise to nonsense in practice the Court should endeavour to find a more liberal interpretation which satisfies business commonsense and fulfils the parties' purpose.

[15] And as was held in *Vector Gas Limited v. Bay of Plenty Energy Limited*³ at para.[23]:

² Including *Vector Gas Limited v. Bay of Plenty Energy Limited* [2010] 2 NZLR 444, and *Silver Fern Farms Limited v. New Zealand Meatworkers and Related Trade Unions Inc* [2010] ERNZ 317.

³ *Ibid*

Context is always a necessary ingredient in ascertaining meaning. You cannot claim to have identified the intended meaning without reference to context. Hence it is always permissible to go outside the written words for the purpose of identifying the context in which the contract was made and its objective purpose.

[16] While *Vector* relates to the interpretation of commercial contracts, it has recently been referred to by the Employment Court in the context of the interpretation of an employment agreement⁴.

[17] So, the starting point is to see whether the words used are clear and unambiguous and then construe them according to their ordinary meaning. If clause 3.6.1.2c.) is broken down into components we have:

The process below will be followed (in the order specified) ...

[18] There then follows at subclauses i, ii and iii, what could be seen to be the first step of the process to be followed (in the order specified), all of which the parties appear to agree has been accepted and implemented.

[19] Having completed the trial period: “...one of the following options will be agreed”. This effectively could be seen as a second step of the process and then: “...the order specified” is:

(a) *Confirm the move onto the new roster pattern;*

[20] As I understand it, some workers have moved onto the new roster pattern but others have not. It seems to me that for those workers whom have not moved onto the new roster pattern, the next step “in the order specified” is:

(b) *Redeployment as per Clause 6.2.*

[21] Following the accepted interpretation rule, whereby consideration must be given to the whole of the contract, clause 6.2 then falls for inspection; the most relevant term being:

6.2.1 Redeployment to Alternative Position (on current site)

Providing the worker(s) terms of employment are not substantially changed to the worker(s) detriment and providing, where necessary, sufficient training is provided by the company to enable the worker to upgrade his/her skills to safely perform any new duties, and further providing any alternative position is on the same site or factory complex, then the Company may:

⁴ *New Zealand Airline Pilots Association Inc .v Air New Zealand Limited* [2012] NZEMPC 88

- (a) Alter a worker's duties in line with that required for the worker to operate the upgraded version of the plant or machinery they were employed on.
- (b) Redeploy a worker to a position in keeping with the worker's level of skill.
- (c) Redeploy a worker to an upgraded position while providing sufficient training to enable the worker to upgrade his/her skills to safely perform the new duties as required.

[22] It seems to me that the affected employees are obliged to follow a process in the order specified and consider redeployment to: "*a position in keeping with the worker's level of skill*" (clause 6.2.1(b)). But if I am wrong about that, and the Union's view is correct, then consideration also needs to be given to clause 6.4 of the CEA. This refers to the amount of redundancy compensation applicable: "*Where any worker(s) are made redundant ...*" The use of the word "made" tends to infer that the worker has no other option available to them. That this is so can be seen within the wording of the preceding clause 6.3 of the CEA. For example, the definition of redundancy at clause 6.3.1 is:

"Redundancy" means a situation where a worker's employment is terminated by reason of the closing down of the whole or part of the Company operations, or by the reorganisation of a factory or site complex where the worker cannot be placed in alternative employment by the Company under either the redeployment provisions or relocation provisions set out above. Alternatively, "redundancy" means a situation where a worker's terms of employment are substantially changed to their detriment as a consequence of the need to continually upgrade plant and equipment. (Underlining added.)

[23] And then, relevant to the dispute that has arisen, is clause 6.3.1.1 which sets out some exclusions in that a worker shall not be deemed to be redundant if:

- i. The worker is employed on a casual or temporary basis.
- ii. The worker is provided with an alternative position on the same site or factory complex in accordance with the Redeployment clause.
- iii. The worker accepts relocation to alternative employment on a different site or factory complex within the company.
- iv. The closure is attributable to war, civil disturbance, stoppage, go-slow or other industrial action.

[24] Therefore, in a redundancy setting, if (at 6.3.1.1) a worker is provided with an alternative position on the same site or factory complex, in accordance with the redeployment clause, then the worker: "*...shall not be deemed to be made redundant.*" If this is linked back to clause 3.6.1.1c.); in the overall context of all of

the relevant provisions of the CEA, as previously discussed, I conclude that the Union's interpretation cannot reasonably be sustained. Indeed, it is difficult to understand why the Union would wish to see its members being made redundant when redeployment to an alternative role is being offered. Usually, redundancy is considered to be the last option. There may still be an issue about the suitability of the role that is being offered, but that does not appear to have even been considered yet, as I understand it.

Determination

[25] Upon consideration of all of the relevant terms of the CEA as discussed above, I find that under the terms of clause 3.6.1.2 c.) of the CEA, the affected workers are obliged to consider redeployment to an alternative position before any possibility of redundancy becomes an option. However, I also make the observation that the drafting of clause 3.6.1.2c.) is rather poor in a certain regards and I would recommend that the parties to the CEA should revisit the wording accordingly, in order to prevent this type of dispute arising.

Costs: Costs are reserved.

K J Anderson
Member of the Employment Relations Authority