

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 119
5414060

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| BETWEEN | FIRST UNION INCORPORATED First Applicant |
| AND | STEPHEN HOSKIN, BRETT ALLAN, TAMA PAULO, MARK WILKINS, DAMIAN TAYLOR, BARRY SMITH, CHRIS WETZEL, GARETH BRIDGER and PHILLIP HUNUHUNU Second Applicants |
| AND | HOOKER BROS HOLDINGS LIMITED Respondent |

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| Member of Authority: | G J Wood |
| Representatives: | Oliver Christeller, for the Applicants Susan-Jane Davies, for the Respondent |
| Investigation Meeting: | 28 August 2013 at New Plymouth |
| Submissions Received: | By 6 September 2013 |
| Determination: | 30 September 2013 |

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This matter is a dispute about the interpretation and application of the collective employment agreement between the first applicant union (FIRST), some of its members (the second applicants) and the employer, Hooker Bros Holdings Limited (Hooker). The union claims on behalf of its members that they have been underpaid by Hooker because they have not received certain additional payments, provided for

under clause 8.6 of the agreement as additional achievement payments. Hooker claims that these payments are not owing because they are incorporated into the core wage rates of the employees concerned. This is because to attain the wage rates they were on they had to have, as minimum requirements, qualifications which the applicants are claiming again for as additional achievement payments. Hooker believes that the additional achievement payments are only owed to people who have achieved some but not all of the qualification requirements for a higher grade than they are currently on.

[2] The dispute is to be determined by interpreting clause 8 of the parties' employment agreement. The relevant clause is set out below.

8. **Wage Rates**

8.1 **Drivers**

8.1.1 *Trainee Driver – New Employee with minimum qualifications of;*

Drivers licence – class 1,2

Must be able to achieve driver (grade C) level within 6 months of starting employment.

Hourly rate - \$13.72

8.1.2 *Drivers Grade (C) – shall have minimum qualification of:*

6 months company service

Drivers Licence – class 1,2,3,4,5.

Drivers Licence – Dangerous goods Endorsement D

Hourly rate - \$14.83

8.1.3 *Driver Grade (B) – shall have minimum qualification of;*

12 months company service

Driver (grade C) qualifications

Customer Service Course

Hourly rate - \$15.54 per hour

8.1.4 *Driver Grade (A) – shall have minimum qualification of;*

24 months company service

Driver (grade B) qualifications

Customer Service Course

Hourly rate - \$16.26 per hour

8.2 **Storepersons**

8.2.1 *Trainee Storeperson – New Employee with minimum qualification of;*

*Must be able to achieve Storeperson (grade C) level within 6 months of starting employment.
Hourly rate - \$13.72 per hour*

8.2.2 *Storeperson Grade (C) – shall have minimum qualification of;*

*6 months company service
Drivers Licence Class 1
Forklift Endorsement F
Attendance at Forklift Safety Training Programme
Hazardous chemicals – Recognition and Handling Course
Hourly Rate - \$14.83 per hour*

8.2.3 *Storeperson Grade (B) – shall have minimum qualification of:*

*12 months company service
Storeperson (grade C) qualifications
Drivers License – Dangerous Goods Endorsement D
Pass level – Forklift safety training Programmed
Order picking/Documentation abilities
Hourly rate - \$15.54 per hour*

8.2.4 *Storeperson Grade A – shall have minimum qualification of:*

*24 months company service
Storeperson (grade B) qualifications
Customer service Course
Pass level – Advanced Forklift safety, Training and Handling Course.
Hourly Rate - \$16.26 per hour*

8.3 *Labourers*

8.3.1 *Labourer Grade (C) – New Employee*

Hourly Rate - \$13.72 per hour

8.3.2 *Labourer Grade (B) – shall have minimum qualification of;*

*12 months company service
Hourly rate - \$13.90 per hour*

8.3.3 *Labourer Grade (A) – shall have minimum qualification of;*

*24 months company service
Customer Service Course
Hourly rate - \$14.83 per hour*

8.4 *Qualified Personnel*

This schedule of minimum ordinary hourly rates shall apply to Employees who have commenced training by their enrolment and attendance in the Company's NZQA optional strand in Combination Vehicle Driver (Total 91 credits) or

NZQA National Certificate in Storekeeping & Warehousing Course (Level 2), with additional approved units as agreed (Total 90 credits).

| | <i>Driver</i> | <i>Storeperson</i> | <i>Labourer</i> |
|----------------|---------------|--------------------|-----------------|
| <i>Trainee</i> | \$13.50 | \$13.50 | N/A |
| <i>Grade C</i> | \$15.25 | \$15.25 | \$13.50 |
| <i>Grade B</i> | \$15.95 | \$15.95 | \$14.55 |
| <i>Grade A</i> | \$16.65 | \$16.65 | \$15.25 |

8.5 Professional Personnel

This schedule of minimum ordinary rates shall apply to Employees who have successfully completed and gained NZQA National Certificate in Commercial Road Transport (Goods Service) Training Course with an optional strand in Combination

Vehicle Driver (Total 91 credits) or (Level 2), with additional approved units as agreed (Total 90 credits)

| | <i>Professional Driver</i> | <i>Professional Storeperson</i> |
|----------------|----------------------------|---------------------------------|
| <i>Grade C</i> | \$15.90 | \$15.90 |
| <i>Grade B</i> | \$16.65 | \$16.65 |
| <i>Grade A</i> | \$17.30 | \$17.30 |

8.6 Additional Achievement Payments

The following payments will be added to the ordinary hourly rates of pay upon the Employees successfully achieving the qualification;

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| <i>A</i> | <i>Licence Class 3, 4 and 5</i> | <i>18 cents per hour</i> |
| <i>B</i> | <i>Drivers Licence – Dangerous Goods Endorsement D</i> | <i>25 cents per hour</i> |
| <i>C</i> | <i>Defensive Driving Course</i> | <i>36 cents per hour</i> |
| <i>D</i> | <i>Customer service Course</i> | <i>36 cents per hour</i> |
| <i>E</i> | <i>First Specialist Operators Course or Payment</i> | <i>59 cents per hour</i> |
| | <i>Additional Specialists payments e.g. Packing/Removals Tankwagon Swinglift/HIAB Forklift course – Drivers Licence Endorsement F Hanging Meat Deliveries Heavy Haulage Operator/Pilot Machine Operator - Drivers Licence endorsement R, T, W Dogman/Crane Operators Assistant MAF BAAC Certificate</i> | <i>18 cents per</i> |
| | <i>(Note: One only Specialist payment shall be paid at 59 cents per hour. Additional Specialist payments shall be paid at 18 cents per hour)</i> | |
| <i>F</i> | <i>First Aid Course</i> | <i>36 cents per hour</i> |
| <i>G</i> | <i>Fire Fighting Training Course</i> | <i>25 cents per hour</i> |

| | | |
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| H | Approved Health & Safety Representative – Stage 1 | 25 cents per hour |
| | Additional – Stage 2 | 12 cents per hour |
| I | Senior Driver Qualification NZQA | 65 cents per hour |

8.7 Trainee Night Swap Allowance
Night Swap Allowance 59 cents per hour

This allowance shall not form part of the employees ordinary hourly rate and shall be payable for time engaged on night swap only. Refer to Definitions 4g.

8.8 Conditions applying to wage Classifications and Achievement Payments

- (A) All Driving Licences to be current and clean.
- (B) Dangerous Goods Endorsement to be current.
- (C) Defensive Driving Course to be current i.e. not more than 3 years old.
- (D) Customer Service Course to be provided by the Employer requirements for the next Grade except in application of clause 8.7 of this Collective Agreement.
- (E) Specialist Operator Course.
 - To be approved by Employer
 - To be relevant to job
 - To have “life” of 3 years
- (F) First Aid Course
 - Approved St John’s Course or similar with Course “Life” of 5 years

8.9 Note:
Where a customer service Course has not been provided at the Employees depot during the six months prior to an Employees anniversary start date, it shall not prevent an employee’s Grade B qualifications and Grade A Service from reclassification to a Grade A Employee.

[3] The parties ratified this collective agreement even though both were aware that the other had a different interpretation on clause 8.6, as set out above. I note but take no account of the fact that the Union claim is a relatively new one and that a similar clause has been in effect under previous collective agreements, involving predecessor unions to FIRST, without this issue having been raised.

The law

[4] Collective employment agreements are regularly interpreted by the Authority and Court. The principles for interpretation have been set out in Para [17] of *New Zealand Professional Firefighters Union v. The New Zealand Fire Service Commission* [2011] NZEmpC 149 as follows:

[17] In summary, it would appear from Vector that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. ... It is, nevertheless, a valid part of the interpretation exercise for the Court to "cross-check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. ... If the language used is, on its face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. ... Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. ... Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time. ...

Determination

[5] I accept that the wording of the clause is ambiguous as to how additional achievement payments should be remunerated. It therefore follows that the issue for determination is which of the two proposed meanings best fits, objectively assessed, the intentions of the parties when concluding their collective employment agreement, given that there appears to be no other alternative interpretation.

[6] For simplicity, I will focus on the wage rates of drivers, but the same principles apply to store persons and labourers. The scheme for drivers sees them shift through a scale from trainee driver to Grade C, B and A dependent on them reaching minimum level of qualifications and service. Each is cumulative on the other, thus to reach Grade B, one must have done 12 months rather than six months service, with the same minimum qualifications as Grade C, together with a customer service course. Grade A requires the same qualifications but requires 24 months service. I note here that it is consistent with Hooker's interpretation that clause 8.9

provides that a driver may progress to Grade A through service if the employer has not provided the driver with access to the customer service course.

[7] Drivers may progress beyond Grade A through further NZQA credits to the “*qualified personnel*” or “*professional personnel*” levels.

[8] I note that the title of sub-clause 8.6 is additional achievement payments. This implies that the achievements are additional achievements and are paid immediately, rather than achievements that apply anyway, even after having to be met in order to meet the minimum qualifications for a certain grade. Thus, clause 8.9 simply provides an exception to the normal regime, where Hooker has effectively been in default by not providing a customer service course.

[9] The union submits that in addition to workers needing to obtain qualifications that are paid for under the minimum requirements for the levels of payment under the different wage rates, such qualifications also qualify for separate payment under the additional achievement payments sub-clause. I note, however, that the additional achievement payments are to be paid upon successful achievement of the qualification, whereas for an increase to wage rates from grade-to-grade, all conditions must be met. Thus, for example, for a driver to move from a Grade C to Grade B, in addition to longer service she or he must also qualify for having been through a customer service course. That customer service course could occur within the minimum six month period required to increase grade. However, the employee will not have the benefit of it under the wage rate grading system until the additional six months service was completed. This approach is consistent with Hooker’s interpretation that a worker having achieved a qualification immediately gets paid extra (as an additional achievement payment) until other conditions allowing their pay to increase kick in, for example through additional service. That is not to say that that is inconsistent with the approach of the union. However, the union’s interpretation suggests a degree of double counting.

[10] Remembering that this was an agreement written by union and employer representatives and not lawyers, I conclude that the more consistent interpretation of their intentions is to not allow for such double counting. It therefore follows that the applicants’ claim must be dismissed.

Costs

[11] Costs are reserved.

G J Wood
Member of the Employment Relations Authority