

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 44
5415068

BETWEEN THE NEW ZEALAND
AMALGAMATED ENGINEERING
PRINTING AND
MANUFACTURING UNION
INCORPORATED
Applicant

AND SEALED AIR (NEW ZEALAND)
Respondent

Member of Authority: G J Wood

Representatives: Greg Lloyd for the Applicant
Lorne Campbell for the Respondent

Investigation Meeting: 13 March 2014 at Wellington

Determination: 5 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dispute about the interpretation, operation and application of the collective agreement (and a variation to it) between the parties, the EPMU and Sealed Air. At issue is the meaning of the phrase *this change will be based on a cost neutral basis* contained in the fresh variation to the 2012-2015 collective agreement, as agreed to on 28 November 2012. Depending on the interpretation, this may impact on the entitlement of the relevant 56 printers and stores personnel to higher meal allowances and/or shift allowances for the 20 week duration of the variation.

[2] The previous collective agreements between the parties have been subject to some judicial determination, such as in *Sealed Air New Zealand v. EPMU* (unreported, Colgan CJ, WRC2/08, 19 May 2008). The Court noted that the parties'

charade of a collective agreement and a separation variation to it were not such, but rather that both documents together formed the collective agreement.

[3] Following a disputed bargaining process that was the subject of proceedings in the Authority and the Employment Court, the parties ratified and signed a new collective agreement, but were unable to resolve the dispute about the meaning and application of the above term.

[4] The new collective agreement has removed the fiction of a collective agreement and the variation to it. Instead, the new collective agreement affected the workers in Sealed Air printing department roster arrangements by effectively removing the on-roster shift pattern (known as *the firemen's roster*). This form of roster (contained in the old so-called variation) had previously been worked during the peak season of around 20-30 weeks per year. Instead the printers and some store staff were to move to the alternative *off-roster* work pattern - namely 8 hours Monday to Friday alternating between day, afternoon and night shifts. This would have led to significant loss of allowances for staff in the peak season, but they also received pay rises in excess of what would normally be expected in the industry.

[5] However, Sealed Air saw a need for additional work for a 20 week peak season in 2012/2013. The union workers wanted to continue working under the annualised hours formula under the on-roster pattern (i.e. the *firemen's roster*), provided there were no claw backs.

[6] Sealed Air's lead negotiator responded to the effect that there would be no claw backs and that Sealed Air had no intention of taking any terms and conditions off staff that were provided in the Collective. Sealed Air also made it clear that reversion to the on-roster system would have to be on a cost neutral basis.

[7] The parties accordingly agreed to variation to the 2012/2015 collective agreement for all printing department staff (and thus including relevant stores staff).

[8] It states:

It is agreed between the parties that the 7 day shift pattern will be varied as below and furthermore it is agreed that this change will be based on a cost neutral basis:

Original shift(s) Rotating shifts (40 hours per week):

Days (Monday to Friday 8 hour shift)

Evenings (Monday to Friday 8 hour shift)

Nights (Sunday to Thursday 8 hour shift)

Alternative shift(s) Fireman's "4 on 4 off" Shift Roster (average 42 paid hours per week over shift cycle):

Payment for alternative shift pattern

1. *All rostered shifts commencing Monday to Friday to be paid based on ordinary hours.*
2. *All rostered shifts commencing Saturday and/or Sunday to be paid based on clause 4.2, paragraph 3 of the Collective Agreement.*
3. *For the purposes of clarification: All shifts commencing on a Friday will be paid at ordinary rates, all shifts commencing on a Saturday will be paid based on the first 3 hours at T1.5 and T2 thereafter and all shifts commencing on a Sunday will be paid at T2.*
4. *Shift start times to be 6am for day shifts and 6pm for night shift.*

Reason for variation

Based on variance agreement agreed between the parties during collective bargaining.

[9] The parties also handwrote in and initialled an addendum, which stated:

5. *In any pay week where only 36 hours occur, 40 hours will be paid.*

[10] The 2012-2015 collective agreement provides for shifts to be worked as or when required by the employer, but to be arranged in accordance with the wishes of the workers concerned as far as possible. Shift workers are workers who do not work 40 hours on any five days between 6am and 6pm, or as agreed upon between the parties. There is no specific provision for the *firemen's roster*, or the 6 plus 2 roster that Sealed Air claimed was in contemplation to provide a comparator with the *firemen's roster* on a cost neutral basis.

[11] As part of Schedule 5, General Allowances, shift allowances provide for a nightshift loading of 15% for those on day/night shift.

[12] The collective agreement also provides (in clause 6) for meal allowances, which are paid to anyone required to work overtime for more than 2 hours in excess of the ordinary hours on any day, and then paid again for each subsequent 4 hours of overtime.

[13] Sealed Air has only paid the allowances where the relevant union members have worked in excess of their regular 12 hour shift on the *firemen's roster*. The union claims that if the employees are on rotating shifts as Sealed Air claims, then they should have been paid a meal allowance on every day they worked more than 2 hours in excess of 8 hours.

The law

[14] The law on the interpretation of collective agreements has been clarified by the Court of Appeal in *Silver Fern Farms Ltd v NZ Meat Workers Union* [2010] ERNZ 317, based on *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5. The Authority is to determine disputes by establishing the meaning the parties intended their words to mean objectively, which may involve hearing extrinsic evidence that could better inform it of the whole matrix of circumstances leading up to that choice of words.

Determination

[15] It is clear that the negotiation of the new collective agreement was difficult, complex and eventually disputed. Sealed Air has had to adapt to a more competitive environment and its employees have been asked to share part of that burden, effectively by the removal of the benefits associated with the *firemen's roster*, which suited the union members as much as Sealed Air. In this context the likelihood of miscommunication is extremely high.

[16] In this case the union genuinely believed that it had agreed to no reduction in pay or conditions for the 20 week period of the new variation, albeit that that was to be the last time such a system would operate. On the other hand, Sealed Air genuinely believed that it was agreeing to the *firemen's roster* on the basis that it would cost it no more than the system to follow it. The extrinsic evidence showed little more than that.

[17] For the union's approach to prevail in its entirety the parties would have had to have agreed to a variation that was excessively wordy, when the parties could simply have agreed to revert to the terms of the old collective for the relevant 20 week period. They did not do so and it therefore follows that the wording agreed on must be considered in its entirety, and thus that the change had to be "*based on a cost neutral basis*".

[18] I reject Sealed Air's submissions that this involved some comparison with a 6 plus 2 roster. Such a roster does not and never has existed. Equally, I reject the union's submission that the phrase had no meaning and/or had an indeterminate meaning, and that members should be remunerated as if on the old agreement, even although the variation only varies those parts of the collective agreement that need to be varied. The union cannot rely on those parts of the collective agreement previously known as the annual hours variation, as they no longer existed.

[19] I conclude that the phrase refers to cost neutrality with the collective agreement itself. Thus the parties operating under the variation's alternatives of rotating shifts or *fireman's* shifts are to be paid on a cost neutral basis with the core collective.

[20] In the alternative, the words relating to costs neutrality could have referred to the situation whereby on some weeks workers worked only 36 hours. However, that intent was over ridden by the handwritten amendment ensuring 40 hours per week for workers in that situation. That interpretation also reaches the result that the rest of the collective applies, including in relation to meal monies and shift allowances.

[21] It follows from that that employees are only entitled to meal monies when they work more than 2 hours in excess of their ordinary hours which, under the *firemen's* 4 on 4 off shift roster, would require a 14 hour day. There have been no claims that the workers have been underpaid on this basis.

[22] On the other hand, it also follows that the workers are entitled to the shift allowances set out in Schedule 5 to the collective agreement, for working day/night shifts, to the extent that they have not been paid by Sealed Air.

[23] I therefore determine that the union members are entitled to shift allowances as set out above, but not meal allowances. Leave is granted for the union to revert to

the Authority if agreement cannot be reached on the quantum involved, or if compliance is otherwise required.

Costs

[24] Costs are reserved.

G J Wood
Member of the Employment Relations Authority