IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 203
5455348

	BETWEEN	NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INCORPORATED Applicant
	AND	SILVER FERN FARMS LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Peter Churchman QC, Counsel for Applicant Tim Cleary, Counsel for Respondent
Investigation Meeting:	22 October 2014 in Dunedin
Submissions:	At the investigation meeting
Determination:	8 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The New Zealand Meat Workers and Related Trades Union Incorporated (the Union) and Silver Fern Farms Limited (SFF) are parties to a collective employment agreement (CEA) which covers workers at the Silverstream meat processing plant in Otago. The Union represents meat workers who work seasonally on lamb processing.

[2] The Union has asked the Authority to determine a dispute between it and SFF about the meaning and effect of clause 39 of the 2012-2013 CEA. The Union contends that the Silverstream seasonal workers are entitled to payment of redundancy

compensation because they were not engaged in their usual seasonal employment in the 2013/2014 lamb processing season.

[3] The Union seeks:

- A declaration that SFF has breached its consultation obligations under clause 39.3 of the CEA;
- A penalty for that breach or breaches;
- A declaration that the affected employees must be paid redundancy compensation in accordance with clauses 39.2 and 39.7 of the CEA;
- Directions allowing the parties to calculate the redundancy entitlements due to the affected employees and leave to return to the Authority to determine final entitlements if they cannot agree; and
- Legal costs.

[4] SFF denies that clause 39.2(b) operates to make the employees redundant and says that the exception in clause 39.2(c) applies because the employees remain on a *seasonal lay-off*, although that lay-off is a long one.

[5] In the alternative, SFF says that if the employees were redundant then the fact that a number of employees accepted work at the Finegand plant means that they were re-deployed and therefore the redundancy payment provisions should not apply to them.

Factual background

[6] The facts are not disputed and were established by way of written statements and by oral affirmed evidence at the investigation meeting by Darryl Carran, president of the Otago Southland branch of the Union, and Gary Williams, SFF's Employment Relations Manager.

[7] Seasonal workers return to the Silverstream plant after a seasonal lay-off upon being notified by SFF management that they are invited to work for the season and have to be given at least five working days' notice *by the employer's customary procedure*.[1]

[1] Clause 34(g)(ii)

[8] On 8 November 2013 salaried administrative and managerial staff at the Silverstream plant, who were permanent and not seasonal employees, were presented with a proposal that the management and administration of the Silverstream plant and the Finegand plant would be combined and based at Finegand. A number of Silverstream salaried staff were made redundant and paid redundancy compensation. Those staff were not covered by the CEA that is the subject of this investigation.

[9] The same redundancy proposal stated that there were fewer carcasses available for boning and that it was *uncertain* when Silverstream would be required to process in the 2013/2014 season.

[10] A memo from SFF also dated 8 November 2013 stated that there was a:

> *…possibility the plant will not be required to take overflow for the 2013/2014 season…*
>
> *Until an overflow is forecast this season, prompting a start date, seasonal staff are not required at Silverstream. They are being called today and advised of the uncertain start date so they can plan their employment options. We are assisting them to take up seasonal employment at Finegand and Waitane and Pareora sites until such time that Silverstream opens.*

[11] The Silverstream plant did not open for lamb processing at all over the expected season in 2013/2014.

[12] Out of approximately 180 seasonal employees who were not engaged at Silverstream over the 2013/2014 season about 70 were offered and accepted temporary work at the Finegand plant, which is situated about 80 kilometres away from the Silverstream plant. There was no consultation with the Union about redundancy or redeployment and none of the Silverstream seasonal staff were told that they were being redeployed to roles at Finegand.

[13] Clause 39 is entitled *Redundancy* and, clause 39.1(b) provides that redundancy coverage includes:

> *all employees who are defined as either currently employed, seasonally laid off, or on approved leave.*

That clarifies that the employees who were seasonally laid off from Silverstream in the 2013 off-season are covered by the redundancy clauses in the CEA.

[14] The interpretation of clause 39.2, which defines redundancy, is at the centre of this dispute:

> *Redundancy shall be defined to mean:*
>
> *(a) An employee's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by that employee is or will become, superfluous to the needs of the employer; or*
>
> *(b) In the case of a seasonal employee, that employee's usual seasonal employment, is made unavailable by the employer, the unavailability being attributable, wholly or mainly, to the fact that the employees position or usual position is, or will become, superfluous to the needs of the employer; but*
>
> *(c) Does not include a situation solely involving a seasonal lay-off or the completion of a fixed-term engagement.*
>
> *(d) No redundancy shall arise from the sale, transfer, lease, merger or contracting out of the whole or part of the business by the employer, providing the new employer is able to offer the employee(s) employment on the same or similar terms and conditions contained in this agreement, and agrees to treat service as continuous.*

[15] Clause 39.3 sets out the requirement for SFF to consult with the Union prior to any proposal to:

> *close, partially close or a proposal to significantly restructure the business being presented to staff.*

[16] There is no dispute that the Union was not consulted about the decision not to open for the 2013/2014 processing season. However, SFF says that is because the redundancy previsions are not applicable as the employees' positions were not superfluous to SFF's needs. SFF wished to retain the employees in case it required Silverstream to operate for a shorter season in 2013/2014 or a season in 2014/2015.

[17] Clause 39.7 sets out how redundancy compensation should be calculated and applies if the employees are eligible for redundancy pay.

Issues

[18] The issues the Authority needs to determine are:

(a) Whether clause 39.2 operates to make the seasonal staff who were not engaged for a 2013/2014 processing season at Silverstream redundant.

(b) If so, whether clause 39.2(c) operates as an exclusion because the staff remain on an extended seasonal lay-off and so are not redundant.

(c) If the staff should have been paid redundancy, what are the entitlements for each employee?

(d) Whether SFF breached its duty to consult the Union under clause 39.3 of the CEA about the redundancies and whether it should pay a penalty for its breach of the agreement.

Does clause 39.2 operate to make the seasonal staff redundant?

SFF's case

[19] SFF says that there was a seasonal layoff in 2013 which extended into 2014. As at the date of the investigation meeting in October 2014 no decision had been made about whether there would be a 2014/2015 season and so SFF says the extended seasonal lay-off continues.

[20] SFF submits that clause 39.2(c) applies to mean that the seasonal employees were not made redundant because they remain on a seasonal lay-off. SFF says that the ordinary meaning of the words in clause 39.2(c) can encompass an extended lay-off period of a year or more. At the date of the investigation meeting using SFF's definition the off-season had run for a period of over 16 months.

[21] SFF cites the following as an example of when a lay-off was for a longer period than usual, with no redundancy payments being sought. For the 2010/2011 season Silverstream night shift workers were told that there would be no night shift for the season and so no work for them at Silverstream. SFF submits that the current situation is similar.

The Union's case

[22] The Union submits that the words in clause 39.2(b) are unambiguous and must be taken to mean what they say. It argues that for the expected 2013/2014 season the seasonal employees' *usual seasonal employment* was unavailable and that

unavailability was attributable to SFF's decision to not process lamb carcasses therefore the seasonal employees' positions were superfluous to the employer's needs for the missed season. Those facts meet the definition of redundancy and therefore the seasonal employees are eligible for redundancy payments.

[23] The Union agrees that it did not seek to characterise the unavailability of the night shift in 2010/2011 as a redundancy. It says it saw the situation as a one-off exception during which it worked alongside SFF to minimise the negative effect on its members. An expanded day shift operated and a large number of night shift workers were engaged on the day shift. Some others opted to take up temporary work at the Finegand plant. Some others chose to remain in their usual off-season employment. No redundancy payments were sought or paid. But the Union argues that was an entirely different situation and it was able to work with SFF to ensure as few employees as possible were negatively affected by the unavailability of the night shift.

Interpretation of clause 39.2

[24] Both parties agree that orthodox contractual interpretation principles apply to the interpretation of the CEA, being the principles set out in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2]and accepted by the Court of Appeal as applying to employment contracts in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trades Union Inc*.[3]

[25] The Authority needs to determine the meaning of a disputed clause objectively. To do that I need to ascertain:

> *the meaning* [clause 39.2] *would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*[4]

[26] The factual matrix may be used as an aid to interpretation. However, any subjective evidence given by parties about what they intended is not relevant. I have

[2] [2010] 2 NZLR 444
[3] [2010] ERNZ 317
[4] Ibid, at 327 which is a quote from McGrath J in the *Vector* case in which he summarises Lord Hoffman's five principles of interpretation from *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98.

not taken any such subjective evidence into account. However, I have taken the commercial or business context into account to check that relying on the natural meaning of the words used is appropriate and that the plain and unambiguous meaning of the words was not modified by the context the parties negotiated in.

[27] I need to consider what a *seasonal employee* is and what their *usual seasonal employment* is in the meat industry, particularly at the Silverstream plant.

[28] The meat industry in New Zealand is seasonal. Most meat workers are engaged over a *season* that runs roughly from September, at the earliest, until June, at the latest. Workers are not generally employed during the *off season* when they may have alternative employment or go on to the unemployment benefit.

[29] The Silverstream plant has been in operation for about 21 years and over *the season* it processes lamb carcasses slaughtered at other SFF plants. The parties agree that it has generally been used as an overflow facility for SFF's other plants.

[30] Over the last three seasons the season length varied from September 2010 to May 2011, 1 December 2011 to 13 April 2012 and 13 December 2012 to 10 June 2013. The Union says that based on the 21 years the plant has operated the season usually starts in middle to late November.

[31] There are two periods when bobby calf processing was undertaken at Silverstream. The first was during the 2011/2012 off-season and the latest was from 5 August to 3 September 2014. Neither party considers that the bobby calf processing was sufficient to amount to *usual seasonal employment* for any employee.

[32] Seasonal employees acquire and retain seniority according to the date of their commencement of employment, which accords them certain entitlements under the CEA, such long service leave, ahead of other less senior employees.[5] Seniority is not broken by seasonal lay-offs.

[33] Clause 25 of the CEA requires that seasonal workers who had been employed in the previous season have priority to be re-employed at the start of the new season so long as they had been competent and satisfactory employees the previous season.

[5] For example, clauses 14 and 34 of the CEA.

[34] The words in clause 39.2 are not ambiguous and I need to give them their natural and ordinary meaning. The online Oxford Dictionary defines *seasonal* as *relating to or characteristic of a particular season of the year*. I have cross-checked the meaning of *seasonal* against the knowledge of the parties about the business environment that the Silverstream plant operates under. The parties knew that the lamb carcass processing season was related to the season in which lambs are usually born; Spring. So far as lamb carcass processing is concerned *seasonal* employment is for a processing *season* after the lambs are born and have grown to an optimal age or size. History shows that the season usually begins in autumn or early summer and runs for a period of weeks or months finishing no later than June in the following year.

[35] According to the online Oxford Dictionary the word *usual* means *habitually or typically occurring or done; customary*. That is the meaning that I attribute to the word in the phrase *usual seasonal employment*. When I interpret the clause I need to refer to what typically occurred or was customary at Silverstream for *seasonal employees* and what their *usual seasonal employment* was.

[36] A Silverstream seasonal employee expects to be laid off at the end of each season and re-engaged at the start of the new season. A *seasonal employee* is one who was employed in the previous season, or in previous seasons. If a seasonal employee was a competent and satisfactory employee in the previous season they expect to be given at least five days' notice by Silverstream that they are required for a lamb processing season.

[37] That seasonal work, although not fixed in duration or by start date, is the *usual seasonal employment* for a *seasonal employee*.

[38] Usual seasonal employment was not available to seasonal employees over the 2013/2014 lamb carcass processing season at Silverstream because SFF did not need to run processing at Silverstream. SFF attributes the lack of lamb carcasses that season to market and climatic conditions.

[39] On the face of it, the Silverstream seasonal employees' usual seasonal employment was made unavailable because their positions were superfluous to the

needs of their employer in the 2013/2014 season. Therefore, according to clause 39.2(b) they were made redundant.

Are the seasonal employees on an extended seasonal lay-off?

[40] I need to interpret clause 39.2(c) to see if it applies to exempt SFF from paying the seasonal employees redundancy compensation because the seasonal employees were, and still are, on a seasonal lay-off.

[41] The words of clause 39.2(c) must be interpreted in the light of the background knowledge of the parties about the meat industry when the CEA was entered into. The parties had the understanding set out above about the seasonal nature of lamb carcass processing at Silverstream. The following is also relevant and would have been well known to the parties.

[42] The employment of seasonal workers is, at least for the purpose of the Holidays Act as defined in *New Zealand Meat Workers' Union Inc. v Alliance Group Limited*[6] not *current continuous employment*. As a part of its decision the Court decided that the employment of the Union members was:

> *…terminated when they are laid off for the off-season …. The meat workers who are laid off seasonally are not in "current continuous employment" for the period of the seasonal lay-off.*

[43] Mr Churchman for the Union submits the fact that seasonal employees are not employed during a seasonal lay-off period is the reason why clause 39.2(c) is in the CEA. SFF does not dispute that. Both parties understood when agreeing to clause 39(2)(c) that seasonal employees were not employed during the seasonal lay-off.

[44] I find that the meaning of clause 39.2(c) is clear. The wording is unambiguous and the natural and ordinary meaning of the words must prevail. I consider that the purpose of clause 39.2(c) when entered into by the parties was understood simply to be to prevent SFF having to pay seasonal employees redundancy pay at the end of each and every season. It is an exception to clause 39.2(b). I need to also consider

[6] [2006] ERNZ 663

whether it can also be interpreted to apply to an extended seasonal lay-off, where no next season occurs.

[45] The Union says that there is no concept of an extended seasonal lay-off which extends beyond the usual season. The 2013/2014 season was the first time in Silverstream's history when no processing season occurred.

[46] If clause 39.2(c) is interpreted to mean that a period of seasonal lay-off can be extended at SFF's sole discretion and beyond the usual off season and past the usual seasonal employment period, clause 39.2(b) would be a nullity that could always be over-ridden by SFF declaring that any seasonal lay-off period would be longer than *usual*. Therefore, SFF could theoretically never be in a position in which it was required to make redundancy payments for seasonal employees. I cannot accept that the parties intended that clause 39.2(b) should bear such marginal meaning.

[47] SFF argues that its interpretation does not mean that there could never be a redundancy situation simply that the lay-off duration to date is not at a point where it can be considered to be at an end. However, it offers no guidance as to when, if ever, the lay-off duration would become so long that clause 39.2(b) would apply to make the seasonal employees' roles redundant. For example, would SFF decide that clause 39.2 does apply if there is no season at Silverstream in 2014/2015?

[48] I cannot accept SFF's argument that at the time the parties entered into the CEA they intended clause 39.2(c) to bear the extended meaning that SFF argues for it. Clause 39.2(b) applies when seasonal employees' *usual* seasonal employment is not available so long as that lack of availability was attributable, wholly or mainly, to the seasonal employee's positions being superfluous to SFF's needs.

[49] SFF says that the season did not proceed wholly due to climatic and market conditions, which it could not control, and so it should not be required to pay redundancy compensation to its seasonal employees. I do not consider this argument assists me to interpret clause 39.2(b) and (c). The clause does not state that it will not apply if redundancy is due to climatic or market conditions. If the parties intended that to be the case I am sure they would have included words to that effect. SFF's liability for redundancy is not limited by clause 39.2 in situations in which outside forces make the employer decide not to make seasonal employment available.

[50] SFF also argues that there was no redundancy for seasonal employees under clause 39.2(b) in 2013/2014 because the unavailability of employment was not attributable (either wholly or partially) to the fact that the positions were superfluous to the needs of SFF. SFF submits that it made no decision to close any departments or the plant as a whole and it argues that the positions could be required for a 2014/2015 season and so they have not become superfluous.

[51] However, applying that interpretation ignores the deliberate use of the word *usual* in reference to the seasonal employment. Evidence has established that *usual seasonal* [lamb carcass processing] *employment* occurred each year within a certain time period. During the *usual seasonal employment* period in 2013/2014 the lamb carcass processing season did not occur.

[52] As a result of that, usual seasonal employment was made unavailable to the seasonal employees. That unavailability was attributable wholly or mainly to the seasonal employees positions being superfluous to SFF's needs for lamb carcass processing at the time in 2013/2014.

[53] The Union invites me to consider that in making the Silverstream salaried staff redundant SFF accepted that because the processing season would not proceed over 2013/2104 its salaried staff positions were redundant and in failing to make the seasonal staff redundant SFF is deliberately flouting its responsibility under the CEA.

[54] SFF counters that by saying that even if processing had occurred at Silverstream over the 2013/2014 season the salaried staff would still have been made redundant because it was a sensible business decision to amalgamate the management and administration of both plants. SFF also says that the redundancy of Silverstream salaried staff has no relevance to the interpretation of clause 39.2(b) because Silverstream lamb carcass processing could continue using staff based at the Finegand plant for the management and administration of Silverstream.

[55] I accept that the salaried staff redundancies add fuel to the Union's suspicion that SFF is deliberately ignoring its duty under the CEA to pay redundancy compensation the seasonal employees, although it recognised the responsibility to its salaried staff, but consideration of the position of the salaried employees under a different CEA does not assist me to interpret the CEA applying to the seasonal staff.

[56] I consider that clause 39.2(b) applies to mean that Silverstream seasonal employees' positions were redundant when the decision not to open for the 2013/2014 season was made by SFF. Clause 39.2(c) cannot operate to exclude the effect of clause 39.2(b).

[57] The parties should work together to establish which staff are redundant and how much their redundancy compensation should be under clause 39.7 of the CEA.

[58] The Union submits that if any seasonal employees who are paid redundancy compensation are called for work at the plant in the 2014/15 season it would be fair for those employees to have their length of service taken back to "year 1".

Were the seasonal employees who accepted work at Finegand redeployed under the CEA?

[59] In submissions for SFF Mr Cleary submitted that the approximately 70 Silverstream employees who accepted work at the Finegand plant were redeployed to *another department*. I assume he was referring to clause 39.3(d) of the CEA.

[60] Clause 39.3 requires consultation with the Union before any proposal to close, partially close or to significantly restructure the business is presented to staff. It also requires a committee to be established representing the Union and SFF. If a decision is made to close, partially close or significantly restructure a plant/department/part department the employer and the committee will review the impact of the proposal on employees. If the proposal results in a reduction of employee numbers:

> *(d) … the objective will be to cater for displaced employees through;*
> *- Redeployment to a similar role within the plant or close proximity commensurate with the employee's skill and experience*
> *- Retraining and redeployment into another position where the number of surplus employees is greater than the number of redeployment/retraining opportunities and the excess number cannot be catered for through attrition, the selection process set out in clause 39.6 shall apply.*
> *(e) The consultation will include, where appropriate, options for compensation for employees that are disadvantaged financially as a result of the proposed changes. No compensation is payable where the employee is redeployed into a position where the typical weekly earnings of the new position are overall comparable to or better than the typical weekly earnings for their current position.*

[61] The Union disagrees that the staff who obtained work at Finegand were redeployed as envisaged in the CEA. At first glance it appears that consideration of redeployment under the CEA occurs only during consultation between SFF and the Union as part of the process prescribed in clause 39.3, which did not occur. However, Mr Cleary submits that redeployment would not be nullified by a lack of consultation with the Union under clause 39.

[62] I have heard no argument from either party on the issue and have had insufficient evidence about it and therefore do not make a determination on the matter. If the Authority was required to determine this issue further evidence and specific argument would be required. However, I note that Mr Cleary's submission is at odds with SFF's position expressed by Wayne Shaw, SFF's sheep and operations manager, in an email to Mr Carran on 23 December 2013 when he wrote about the 70 employees who had taken up work at the Finegand plant:

> *them taking us (sic) this opportunity does no (sic) impact their status with respect to Silverstream (i.e. they remain 55 employees) … we do not consider it a redeployment/redundancy situation*

[63] Whether or not some employees were redeployed as envisaged under the CEA is also a matter the parties should work together to resolve in the first instance.

[64] The parties have leave to return to the Authority for assistance in determining the outstanding matters if the parties are unable to reach agreement by 30 January 2015. Using the services of a mediator should be considered before there is any decision to return to the Authority.

Did SFF breach its obligation to consult with the Union about the seasonal staff redundancies?

[65] The Union submits that SFF breached its duty to consult with the Union under clause 39.3 of the CEA and a penalty should be imposed under s.135(1)(a) of the Employment Relations Act 2000.

[66] Clause 39.3 triggers a consultation process:

> *prior to any proposal to close, partially close or a proposal to significantly restructure the business, being presented to staff.*

[67] On 23 December 2013 Mr Carran emailed Mr Shaw, notifying that he intended to send a letter in the New Year:

> *outlining the issues of the conditions of Silverstream workers at Finegand and also the consequences should Silverstream not start for this season.*

[68] Mr Shaw replied that SFF did not:

> *consider it a redeployment/redundancy situation.*
>
> *We have advised personal* (sic) *that we think it unlikely that Silverstream this season* (sic) *but that is possible and a start next season is likely as markets re-adjust*

[69] On 23 January 2014 Mr Carran wrote to Mr Shaw to notify him that:

> *as a result of the Silverstream workers not being called back for the 13/14 season at Silverstream we are seeking on their behalf, redundancy compensation as provided for under clause 22.1* (sic) *of the Silver Fern Farms South Island Collective.*
>
> *I would agree with your references in your email that Silverstream workers in the meantime are working at Finegand on the basis that their original status as a Silverstream worker has not changed, however in most cases Silverstream workers are finding this unsustainable, given the distance of travel and the time involved this is only an interim measure on a voluntary basis whilst workers await the final decision on the Silverstream Plant continuing.*

[70] Mr Shaw replied on the same day:

> *Clearly we have not advised that Silverstream is closing and it is not a redundancy situation.*
>
> *I will continue to keep you informed as things develop on when the plant is likely to recommence. At this stage my best estimate is later this year for the 2014/2015 season but highly dependent on stock and market situation re the carcase trade.*

[71] Mr Cleary submits that there was no deliberate non-compliance with clause 39.3 but that as SFF did not consider it was in a situation whereby redundancies were occurring it did not consider it had to advise the Union that it proposed to make the employees' positions redundant. Therefore, it considered that clause 39.3 did not apply. SFF submits that this is not an appropriate case for a penalty to be imposed.

[72] The words triggering consultation with the Union in clause 39.3 describe redundancy in quite different terms to the words used in clause 39.2 to define

redundancy. It is less clear under clause 39.3 that SFF was proposing redundancies in that it did not have a proposal to close, partially close or significantly restructure the business. It is arguable that in not operating a season SFF was proposing to partially close the business.

[73] Penalties focus on the conduct of the party who breaches the provisions of an employment agreement. The function of penalties is to punish wrongdoing and to deter it from happening again.

[74] In all the circumstances, including that the parties will now be co-operating to resolve the redundancy payments to the seasonal employees, I do not consider this an appropriate situation to impose a penalty.

Costs

[75] Costs are reserved. The parties are invited to agree on the matter. It may be that it is appropriate for costs to lie where they fall, as in common in cases of a dispute.

Christine Hickey
Member of the Employment Relations Authority