IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 122
5559335

	BETWEEN	E TŪ [Formerly known as THE NEW ZEALAND ENGINEERING PRINTING AND MANUFACTURING UNION INC] Applicant
	AND	CENTURY DRILLING & ENERGY SERVICES (NEW ZEALAND) LIMITED (trading as MB CENTURY) Respondent

Member of Authority:	Michele Ryan
Representatives:	Greg Lloyd, Counsel for Applicant Candice Murphy, Counsel for Respondent
Investigation Meeting:	6 and 7 August 2015 at New Plymouth
Submissions Received:	24 August 2015 for the Applicant 8 September 2015 for the Respondent
Determination:	14 December 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] E tū (formerly known as the "New Zealand Engineering Printing and Manufacturing Union" ("the union") challenges whether Century Drilling & Energy Services (New Zealand) trading as MB Century ("MB Century") can direct employees who live in New Plymouth and its surrounds, to reside in camp approximately 35 kilometres east of New Plymouth, when rostered on a 14 day shift period ("a rostered-on period", also known as a "hitch"). The parties also dispute whether MB Century can restrict the period of time an employee may be absent from camp between shifts whilst on a hitch.

Background

[2] MB Century is engaged in exploratory petroleum, gas and geothermal drilling. It is one of three employer parties to the MECA with the union.[1] The MECA commenced on 1 April 2012. It has since expired but remains in force[2]. The parties are bargaining for a new collective agreement.

[3] In mid to late 2013 MB Century entered into a commercial agreement with a third party to operate and manage an onshore drilling operation on the outskirts of New Plymouth. MB Century set about recruiting staff. Prospective employees were provided with a copy of the MECA, and a letter of offer informing employees;

> *"you will be required to reside on site for the duration of your "rostered-on" period of work"*
>
> *...*
>
> *"when residing in camp you will be required to comply with the Camp Rules"*[3]

[4] The Camp Rules reiterated all rig crew must live in camp when rostered-on and that occupants must sign in and out on arrival and departure respectively. The camp rules were silent as to whether, and for how long, an employee may be away from camp between shifts.

[5] Work on the rig commenced in or about February 2014. The rig operates continuously.

[6] In March 2015 MB Century senior management became aware that local management were not strictly enforcing camp residency during a hitch. Some New Plymouth resident employees were going home at the end of a shift and returning to the rig the following day.

[7] On 21 May 2015 MB Century issued a 'Living in Camp Directive'[4] (the directive). Staff were reminded to stay in camp during a hitch. In addition the directive introduced a schedule regarding absences from camp. Dependent on the

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[1] The dispute at issue does not involve the other employer parties

[2] The MECA expired on 31 March 2015. It remains in force pursuant to s 53 of the Employment Relations Act

[3] 'Camp Rules' were attached to the letter of offer

[4] The directive was initially issued on 18 May but was amended and reissued on 21 May 2015

shift pattern, a prescribed timeframe was set by which employees may leave and return to camp between shifts. The length of absence was fixed at a maximum of 2 hours. The stated purpose for the restriction was to "*ensure personnel are achieving a minimum of 7 hours of sleep between shifts*".

[8] Two weeks (or thereabouts) before the Authority's investigation, and following discussions with the union, MB Century modified the directive and extended absences from camp to 3 hours between shifts, conditional on employees taking a minimum of 7 continuous hours of sleep in camp.[5]

[9] Both directives informed employees that a breach [of its contents] without sufficient justification would be deemed serious misconduct and potential grounds for dismissal.

[10] The parties have attempted to resolve their differences but remain unable to reach agreement.

The union's position

[11] The union agrees that the provision of on-site accommodation is appropriate for employees who do not live locally. It says that to the extent that MB Century's letter of offer and its Living in Camp directive compels all employees to reside in camp during a hitch irrespective of where an employee resides, those requirements are inconsistent with the MECA and are unenforceable.

[12] Next, the union says there is nothing in the MECA that permits MB Century to restrict the activities of an employee during non-work hours when residing in camp. It submits that MB Century's Living in Camp directive is unlawful, unreasonable and against public policy.

MB Century's position

[13] MB Century's responses to each matter of dispute refer to its duties under the Health and Safety in Employment Act 1992. It says the company's requirements to have employees reside in camp and to limit the duration of absences from camp

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[5] issued on 22 July 2015

during a hitch are designed to ensure employees receive uninterrupted sleep and rest, crucial to the management of fatigue.

[14] MB Century says the terms contained in the MECA allow it to require employees reside in camp and the terms contained in the letter of offer agreed by employees are lawful and enforceable. Alternatively it says there is nothing in the letter of offer or the directive which is inconsistent with the MECA. It says the policy to have employees remain in camp is reasonable in all the circumstances.

The Authority's investigation

[15] Pursuant to s 174E of the Act I have not recorded all evidence and submissions received but have stated relevant findings of fact and law necessary to dispose of the matter, and specified orders made as a result.

[16] This determination has been issued six days outside the statutory period of three months after receiving the final submissions. As permitted by s 174C(4) the Chief of the Authority decided that exceptional circumstances existed to allow a written determination of findings later than the latest date specified at s 174C(3).

The issues

[17] The Authority is required to determine:

(a) whether MB Century is able to require all employees to reside in camp during a hitch. A determination of this issue requires the following be examined:

- what has been agreed between the parties as recorded in the MECA;

- whether the letter of offer and/or the Living in Camp directive is inconsistent with the MECA; and .

(b) whether MB Century may restrict the length of time an employee may be absent from camp. In particular,

- is there anything in the law or the collective agreement to prevent MB Century from restricting absences from camp;

- is there a demonstrable connection between the hazard or the risk of harm and the step proposed;
- is the directive restricting the duration of absences from camp objectively reasonable in all the circumstances.

Is MB Century is able to require all employees to reside in camp during a hitch?

[18] A determination as to whether MB Century can insist all employees reside in camp first requires an assessment as to what has been agreed between the parties on the matter. I have not set out in full every referred clause as some of these do not assist to determine this application.

What does the MECA mean?[6]

Clause 19.2 - Country Work

[19] Both parties referred to cl. 19.2 of the MECA. The parties diverge on the meaning of the provision. Clause 19.2 states:

> *"Country work" means work done in such a locality as to necessitate an employee sleeping elsewhere than at his genuine or declared place of residence. For the purpose of this clause the genuine or declared place of residence shall be deemed to be the address provided by the employee on the application form for employment with the employer.*

[20] The words used at cl. 19.2 should be given their ordinary meaning. It is plain that it not the locality of the work in and of itself, that defines Country Work. Put simply, it is the *necessity* for an employee to sleep elsewhere than his or her declared place of residence as a consequence of the locality of work which determines whether that individual is required to sleep in camp.

[21] MB Century argues that if cl. 19.2 requires consideration of individual employees' places of residence alongside the locality of the work to assess whether

[6] I have applied the accepted principles regarded as relevant to contractual interpretation, see *Vector Gas v Bay of Plenty Energy Ltd* [2010] NZSC 5; *Silver Fern Farms Ltd v NZ Meat Workers & Related Trades Unions Inc* [2010] NZCA 317; *New Zealand Air Line Pilots' Association Incorporated v Air New Zealand* [2014] NZEmpC 168

those conditions necessitate an employee sleeping in camp, then the application of the provision is open to subjective and uncertain results. It points to the words: "*the work done in such a locality*" and says attention should be given to the conditions surrounding the locality of the work including for example, the nature of the roads surrounding the rig (including resource consent restrictions on a private road entering the rig site) and weather conditions, as factors which may impact of the necessity to have employees reside in camp.

[22] I am not satisfied that MB Century can reasonably elevate the factors it has raised as matters that take precedence over the words used at cl. 19.2. I agree that the evidence given was not uniform, both as to what distance between the rig and a place of residence, and what, if any, other factors "*in such a locality*" will necessitate an employee to sleep in camp. The lack of precision on these matters however, is insufficient to find against the plain words of cl. 19.2 particularly where an inherent feature of the provision itself involves inquiry with an employee about his or her residential circumstances.

[23] The English Oxford dictionary (online edition) defines 'necessitate' as "make (something) necessary as a result of consequence". The word "necessary" is defined (amongst other things) as "inevitable". The test must be, having assessed the distance between the locality of the work and an employee's place of residence, whether it is inevitable that an employee must sleep at camp.

Clause 18.1.6 – Amenities Provided by the Employer

[24] Next, MB Century furnished evidence of the union bringing a claim in the 2003 bargaining to have the employer provide camp accommodation irrespective of where employees lived. The agreed provision is now recorded at cl. 18.1.6[7] and provides "*the employer may provide a camp for accommodation*". MB Century states that it makes no commercial common sense that it would agree to such a term in the absence of agreement that employees would occupy the lodgings.

[25] I do not accept that cl. 18.1.6 allows MB Century to insist employees reside in camp. The words within that provision do not record any reciprocal obligations on

[7] which sits outside the Country Work provisions

employees to reside in camp if the employer provides accommodation. Clause 18.1.6 does not advance MB Century's position.

Clause 23 - Safety and Environmental Policies

[26] Clause 23 of the MECA states:

> *The employer may issue company safety and/or environmental policies in line with the relevant legislation. Such policies will not be inconsistent with the terms and conditions of employment of this Agreement. These policies may be reviewed and changed to make sure they are appropriate and up to date.*
> *…*
> *Employees will comply with the employer's safety policies and instructions…*

[27] I shall return to MB Century's health and safety policies when determining the second area of dispute between the parties but it is clear from the content of cl. 23 that policies issued pursuant to this provision cannot be inconsistent with terms contained within the MECA. Logically this must include the agreement at cl. 19.2.

[28] Material to determining what has been agreed between the parties it is clear, with the sole exception of cl. 19.2, that there is no express requirement in the MECA for employees to reside in camp.

Is the requirement to "reside onsite for the duration of your rostered on period" (as contained in the letter of offer and reiterated in the Living in Camp directive) inconsistent with the MECA?

[29] Section 61 of the Employment Relations Act allows employers and employees to mutually agree on terms additional to those in the MECA if these are not inconsistent with the MECA. More favourable terms are generally not regarded as inconsistent but where two provisions cannot stand together, the MECA will prevail.[8]

[30] There is an inconsistency between cl. 19.2 and MB's letter of offer. At cl. 19.2 the requirement for an employee to sleep in camp arises only when the locality of the work and an employee's place of residence necessitates that event, whereas the letter of offer compels employees to reside in camp without pre-conditions or exceptions before the requirement is triggered. The differences between the two terms are significant and cannot be reconciled. If left to stand, the term contained in

[8] *NZEPMU v Energex* [2006] ERNZ 749

the letter of offer renders cl. 19.2 irrelevant and effectively varies the agreement between the parties. The same reasoning applies to the Living in Camp directive.

[31] MB Century next submits there is nothing in the MECA that states locality of work is the only factor relevant to employees residing in camp. It says the MECA's silence on a matter does not necessarily result in an inconsistency with the letter of offer or the directive. The implication I understand it wishes me to take is that it is able to require employees to reside in camp on health and safety grounds where there is no express provision against the requirement. That ground (if that is what is suggested) would give rise to an inconsistency given the contents of cl.23 and cl.19.2. In any event MB Century cannot avoid cl.19.2 which I consider provides a complete statement as to the circumstances that will require an employee to reside in camp.

[32] Both parties turned also to surrounding clauses in the MECA to give context to their respective positions. The union points to clauses within the MECA that allow for payment of board and lodgings where camp accommodation is not provided[9] and provisions concerning payment and reimbursement of daily travelling time as evidence that the MECA contemplates a variety of living arrangements whilst employees are working.[10] Those provisions, together with testimony of employees living at home if proximate to the workplace during a hitch, undermine MB Century's position that there is no inconsistency between the terms of the MECA and its view that employees must reside in camp during a hitch.

[33] MB Century points to the same provisions and says travel allowances are only available where camp accommodation is not provided. MB Century further submits that whether employees reside in camp according to the Country Work provisions or alternatively under cl. 18.1.6 the same allowances and bonuses are paid. MB Century submits that in this way there is no inconsistency between the separate provisions. The issue is not whether there is an inconsistency in remuneration provisions

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[9] Clause 19.5 sets out additional rates of payment subject to the type of accommodation the employer makes available

[10].Clause 10.2 states that the wages schedule includes all payments for rostered on and rostered off periods as well as travelling time (and other matters). Clause 11 provides a reimbursement payment where the employer does not provide transport between an employee's declared place of residence and the drill site, and payment of travel time payment (set at either one hour per day or if above, actual time) when employed on a drill site. These payments do not apply where a camp site or site accommodation is provided.

depending on whether an employee is residing in camp due to necessity, compared to those who elect to do so. The issue is whether there is an inconsistency between MB Century's requirement to have all employees stay in camp and the terms of the MECA.

[34] I find there is an inconsistency between the terms of the MECA at cl.19.2 and the letter of offer and Living in Camp directive. Clause 19.2 is a binding term as part of the MECA and it cannot be altered without consent by both parties.[11] In the absence of agreement to that effect cl. 19.2 of the MECA prevails.

Can MB Century, by its Living in Camp directive, restrict the length of time an employee may be absent from camp.

[35] The second area of dispute between the parties is whether MB Century may restrict the period of time an employee may be absent from camp between shifts whilst on a hitch.

[36] MB Century compares its directive, to limit absences from camp as a means to address a work place hazard, with the circumstances in *NZEPMU v Air New Zealand*[12] where the Court found that there was nothing in the collective agreement to prevent the employer from imposing a policy on drugs and alcohol in the workplace[13], particularly where there is a demonstrable connection between the hazard or the risk of harm and the step proposed[14].

Is there anything in the law or the collective agreement to prevent MB Century from restricting absences from camp?

[37] The union reiterated that the Living in Camp directive is a policy issued under cl. 23 of the MECA which precludes safety policies that are inconsistent with terms of the MECA. It again refers to the limitations at cl. 19.2 requiring employees to reside in camp. I accept that the effect of the directive is likely to give rise to some disparity of treatment depending on individual residential circumstances, but the union's response is not a complete shield once it is established that an employee's circumstances do necessitate staying in camp. I was not referred to any provision

[11] Cl. 4.1 of the MECA
[12] [2004] 1 ERNZ 614
[13] Ibid at [179]
[14] Ibid at [198]

within the MECA, insofar as the duration of absences from camp may be limited, that the directive is inconsistent with. Nor did the union point to any law with which it could be said the directive is in breach.

Is there a demonstrable connection between the hazard or the risk of harm and the step proposed?

[38] It was apparent during the investigation meeting that MB Century takes a commendable proactive approach to its health and safety obligations. It concedes that its direction to limit the duration of an absence from camp between shifts may be an interference into the private lives of its employees. It submits that its statutory duty to take all practicable steps to ensure the health and safety of its employees[15] and where rig work is classified as a high hazard in nature[16] warrants the intrusion.

[39] No expert evidence was given orally but MB Century provided industrial reports and information on the management of fatigue in the workplace. I accept that MB Century is seeking to ensure that employees will achieve 7 continuous hours of sleep per day but there was nothing in that material furnished which establishes that limiting absences from camp to 3 hours per day between shifts will achieve that objective. In this respect I hold significant doubt that there is a sufficient link between the hazard and MB Century's directive as a means to manage the risk of fatigue as a hazard.

[40] There is relative consensus in the reports that fatigue arises as consequence of long working hours coupled with limited time for recovery. MB Century acknowledges that the current shift pattern comprising 12.5 hours over 14 days is a factor that may contribute to the fatigue of its workers. If it is the pattern of work that creates the hazard then it is that which should be changed. While it is not for the Authority to fix terms and conditions, the parties are engaged in bargaining for a new collective agreement and this may provide an ideal opportunity to alter hours of work arrangements so as to better manage the risk of fatigue.

Is the directive restricting the duration of absences from camp objectively reasonable in all the circumstances?

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[15] Section 6 Health and Safety in Employment Act
[16] By WorkSafe NZ

[41] At issue is whether the directive to limit the duration of absences from camp to 3 hours per day is reasonable. A determination on the reasonableness of MB's Century's directive requires an objective assessment of the nature and consequence of the policy in all relevant circumstances.[17]

[42] I have no doubt that MB Century seeks to continuously improve its safety record and regards its directive as one of a range of health and safety policies to that end. As noted I am not satisfied on the evidence provided that the directive prevents or remedies the symptoms of fatigue. This alone leads to me find that the directive is unreasonable. However even if I were assured the directive entirely address the hazard identified I continue to regard the directive objectively unreasonable.

[43] It was clear that MB Century's approach to management of operational issues is influenced by its industry norms, including that exploratory drilling generally occurs at sea on rig platforms or ships. Where work is performed in settings such as off-shore work, the question as to where an employee conducts his or her non-work time is necessarily constrained by the physical working environment. Those conditions will have been accepted by the parties when entering into an employment agreement.

[44] Circumstances similar to those described above do not apply in this matter.

[45] The relationship between employer and employee is limited to an agreement for the provision of labour over agreed periods of time in exchange for wages. Employees are free to choose how to spend personal time when the parties are not actively engaged in performing their agreement. The exercise of some freedoms may result in an employee being temporarily (or perhaps permanently) unsuitable for the type of employment involved. But I am not satisfied that the obligations under the Health and Safety in Employment Act permit, per se, an employer to intrude upon an employee's personal time. While the Health and Safety in Employment Act requires the an employer to take all practicable steps to ensure the health and safety of its employees I consider the practicability of those steps requires a balancing of interests between the parties.

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[17] Ibid at n.12 at [221]

[46] In a modern civil society I find MB Century's policy impacts on an employee's reasonable expectations that he or she is free to leave the workplace when no longer contracted to perform duties and that his or her employer is not entitled to limit how, or on what activities, personal time is spent, or even to have knowledge about those matters without an express agreement between the parties on the matter.

[47] There is no dispute that neither the union nor its members have agreed to limit the duration of absences from camp. I find MB Century's policy to be unreasonable in all the circumstances.

Costs

[48] Costs are reserved.

Declarations

[49] Century Drilling & Energy Services (New Zealand) trading as MB Century is not able to require an employee to reside in camp except where the contents of cl. 19.2 apply.

[50] Century Drilling & Energy Services (New Zealand) trading as MB Century is not able to enforce its directive to restrict the period of time an employee may be absent from camp between shifts whilst on a hitch.

Michele Ryan
Member of the Employment Relations Authority