**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2015] NZERA Auckland 126
5519744

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| | BETWEEN | NZ DAIRY WORKERS UNION INC<br>Applicant |
| | A N D | CANPAC INTERNATIONAL LIMITED<br>Respondent |

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| Member of Authority: | Rachel Larmer |
| Representatives: | Helen White, Counsel for the Applicant<br>Alex Chadwick, Counsel for the Respondent |
| Investigation Meeting: | 22 April 2015 at Auckland |
| Date of Determination: | 06 May 2015 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Canpac International Limited (Canpac) is Fonterra Cooperative Group's largest secondary packager of milk powders and supplies branded nutritional powders, bulk blended nutritional milk powders, cans and can components to customers across the globe. The Canpac factory is based in Hamilton. Prior to September 2014 Canpac employed 301 employees, 245 of whom were Union's members.

[2] NZ Dairy Workers Union Inc (the Union) has (in agreement with Canpac) sought a determination to resolve a dispute between the parties regarding the interpretation and application of clause 5.14 of the Fonterra-Canpac International Limited and NZ Dairy Workers Union Inc Collective Agreement dated 1 April 2014-31 March 2015 (the Collective Agreement).

[3] Clause 5.14 of the Collective Agreement states:

> ***5.14 Job Search Assistance and Finishing Bonus***

> *To provide for a planned closure of a factory or department any worker who has been declared redundant who remains at work during any of the last four weeks of the notice period shall be paid one additional week's wages at ordinary rate for each completed week worked. A completed week shall mean being at work for all ordinary hours on a rostered day.*

[4] The parties are in dispute about whether or not clause 5.14 of the Collective Agreement applies to union members who were involved in Canpac's 2014 restructure. This restructuring involved Canpac reducing headcounts across all departments and moving operations from a 24/7 to a 24/5 shift pattern. There were no redundancy dismissals because all redundancies were voluntary and others who were given notice of redundancy were redeployed before their redundancy notice period expired.

[5] During the course of the restructure 38 of the Union's members opted to take voluntary redundancy and the remaining 39 employees being redeployed by Canpac, including to other Fonterra sites. Of the redeployed employees, 13 were successfully redeployed before notice of redundancy was given and 26 were successfully redeployed after they had been given notice of redundancy, but before the expiry of their four week notice period.

[6] In accordance with Canpac's obligations under clause 5.6.4 and 5.6.5 of the Collective Agreement, the Union was advised that its members could request not to work out their full notice period and that contractually Canpac's consent to such request could not be unreasonably withheld. A number of such requests were made by Union members to Canpac during the notice period and Canpac says that when such requests could be accommodated from an operational perspective, they were granted.

[7] The Union says that the Union members who worked during their notice period should be paid an additional week's wages for each full week they worked. Canpac says that clause 5.14 is conditional upon there being a *"planned closure of a factory or department"* which results in redundancies. Canpac says clause 5.14 does not apply because there was no closure.

[8] Canpac also says that even if there had been *"a planned closure of a factory or department"* (which is denied) clause 5.14 does not apply to voluntary redundancies.

Canpac's position is that the *"job search and finishing bonus"* is not payable to the Union's members as claimed.

**Issues**

[9] The following issues are to be determined:

(a) Is clause 5.14 of the Collective Agreement conditional upon there being a *"planned closure of a factory or department"*?

(b) If so, did the 2014 restructure involve the planned closure of a factory or department?

(c) Does clause 5.14 require the Union's members to be "*declared redundant"* before it applies?

(d) If so, were the employees who elected to take voluntary redundancy or who were redeployed prior to the expiry of their notice period "*declared*" redundant?

(e) Are any of the Union's members entitled to an extra week's pay under clause 5.14 of the Collective Agreement?

**Is clause 5.14 in the Collective Agreement conditional upon planned closure of a factory or department?**

[10] Clause 5.14 of the Collective Agreement is an historic industry clause. I am told it first came into existence in response to the closure in 1988 of an old NZ Dairy Group (Anchor) dairy factory at Kerepehi.

[11] As a result of the closure of the Kerepehi factory around 100 dairy workers were told that they would be losing their jobs as a result of the closure approximately 12 months in advance of that occurring. Whilst some employees left to seek other employment and were paid their redundancy compensation earlier, Anchor required a core group of workers to stay until the closure took effect in order to wind production down in the intervening period.

[12] The employees who were permitted by Anchor to leave earlier were viewed as having a better chance of securing alternative work at one of the neighbouring dairy factories because they were free to start work for a new employer immediately. Those who were required to remain until the factory actually closed were perceived to be

disadvantaged in their search for alternative employment because they were unable to start work for a new employer until the Kerepehi site had completely closed down.

[13] To address the perceived disadvantage to those employees who were required to stay until the factory had actually closed, Anchor agreed to pay a bonus of one week's additional wage for each full week of the four week notice period during which the remaining employees worked.

[14] The first version of clause 5.14 was negotiated into the 1989 NZ Dairy Factories Employees Award shortly after the Kerepehi closure. The clause was included in the industry wide New Zealand Dairy Factories Employees Collective Contract between 1991 and 1997, after which companies negotiated separate agreements.

[15] In the 1990s the clause flowed from the main New Zealand Dairy Factories Employees Collective Contract into the Dairy Industry Subsidiary Contracts. The clause was subsequently negotiated into the Pastoral Foods (NZ) Limited Dairy Workers Collective Employment Contract and into the NZ Packers Limited and Dairy Containers Limited Collective Employment Contract. It was then included in the Canpac Collective Agreement following the amalgamation of these two companies in 2000.

[16] The version of clause 5.14 in the current Canpac Collective Agreement remains fundamentally unchanged from the version of the clause first negotiated into the Canpac Collective Agreement in 2000.

[17] The Union says that the application of clause 5.14 is not conditional or provisional upon the planned closure of a factory or department because it submits that the clause does not expressly state that it is conditional.

[18] I do not accept this submission. The words *"to provide for a planned closure of a factory or department"* must mean something within this context. If a planned closure was not a prerequisite then the payment of the additional week's wages could have been dealt with under the Notice clause in the Agreement, as was the case in respect of other Collective Agreements with other Unions within Canpac's workplace.

[19] I accept Canpac's argument that if the purpose of clause 5.14 was just to provide an additional payment to redundant employees who worked their full notice,

then that could have been a subclause of clause 5.6 of the Collective Agreement (which relates Notice).

[20] I consider the objective factual background described above provides a useful cross-check to my preliminary view that the wording *"a planned closure of a factory or department"* sets the circumstances in which clause 5.14 may come into operation (subject to the other requirements of that clause being fulfilled).

[21] I consider that the purpose of clause 5.14 is to provide compensation to workers who were not permitted to be released from their notice early because they were needed until the final department or factory closure occurred. I consider the history of the clause supports that view.

[22] I consider the fact that this additional payment does not appear in the period of notice clause (see 5.6) of the Collective Agreement also supports my view that this additional payment is to be made in the unique or special circumstance in which there is a planned closure of a factory or department.

[23] I consider that if the additional payment is not conditional upon there being a planned closure, then there would be no need to have included the material words *"to provide for a planned closure of a factory or department"* in the clause. I find that these words must have been included for a specific reason and that the reason is to restrict the circumstances in which this additional payment will be made to a planned closure situation.

[24] I also consider that the title of the clause is reflective of its purpose, which I find is to provide assistance to redundant workers who may be perceived to have been disadvantaged in their job search by being required by Canpac to remain at work until an actual closure has occurred in the event of a closure situation.

[25] For these reasons I consider that it is a prerequisite that there be a planned closure of a factory or department before clause 5.14 may apply.

**Did the 2014 restructure involve the planned closure of a factory or department?**

[26] Canpac says it did not close its factory or any of its departments as a result of this restructure but merely changed the scheduling of normal work. Canpac says that whilst there have been reductions in headcount across its business as a result of the restructure, the factory has not closed nor have any of its departments.

[27] Canpac says that the department structure remains the same as it did pre-restructure and that the only thing that has changed is that instead of operating a 24/7 shift pattern there is now a 24/5 shift pattern.

[28] Canpac says this change in shift pattern did not result in the closure of the factory over the weekend as the Union claims. It just meant that normal production work is no longer scheduled to take place over the weekend when employees are no longer rostered to work, but the factory remains open and operational throughout the weekend.

[29] Canpac provided evidence of a number of weekends since the restructure when the factory has operated and of a number of upcoming weekends when operations would continue. The Union did not challenge that evidence. I am satisfied this was operational work and not merely ongoing maintenance work as the Union initially alleged. I do not accept the Union's submission that the factory has closed because weekend production only occurs on occasion.

[30] I find that there was no planned closure of a factory or department as a result of the mid 2014 restructuring. The factory and department have remained open and have and are continuing to operate.

**Does clause 5.14 of the Collective Agreement require an employee to be "declared redundant"?**

[31] I find that clause 5.14 only applies to Union members who are *"declared redundant*". I consider "*declared redundant*" means the Union member's employment is actually terminated on the grounds of redundancy. It is not the mere giving of notice. An employee may resign during the notice period, they may be voluntarily released early during the notice period or they may be redeployed. All of these scenarios avoid a redundancy dismissal occurring.

[32] I consider the use of the words "declared redundant" connotes there is no choice on the employee's behalf (i.e. that the Union member's redundancy is compulsory). If consider that if the clause came into effect merely when notice of redundancy as given the word "*notice*" instead of "*declared*" would have been used.

[33] I consider that interpretation is consistent with the purpose behind the clause this is to compensate Union members who are perceived to be disadvantaged because

they are not free to commence work for a potential new employer as early as other employees who are not required to work out their full notice.

**Were any Union members "declared redundant"?**

[34] I find that none of the Union's members were "*declared redundant*" as a result of the mid 2014 restructure.

[35] The Union members that left their employment with Canpac did so voluntarily so their employment was not terminated on the grounds of redundancy. The Union members who were redeployed by Canpac remained in continuous employment so their employment did not terminate on the grounds of redundancy.

**Are any Union members entitled to an extra week's pay under clause 5.14 of the Agreement?**

[36] I find that because there was no closure of a factory or department clause 5.14 does not apply. Therefore the Union's members are not entitled to be paid the job search assistance and finishing bonus.

**Declaration**

[37] I find that the job search assistance and finishing bonus provided for in clause 5.14 of the Collective Agreement becomes payable if:

a. The factory or department is to be or has been closed; and

b. The Union member in question has been declared redundant (i.e. has had their employment actually terminated on the grounds of redundancy); and

c. The Union member has actually worked during their notice period (so it is not payable if an employee is suspended or on sick leave or other leave while on notice); and

d. The Union member has worked a full week (meaning they have actually been present at work for all of the ordinary hours they were rostered to work) during any of the weeks of their notice period.

**Costs**

[38] Canpac as the successful party is entitled to a contribution towards its costs. The parties are encouraged to resolve costs by agreement. If that is not possible, then Canpac has 14 days within which to file costs submissions, with the Union having seven days to respond and Canpac having a further three working days within which to reply.

[39] Costs are likely to be assessed in accordance with the Authority's normal practice of applying the notional daily tariff, which is currently $3,500 and then adjusting it to reflect the particular circumstances of this case. The parties are invited to identify any factors which they say should result in the notional daily tariff being adjusted.

**Rachel Larmer**
**Member of the Employment Relations Authority**