Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2015] NZERA Christchurch 114
5561201

BETWEEN	NEW ZEALAND MEAT WORKERS & RELATED TRADES UNION INCORPORATED Applicant
A N D	SILVER FERN FARMS BEEF LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Peter Churchman QC and Karina Coulston, Counsel for the Applicant Tim Cleary, Counsel for the Respondent
Investigation Meeting:	17 July 2015 at Christchurch
Submissions Received:	On the day
Date of Determination:	7 August 2015

DETERMINATION OF THE AUTHORITY

A The dispute is resolved in favour of the union.

B Leave is reserved for either party to return to the Authority about lost wages.

C Costs are reserved.

Prohibition from publication

[1] I prohibit from publication by agreement the commercially sensitive documents attached to the statement of evidence of Jason Graham.

Employment relationship problem

[2] New Zealand Meatworkers & Related Trades Union Incorporated (the union) has membership in the meat processing and related trade areas. It has 295 members at the meat processing plant at Belfast, Christchurch operated by Silver Fern Farms Beef Limited (Silver Fern Farms or the company). The Belfast plant slaughters and processes cattle for beef production primarily for export.

[3] The union and the company are parties to a collective employment agreement from January 2014 to 31 December 2016 which covers the union members at the Belfast plant. There is a preamble to the collective agreement. It deals with the long standing arrangement whereby terms and conditions applicable to many Silver Fern Farms employees are agreed to in two separate forums, the collective agreement and departmental contracts. The departmental contracts are primarily concerned with incentive payments, manning and through puts and are negotiated between employer and employee representatives. These are expressed to be unique to each processing operation and are flexible reflecting the need to accommodate any changes in circumstances that affect work sites from time to time. The preamble provides that in the event of there being any inconsistency between the minimum terms and conditions of the collective agreement and those contained in the departmental contract, the provision which is most favourable to the employee shall prevail.

[4] It is common ground that there is no departmental agreement in writing. Mr Watt said that the union has made numerous requests to the Silver Fern Farm Group to put the departmental agreements in writing but it has refused to do so.

[5] Jason Graham has been the Regional Plant Manager of the company for ten months. He has been employed in senior management roles in the meat industry for the previous 8 years. His role includes oversight of the beef plant at Belfast.

Mr Graham was concerned about the costs at the Belfast plant per head compared to other Silver Fern Farm plants and the company was looking at ways to improve efficiency.

[6] On 28 April 2015 the company presented a general proposal for change at the Belfast plant to the union. The proposal was to:

(i) Disestablish the current carcass processing operating levels of 405 and 525 per day;

(ii) Create three new operating levels of 300, 450 and 600 carcasses per day;

(iii) The new rates proposed would be fixed until 31 December 2016.

[7] Mr Graham said in evidence that the proposal indicated an increase in the chain rate to 80 carcasses per hour but the chain rate was already at that level and the company wanted the chain rate formalised at 80 carcasses per hour. William (Bill) Watt is the Branch Secretary of the union and his evidence is that the union members were contracted to work at a chain rate of 70 carcasses per hour under a departmental agreement. Mr Watt said that there had been some increase to the chain speed and carcasses processed each hour to enable workers to get home earlier. He says there was benefit to both parties in this increase. The union says that there was no formal variation to the agreement for a chain rate of 70 carcasses per hour and that overtime was paid on the basis of 70 carcasses.

[8] The company says in the absence of a written departmental agreement the existing arrangements were customary practice and that there is no agreement about the chain speed or that the tallies would stay in place. It says that overtime was customarily based on tally and not time.

[9] Trevor Topp is the Belfast Sub-Branch Secretary of the union and he has worked at the Belfast plant for 38 years. He confirmed Mr Watt's evidence about an agreement to a chain rate of 70 carcasses.

[10] The company and the union met to discuss the proposal on 28 April and 8 May 2015.

[11] The union said that the effect of the proposal was to increase the workload of its members and reduce their daily pay. The union considered the proposed rates were unacceptable as they included negotiated pay increases the second of which was to take effect from October 2015 and the third from June 2016. There was no agreement reached.

[12] Mr Graham and other company personnel met with the workers and union officials on 25 May 2015 to discuss the proposal further. They advised that reliance for the change was placed on the alteration of methods clause 29(b) in the collective agreement. There was advice given that the creation of the 3 new operating levels would leave the daily remuneration and other terms and conditions consistent with current normal daily earnings. Some question and answers sheets were available and a schedule including tallies and daily remuneration was discussed.

[13] Clause 29 of the collective agreement provides as follows:

> *Alteration in Methods*
>
> *(a) Should there be any alteration in methods of work required at any time employees shall meet the employers requirements in this respect. It must be recognised by the parties to this agreement that a considerable degree of flexibility in minor processing detail is required on some operations (e.g. boning and cutting) to allow quick response to varying market requirements.*
>
> *In regard to minor alterations, e.g. to product specification and work content, consultation between the employees representative and management shall take place and will normally be sufficient.*
>
> *(b) Where the employer is planning major changes (either singularly or accumulatively) to work practice including the installation of new machinery which has never been installed in the plant before, the employees shall meet the employers requirements in this respect. If normally production earnings can be maintained and the role/s remain largely unchanged as a result of these changes (including individual workloads as an example) the change shall be implemented after consultation. If normal production earnings cannot be maintained or the workloads are increased as part of this change, negotiation on wages and conditions of employment shall commence as soon as practicable.*

[14] The meeting was considered to be part of a consultative process with the workers and there was a period for feedback until 3 June 2015.

[15] The union met with the company on 3 June 2015 and advised that it did not consider that the company was able to implement changes using clause 29(b) of the collective agreement and provided a legal opinion to that effect. The company considered that it was able to make the changes.

[16] On 8 June 2015 the changes were implemented with new tally rates of 300, 450 and 600 in effect. Mr Topp and the workers requested information about what remuneration they would receive.

[17] After work had commenced for the day details of the tally and daily remuneration income was provided to the employees. I have set out the information that was received below:

Pays

Tally	***body rate***	***pool***	***divisor***	***A***	***B (90% A)***	***C (75% A)***
600	*$16.22*	*9732*	*38.55*	*$252.45*	*$227.20*	*189.34*
Compared to						
525	*$18.537*	*9731.925*	*38.55*	*$252.45*	*$227.20*	*$189.34*
450	*$16.684*	*7507.8*	*28.5*	*$263.43*	*$237.09*	*$197.57*
Compared to						
405	*$18.537*	*7507.485*	*28.5*	*$263.42*	*$237.08*	*$197.56*
300	*$17.00*	*5100*	*20.2*	*$252.47*	*$227.22*	*$189.35*
Compare to 525 daily earnings						

+ *GWO* (general wage order) *A & B = $22.616/Day*

(This applies to all tallys) *C = $22.288/Day*

[18] Payments are for piece work per carcass but a small portion of the pay is fixed by the general wage order.

[19] The company says that the meat processors normal production earnings under clause 29(b) are not affected by the proposal because overtime that was paid for carcasses in excess of 525 and 405 and, before 450 minutes had been worked, was not consistent with the concept of normal production earnings under clause 29(b).

[20] The union says that normal production earnings were affected by the proposal and that there was a departmental agreement which could not be varied without agreement.

[21] There is a dispute therefore between the union and the company whether clause 29 of the collective agreement allowed the company to make the changes that it did.

[22] The union wants by way of remedy:

a. A declaration from the Authority that the change was unlawful and inconsistent with the collective agreement and departmental agreement.

b. A declaration that the company has breached its duty of good faith to the union and its members.

c. An injunction preventing the respondent from changing the conditions other than by agreement.

d. A compliance order.

e. Reimbursement of the lost earnings incurred by the members.

f. Costs

[23] The company opposes the remedies sought.

[24] It was sensibly agreed by counsel that the focus for the Authority should be on resolving the dispute and if it is in the applicant's favour then there should be an opportunity for agreement to be reached on wages without the Authority needing at this stage to determine that remedy or that of compliance. The remedy for a declaration that there has been a breach of good faith is still sought.

[25] Mr Cleary referred the Authority to the Court of Appeal judgment in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trades Union Inc*[1] for guidance on the principles of interpretation. The Court of Appeal referred to and applied the reasoning in the Supreme Court judgment in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[2].

[26] The Court of Appeal stated at [36]:

> *[36] For present purposes, the summary provided by McGrath J in* Vector *of Lord Hoffmann's five principles of interpretation in his judgment on behalf of the majority in* Investors Compensation Scheme Ltd v West Bromwich Building Society *is helpful:*
>
> *... In summary, Lord Hoffman said that interpretation of a commercial agreement is the ascertainment of the meaning it 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 contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.*

[27] I accept that is the appropriate approach to take in interpreting clause 29(b).

The issues

[28] The issues for determination are:

a. What were the existing arrangements before 8 June 2015?

b. Were the changes the company wanted to make *changes to work practice* under clause 29(b) of the collective agreement?

c. What is the meaning of normal production earnings under clause 29(b) and were these maintained after 8 June 2015?

d. Was the role largely unchanged as a result of the changes?

[1] [2010] NZCA 317
[2] [2010] NZSC 5

e. Was there a breach of good faith by the company?

What were the existing arrangements before 8 June 2015?

[29] The Authority heard evidence from Mr Watt, Mr Topp and Mr Graham about what happened before 8 June 2015. It is background knowledge which was reasonably available to the union and the company at the material time when change was proposed.

[30] Mr Graham said that the proposal and implementation of the changes under clause 29(b) was because of a concern about the costs at the Belfast plant per head compared to other Silver Fern Farm plants and they were looking at ways to improve efficiency.

[31] He said that he gained his knowledge from management about existing arrangements on the Belfast site but had no personal knowledge about what happened before he arrived.

[32] Mr Graham agreed to a question from Mr Churchman that on site agreements are features of freezing works. He agreed that before 8 June 2015 there were the two arrangements at the Belfast plant for processing 405 and 525 carcass kills. If there were more than 525 carcasses processed then overtime rates applied and if more than half an hour of overtime was needed union consent was required. The rate for overtime was calculated on the basis of 70 carcasses processed per hour.

[33] The union says that the department agreement provides where a worker works more than 7.5 hours of physical work **or** reaches a tally of 525 carcasses they are entitled to penal rates of time and a half. Mr Watt referred to this as *time or tally.* Mr Topp said *time or tally* has existed from when he first started work some 38 years ago.

[34] The company supervisor controls the chain rate. The company says that the chain rate was already at 80 carcasses per hour and that it simply wished to formalise that and utilise a normal production day of eight hours under clause 5 of the collective agreement at that current rate.

[35] There is a dispute about how many carcasses were processed per hour and whether for the four days analysed by the company the ear tag station was the beginning of the process.

[36] Mr Watt accepted that some twenty years previously the 525 processing rate used to be spread over 8 hours with an operating chain of 70 carcasses per hour. He does not accept as Mr Graham said in evidence that extra staff were added to deal with an increased carcass rate. Mr Topp's evidence was that the additional staff were added to increase the product that was saved, for example offal cuts. Mr Watt did not accept there was any agreed variation to the chain rate from 70 carcasses per hour and I accept the fact that overtime was paid at this lower rate does tend to support that.

[37] Mr Graham accepted that after the changes were implemented on 8 June 2015 workers have not achieved the 600 daily kill in the eight hour day with breaks and the highest tally achieved was 533 but he said that it was the end of the season and that would have impacted on the numbers.

[38] Mr Cleary submits that there is no department agreement to support the existing arrangements before 8 June 2015 of tallies of 405 and 525, overtime rates and *condensation* of time and those are simply customary practices. I find that the existing arrangements about tallies, time and overtime rates are longstanding and agreed in a departmental agreement notwithstanding it has never been reduced to writing. They were more than simply customary practices.

Were the changes the company wanted to make *changes to work practice* under clause 29(b) of the collective agreement?

[39] Mr Churchman submits that there is no change to work practices and the purported use of clause 29(b) is unjustified because the only thing altered is the chain speed and the amount the worker is paid.

[40] There is the example given of change of new machinery although the definition of changes to work practices is not limited to that.

[41] I agree with Mr Churchman that clause 29(b) could not be used to simply reduce remuneration. The clause affords protection in that regard. The phrase *changes to work practices* is however very broad and could include I find the proposal for a change to tallies.

Normal production earnings

[42] I agree with Mr Churchman that the correct interpretation of *normal production earnings* is the primary issue for determination in this matter. It is not defined in the collective agreement and needs to be interpreted in light of the departmental agreement and the collective agreement.

> *If normal production earnings can be maintained and the role/s remain largely unchanged as a result of these changes (including individual workloads as an example) the change shall be implemented after consultation. If normal production earnings cannot not be maintained or the workloads are increased as part of this change, negotiation on wages and conditions of employment shall commence as soon as practicable.*

[43] Mr Cleary submits that normal production earnings means earnings received in an ordinary work day of eight hours as defined under the collective agreement. Mr Cleary has taken an example from the rates set out in [18] above of a C grade employee. He submits that under the old tallies the range is $211.63 - $219.85 and the new range is $211.63 - $219.86 and therefore normal production earnings are maintained. Mr Cleary submits that the term normal production earnings does not easily or naturally connote an inclusion of overtime earnings which are based on penal rates and that normal production is production under normal pay rates in normal circumstances.

[44] Mr Churchman submits that the correct interpretation of normal production earnings is the amount workers would be paid were they to work a certain number of hours or process a certain number of cattle.

[45] I have interpreted the meaning of normal production earnings against the following background. The amount earned per carcass is defined by the departmental agreement and is paid with the general wage order. There are seasonal elements which can impact on cattle availability. There is no guarantee of daily tallies although I do note the evidence that for the six month period from 1 December 2014 until 29 May 2015 there was one hour overtime worked and paid at the overtime rate for a tally each day of 595 carcasses. The evidence supports that when workers worked more than 7.5 hours of physical work or reached a tally of 525 carcasses they are then entitled to penal rates of time and a half calculated on 70 carcasses per hour for continued processing.

[46] I find the words *normal production earnings* would convey to a reasonable person with the background knowledge earnings received on the basis of varying carcass counts rather than earnings earned in an ordinary working day. Some carcass counts attract overtime. Normal production earnings for processing 600 carcasses are for 525 carcasses at ordinary rates and 75 carcasses at a penal rate of time and a half. Normal production earnings for processing 525 carcasses are at ordinary rates.

[47] I accept Mr Churchman's submission that that interpretation means as the workers receive the same amount of remuneration for processing 600 carcasses that they previously received for processing 525 they cannot be receiving normal production earnings. Mr Watt gave evidence that on the 600 carcass rate A grade slaughter men and women will have their daily pay reduced by $54.08, B grade reduced by $48.65 and C grade reduced by $40.56.

[48] I find that the changes implemented do not allow normal production earnings to be maintained.

[49] I have considered whether the roles remained largely unchanged including individual workloads.

[50] Although the workers are still doing the same type of work they are required in order to maintain the same earnings for processing 525 carcasses to process 600 carcasses. That is without payment of penal rates after processing 525 carcasses. The chain speed is formally set at 80 carcasses per hour and although it had increased over time there is no evidence of an agreed variation to the departmental contract rate of 70 carcasses per hour. If there had been it would have been expected to have flowed through to calculation of overtime rates. There is no agreement between the parties as to how many carcasses were actually being processed an hour before the change. The union does not agree with Mr Graham that 77.8 carcasses were processed an hour before the change and say it was more like 75 carcasses.

[51] I find that the workload has increased with the changes and normal production earnings have not been maintained. Under clause 29(b) if that is the situation then negotiations on wages and conditions of employment are to commence as soon as possible. That should now occur.

[52] The dispute is resolved in favour of the union.

[53] Mr Churchman submits correctly that an employer cannot lawfully unilaterally reduce workers earnings without their consent. Mr Churchman and Mr Cleary are to discuss the implications of the findings and reimbursement of lost wages and leave is reserved for either party to return to the Authority if necessary.

Good faith

[54] There are allegations of breaches of good faith and a declaration of breach of good faith is sought.

[55] There was evidence that Mr Topp faced a disciplinary investigation after allegedly meeting with affected workers on 8 June 2015 without permission and he seems to have been issued with a verbal warning. The evidence supported that Mr Topp and Mr Watt persuaded workers who wanted to stop work or walk off to carry on working and let the legal processes sort the issue out. That was an appropriate and responsible way to deal with the matter and to the benefit of the company.

[56] The full rates of pay were not provided to the workers until after they commenced work on 8 June 2015. Mr Graham says that they knew the rates and it was simply the divisors that took some time to calculate and he wanted to make sure they were correct. I accept that may have been the situation but the rates should have been available before the workers were required to commence their work.

[57] Mr Watt was not formally invited to the meeting on 25 May 2015 which was a meeting to discuss a significant change and only heard about it through others.

[58] Rather than simply imposing the change on 8 June where it was clear the right to do so was disputed it would have been preferable to have the Authority determine the dispute which it could have done quickly.

[59] These matters do support some good faith concerns but I do not intend aside from setting them out to make a declaration of a breach of good faith. The union and the company have a long term relationship and Mr Graham had not long been the Regional Manager at this time.

Costs

[60] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority