

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 31
5559755

BETWEEN NEW ZEALAND MEAT
 WORKERS & RELATED
 TRADES UNION
 INCORPORATED
 Applicant

AND SILVER FERN FARMS LIMITED
 First Respondent

AND SILVER FERN FARMS BEEF
 LIMITED
 Second Respondent

Member of Authority: M B Loftus

Representatives: Simon Mitchell, Counsel for Applicant
 Tim Cleary, Counsel for Respondent

Investigation Meeting: 1 December 2015 at Napier

Submissions Received: At the investigation along with further submissions on
 8 December and 21 December 2015 from Respondent
 and 15 December 2015 from Applicant

Determination: 11 March 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, New Zealand Meat Workers and Related Trades Union Incorporated (the Union), seeks an order requiring the respondents, Silver Fern Farms Limited and Silver Fern Farms Beef Limited (collectively known as Silver Fern), comply with a provision in the applicable collective agreement(s) concerning work performed by supervisors.

[2] Silver Fern denies using supervisory staff in a way that breaches the collective agreement.

Citation of the respondent

[3] Situated at Whakatu, Hawke's Bay, is a meat processing plant known as the Pacific Plant. At the time the applicable collective was agreed Pacific was owned and operated by Silver Fern Farms Limited. Since then the operation has passed to Silver Fern Farms Beef Limited, a wholly owned subsidiary of Silver Fern Farms Limited.

[4] Having discussed the issue the parties agreed to amend the citation of the respondent given little has changed in the way the plant operates and is staffed. Notwithstanding the fact Silver Fern Farms Beef Limited is not identified as a party the earlier collective agreement continues to apply.

[5] Any order, if one is to be made, shall apply to the Pacific plant irrespective of which Silver Fern entity owns and operates it.

Background

[6] As already said Silver Fern operates the Pacific plant at Whakatu. Employed therein are a number of the Union's members. Their terms of employment are governed by the *Silver Fern Farms Pacific Collective Agreement 2013 - 2016*.

[7] Clause 27(j) provides:

Supervisory staff may perform the work covered by this agreement to assist with first aid and accidents, re-deployment of staff, processing line changes, training and temporary absences.

[8] The coverage, referred to above, is those

...who are members of the Union who are engaged in beef slaughtering, boning, bi-product recovery and ancillary operations. It excludes supervisors, clerical workers, and maintenance staff covered by the engineers collective agreement, or other exemptions (e.g. management cadets) which may be agreed between the parties.¹

[9] The work supervisors have allegedly been performing in contravention of the above is known as *rework*.

¹ Silver Fern Farms Pacific Collective Agreement 2013 to 2016 at clause 2

[10] The Union's position is enunciated by Max McGregor, the Union's plant secretary who has worked at the Pacific Plant for approximately 23 years. He says:

*In my view, rework is included within the coverage of the Agreement. It is part of the ancillary operations of the plant. Rework is completed at every plant at times. However, as it is inefficient work, there are always steps to reduce the amount of rework completed. ... Rework has a specified hourly rate because it is paid on an hourly basis. This is different to processing work which is paid on a part hourly and a part piece rate basis.*²

[11] Mr McGregor goes on to say:

*As the name would suggest, rework takes place when there is contamination of meat, or the cuts are not performed correctly. It requires work to be redone, to be at the required standard. In the past, rework has always been completed by members of the Union covered by the agreement. From August 2014, I became aware that some of the rework was being completed by supervisory staff.*³

[12] Mr McGregor says he raised this with management. Of particular concern were reports of *rework* being performed by supervisors on days no other processing was undertaken and union members were not required to be at work. His approaches were rebuffed.

[13] Silver Ferns' position is voiced by the plant manager, Sean O'Neill. He says:

*There is nothing in the collective agreement to say that all processing work at the Pacific shed must always be completed by meat processors. We operate a seasonal business and decide when the season starts and when staff are laid off at the end of the season. ... We can also decide to work short weeks if livestock numbers are low (see for instance clause 13(e)).*⁴

[14] Mr O'Neill goes on to refer to *short processing weeks* and applicable provisions of the collective agreement which provide staff receive a minimum of four hours pay when asked to come to work.⁵ He then advises a view clause 27(j) only applies on *kill days* before saying:

But it does not make commercial sense to call out staff to work, for say two hours, and have to pay the 4 hour minimum when supervisors already at work doing other things can carry out the work. We do not

² Witness statement of Max McGregor at [5]

³ n 2 above at [7]

⁴ Witness statement of Shaun O'Neill at [6]

⁵ n 1 above at clause 17(c)

*consider that clause 27(j) means we cannot employ supervisors to do processing work on those non-kill days. There is no demarcation of work.*⁶

[15] Mr O'Neill disputes Mr McGregor's claim of long ingrained practices by referring to the fact clause 27(j) was amended in 2012. He also claims Mr McGregor is incorrect when he says *rework* has always been completed by Union members and asserts supervisors have performed the work many times in the past.

Determination

[16] At the end of the investigation meeting, and having considered the parties comprehensive submission, I advised, by way of an indication, I was going to grant the order sought. Mr Cleary then asked for an opportunity to address the indicated outcome in an attempt to procure a change of mind. With Mr Mitchell's agreement this was granted.

[17] My rationale for granting the orders sought was as follows.

[18] The parties agree the issue has generally, but not always, arisen on non-kill days when there is little re-work. From Silver Fern's perspective, and as said by Mr O'Neill, it does not make commercial sense to call in staff who must be paid a minimum of four hours when four hours work is not available. The decision as to who performs the work is commercially driven and based on balancing available staff against the work to be performed.

[19] The problem with this is a commercial decision cannot be made if it contravenes an express contractual provision.

[20] Primarily I note Mr O'Neill's concession re-work is generally the rectification of work already performed by workers covered by the agreement and often involves *beef slaughtering, boning, bi-product recovery and ancillary operations* – particularly ancillary operations. It follows the work therefore falls under the coverage clause.

[21] There is then Mr O'Neill's acceptance clause 27(j) is primarily designed to cover temporary absences of staff covered by the agreement and replace them during their absence. Again it follows that is work which would normally be performed by those covered by the collective and falls under the coverage clause.

⁶ n.4 above at [8]

[22] There is then Mr O’Neill’s concession supervisors are used to perform work normally within the agreements coverage clause on non-kill days ([14] above). Using supervisors in this way so as to avoid the cost of the minimum payment provisions is not covering a temporary absence or the like – there are no rostered staff to be absent and I conclude it is a wider use.

[23] If, as Mr O’Neill contends this is to address commercial common sense and I accept it is, that should have been considered when the clause was agreed (or more correctly retained in the most recent negotiation). The later adoption of an alternate fix which breaches the agreement is not acceptable.

[24] Turning to the supplementary submissions. Mr Cleary argues the above is factually unsound as rework is not limited to fixing *stuffed up processing work*. In support he cites Mr O’Neill’s example of the replacement of labels or packaging due to changed marketing conditions and says this has nothing to do with processing error.

[25] Mr Cleary’s second, and more fundamental point is my interpretation reads too much into the collective. It is submitted clause 27(j) applies to work covered by the agreement. He argues that if union members are not called to work they are not *engaged* in any work let alone that covered by the agreement. There is then an argument the parties decision to insert a rework rate in 2012 does not imply a guarantee it be performed by covered workers and my approach defies business common sense which was a poignant factor in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.⁷

[26] In reply Mr Mitchell notes rework is still work that would normally be performed by those covered by the collective and with this I agree. Using Mr Cleary’s example I simply note the original placing of labels is undoubtedly the work of such staff.

[27] Mr Mitchell correctly asserts there is nothing in its content, or anywhere else in the collective, that limits the effect of clause 27(j) to days upon which those covered by the collective are called to work. Indeed I agree with the notion the inclusion of a rework rate actually confirms it is work covered by the collective. Finally I agree with the submission that while business commonsense may assist with contractual interpretation it cannot be used to override a clear provision.

⁷ [2010] NZSC 5

[28] Having considered the supplementary submissions I conclude my original indication should stand.

[29] For the above reasons, and given the evidence, I am satisfied Silver Fern is using supervisors in breach of the limitations imposed by clause 27(j). The compliance order the Union seeks is therefore warranted. Orders will follow accordingly.

Conclusion and costs

[30] The respondents, Silver Fern Farms Limited and Silver Fern Farms Beef Limited, are ordered to comply with Clause 27(j) of the *Silver Fern Farms Pacific Collective Agreement 2013 - 2016* which provides:

Supervisory staff may perform the work covered by this agreement to assist with first aid and accidents, redeployment of staff, processing line changes, training and temporary absences.

[31] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority