IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 350
3004134

	BETWEEN	MARITIME UNION OF NEW ZEALAND INC Applicant
	A N D	PORTS OF AUCKLAND LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Simon Mitchell and Jeremy Lynch, Counsel for Applicant Jennifer Mills and Lucy George, Counsel for Respondent
Investigation Meeting:	14 and 26 June, 20 and 21 July and 11 August 2017 at Auckland
Submissions Received:	At the investigation meeting
Date of Determination:	10 November 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Between about May 2011 and late 2014 the Maritime Union of New Zealand Inc (MUNZ or the union) and Ports of Auckland Ltd (POAL or the company) bargained for a collective employment agreement. The process was protracted, and at times acrimonious, and included use of the Authority's facilitation process.

[2] The parties eventually entered into a collective employment agreement (the agreement) covering a number of categories of employees working at the port. The agreement ran from 18 February 2015 to 17 August 2017. Annexed to it is the

Stevedoring Schedule (the Schedule). Stevedores are sometimes known as wharfies or dock workers.

[3] The Schedule contains provisions regarding hours of work. MUNZ claims that the company is not complying with provisions of the Schedule regarding rostering and seeks a compliance order in that regard.

[4] POAL says that it is complying with those provisions and opposes the compliance order sought. The company also argues that the Authority has no jurisdiction to deal with this matter on the basis that it involves a reconsideration of a matter filed earlier and that MUNZ has not brought an application to reopen the previous investigation.

[5] The investigation meeting was originally set for only one day. However, after hearing opening submissions the prospect of settlement was raised and the investigation meeting was adjourned. A meeting was held on 22 June 2017 for that purpose but resolution was not reached. The investigation meeting resumed on 26 June 2017 when witnesses were heard. However, POAL then applied to file new evidence. That application was granted and the investigation meeting was adjourned. POAL then filed extensive witness and documentary evidence and MUNZ filed statements in reply. The investigation meeting resumed.

[6] The Authority heard evidence from union witnesses Russell Mayn (Secretary of the Auckland Branch), Craig Harrison (Assistant Secretary of the Auckland Branch) and two stevedores. Evidence was also heard from POAL witnesses Jonathon Hulme (Senior Manager, Terminal Operations and Employment Relations), Colin Tasi (Manager for Stevedoring), Jason Tuck (former Human Resource Manager) and Rodney Lingard (consultant).

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result. I was assisted by detailed submissions provided by counsel for both parties.

Stevedoring Schedule

[8] The Schedule contains clause 5, which is headed "Notification". Clause 5.1 has the subheading *"*Stevedoring Roster*"*. Under that heading, the following sub-clauses appear:

> 5.1.1 The Port is bound to operate its services on a 24 hours a day, 7 days a week basis and the ordinary hours of work for each employee will be rostered by the Company to facilitate meeting this demand.
>
> 5.1.2 The roster may include provision for rotational and non-continuous shift work, with shift duration ranging from 4 to 12 hours per ordinary shift. A minimum of ten hours between the completion of one shift and the commencement of the next shift shall be rostered and a maximum of 60 hours being rostered in any one week.
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> 5.1.3 An indicative schedule of shipping is available well ahead of each working week. Employees will be tentatively assigned on the basis of the indicative shipping schedule, with accounting for approved leave and, where practicable, personal requests that may be accommodated.
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> 5.1.4 The actual weekly work roster will then be further confirmed no later than the Friday of the week preceding. Provided however, the Company necessarily reserves the right to vary the roster due to the unplanned/uncertain situations and incidental absences that belatedly arise from time to time. It shall endeavour to provide 24 hours minimum notice for shift changes (unless otherwise agreed) and 8 hours minimum notice for shift cancellations.

[9] MUNZ claims that POAL is breaching these provisions in two regards. First, that it has not "tentatively assigned" employees on the basis of the indicative shipping schedule. Secondly, that what POAL provides is not an "actual weekly work roster" confirmed no later than Friday of the week preceding the work. POAL denies both these allegations.

The issues

[10] The issues for investigation and determination are:

(a) Does this matter involve a reopening of the previous investigation, which should not proceed due to MUNZ's failure to file for a reopening?

(b) If not, is POAL in breach of clause 5.1.3 and/or clause 5.1.4 of the Schedule to the collective agreement?

(c) If so, should a compliance order be issued in that regard?

(d) Should either side be required to contribute to the other party's costs in this matter?

[11] There were indications from union witnesses of other areas of discontent with the POAL rostering and work notification practices. However, MUNZ's counsel confirmed at various points during the investigation meeting that this case was limited to whether POAL was complying with clause 5.1.3 (whether stevedores are "tentatively assigned") and/or clause 5.1.4 (whether an "actual weekly work roster" is provided in the specified period). The investigation meeting proceeded on that basis.

Reopening question

[12] In July 2015, MUNZ filed in the Authority an application seeking compliance with the rostering provisions of the Schedule of the collective agreement. The company then filed a statement in reply stating that it was complying with the rostering obligations and denying that the Union was entitled to the remedies sought.

[13] Subsequently, a timetable was agreed to and an investigation meeting date of 12 November 2015 allocated. In the meantime the parties were in discussions and MUNZ then sought an adjournment of the hearing date with a view to trying to resolve the matter. The company agreed to that approach and the hearing date was vacated. Nothing further was heard by the Authority for some time and it then contacted the parties. The union's representative advised the Authority in mid-2016 that the matter may be withdrawn.

[14] On 1 March 2017, the union filed another statement of problem which was almost entirely the same as the statement of problem filed in 2015. The company alleges that the union is seeking in whole or in part to reopen an historic investigation, namely the 2015 matter, and that the Authority lacks the requisite jurisdiction and/or authority to hear the matter. Further, POAL alleges that MUNZ has failed to apply for, and/or has not been granted leave, and/or has failed to pay the prescribed fee[1].

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1 Regulation 10 of the Employment Relations Authority Regulations 2000

[15] Under clause 4 of Schedule 2 of Act, the Authority may order an investigation to be reopened upon such terms as it thinks reasonable, and, in the meantime, to stay the effect of any order previously made. The reopened investigation need not be carried out by the same member of the Authority.

[16] It is common ground that the 2015 application did not result in a determination of MUNZ's claim by the Authority.

[17] In *Puna Chambers Inc v Christensen*, Judge Inglis, as she then was, stated:

> Parliament has made express provision for the Authority to reopen its investigations under cl 4. Implicit in the power to reopen an investigation must be the power to set aside a determination. And logically, in order to "reopen" an investigation the investigation must first have been closed. This can occur either before an investigation meeting (where a grievance has, for example, been struck out) or once a determination has been issued. The power under cl 4(1) to stay the effect of any order previously made reinforces the point.[2]

[18] Her Honour noted that a review of the cases indicates that clause 4 has been relied on in a number of circumstances involving applications advanced at both a pre- and post-determination stage[3].

[19] The main criterion in determining whether a reopening should be granted is whether there has been a miscarriage of justice[4].

[20] In 2015, although a timetable was set by the Authority, the investigation meeting was adjourned by consent. There were no orders affecting the rights of the parties. The application was subsequently withdrawn.

[21] I do not consider that the investigation can be seen to have been closed in the sense in which Her Honour refers to in the *Puna Chambers* case. Therefore, the 2017 application was not effectively a request for a reopening. I therefore have the jurisdiction to proceed on the basis of the claim as filed in 2017.

Practice under the 2015 agreement

[22] I now go on to consider what is happening at the port in terms of notification to stevedores of their work requirements. After that I will undertake the interpretation

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2 [2014] ERNZ 756 at [13]
3 N 2 at [15]
4 *New Zealand Waterfront Workers' Union v. Ports of Auckland Ltd* [1994] ERNZ 304 (EC)

exercise and evidence provided regarding that, including about negotiations for the 2015 agreement.

[23] Clause 5.1.3 of the Schedule refers to an indicative schedule of shipping being available well ahead of each working week.

[24] POAL runs a berthing schedule which includes when particular ships are expected to be in port and the number of cranes and straddles needed. This is the indicative schedule of shipping referred to in clause 5.1.3. The schedule is revised daily and put up for staff to see. The berthing schedule does not tell a stevedore when they are working.

Indicative forecast

[25] POAL provides stevedores with a document entitled indicative forecast. It is provided every Friday for the two week period ahead.

[26] So, for example, for work on Monday 16 October 2017, the indicative forecast for that day would be available on Friday 6 October 2017. The forecast also show days later in the week starting 16 October, so stevedores would get more notice for days of the week later than Monday. This determination will focus on Monday as that is the start of the POAL working week and is the day when there is the shortest notice of work. Through the indicative forecast a stevedore gets 10 days' notice of the work situation for Monday 16 October 2017, counting the day the roster comes out.

[27] The indicative forecast lists employees and has a grid with a box for each day. The days which are not coloured in are rostered work days. Coloured in boxes have acronyms on them which capture rostered days off, annual leave, and days off. There are no times specified on the indicative roster.

[28] A stevedore will get a sense from the indicative forecast whether a particular day is indicated to be a working or a non-working day.

POAL's Actual Roster

[29] What POAL describes as the actual roster is provided the Friday before the work week. It is a similar grid to the indicative forecast showing whole days blank,

which are working days, and a variety of other days off as coloured boxes with acronyms.

[30] A significant change between the "Indicative Forecast" and the "Actual Roster" is that the latter has guaranteed days off separated from rostered days off. Guaranteed days off are supposed to be sacrosanct whereas stevedores have to make themselves available to work if called to do so on rostered days off. There was suggestion by union witnesses that occasionally stevedores may be required to work on guaranteed days off, but this was denied by POAL and is not the subject of this investigation.

Text about earlier start times

[31] POAL's evidence was that in practice shifts for day workers[5] started at 7am. There is a system in place to provide more notice for those allocated earlier start times than 7am. This was given two days before the relevant shift. So, for example, those who are likely to be starting earlier than 7am on Monday 16 October 2017, would get a message on Saturday 14 October saying what their Monday start time is likely to be. The text notes that "[t]his will be confirmed on Sunday". No finish time is provided.

Text including start and finish times

[32] An SMS text message advising of start and finish times is sent the day before the shift. So, for example, on Sunday 15 October 2017, stevedores would get a message saying "[c]onfirmed 1ST SHIFT" and the actual start and finish times of their Monday 16 October 2017 shift. This pattern continues, so if Tuesday 17 October 2017 is to be a working day, a stevedore would get a text on Monday 16 October at around 1pm telling them the start and finish times of their shifts.

[33] POAL aims to get the confirmation text out around 1pm. However, if the work allocation is finished earlier the texts may be sent out earlier. This seems more prevalent in the weekend. The example provided by POAL was sent out on a Sunday at 9.42am. There was evidence that the texts had occasionally been as late as around 3pm or even later. There is also a recorded message which stevedores can call to check their shift. This is available at about the same time as the texts come out.

[5] Sometimes day workers are referred to as 1st shift, and night workers as 3rd shift. More is said later on this differentiation between day and night workers.

[34] This confirmation text, sent around 1pm the day before a shift, appears to have been a practice in place well before the 2015 collective agreement. There was some suggestion by POAL that this was an agreed practice between the parties although the union denied this. POAL did not provide specific evidence about when or how such agreement may have occurred. The texts would have been of limited value to most MUNZ members prior to 2015 as they worked set length shifts with set start and finish times.

Night shifts

[35] The timing for those working night shifts is a little different. For a shift on Monday 16 October 2017 starting at 7pm, the stevedore would get a confirmation text at about 11am on 16 October 2017. This would give them around eight hours' notice of the start and finish time of their shift. There was evidence that night shifts usually started at 7pm.

The interpretation principles

[36] The question is then whether what POAL provides is adequate for the purposes of clause 5.1 of the Schedule. Both parties agreed that there was some room for various notification and roster formatting methods as the clause is not so prescriptive as to mandate only one method of notification in a particular form.

[37] In terms of the principles of interpretation, both parties referred to the Supreme Court decision in *Vector Gas Ltd v Bay of Plenty Energy Ltd* [6] although they took somewhat different approaches to the findings in that case. MUNZ encouraged a more restrictive approach to the use of extrinsic material, and stressed that where third parties, in this case union members, rely on the words of an agreement the emphasis must be on objective evidence[7]. POAL emphasised the importance of the challenging and volatile shipping industry environment, in which the negotiations occurred.

[38] I am also guided by Judge Ford's comments in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*[8], on the principles from *Vector Gas.*

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[6] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5
[7] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5 at [21] per Tipping J
[8] *NZ Professional Firefighters Union v NZ Fire Service Commission* [2011] NZ EmpC 149

[39] The ultimate objective must be to establish the meaning which the parties intended their words to bear but this is done by establishing the objective meaning which a reasonable and properly informed third party would consider the words to have. To be properly informed I must consider the context in which the agreement was made. However, subjective intentions or understandings are not relevant.

[40] In summary, the starting point is to consider the words of the clause 5.1, particularly clauses 5.1.3 and 5.1.4. From there I will consider the whole agreement. In this instance the focus is on the Stevedoring Schedule, and in particular the hours of work, rostering and notification provisions.

[41] In some circumstances evidence as to the context can be helpful, such as particular usage of words in an industry. However, in this case there was little useful referred to in that regard.

[42] I will consider the extent to which extrinsic evidence is relevant to the interpretation required. Evidence of negotiations can be considered, but that must be objective evidence, rather than the subjective evidence of what one party was thinking or intending regarding the agreement.

Clause 5.1.3

[43] Clause 5.1.3 of the Schedule contains two sentences. The first indicates that an indicative schedule of shipping is available well ahead of each working week and the second is that employees will be tentatively assigned on the basis of that schedule.

[44] The first sentence can be seen as a statement of fact rather than imposing an obligation. In any event, the berthing schedule appears on the evidence to be made available to the employees. However, it does not assist stevedores to know when they are to work.

[45] There was no dispute that the berthing schedule is used as the basis for allocation of work. Clause 5.1.3 requires employees are "tentatively assigned" on the basis of the indicative shipping schedule. The use of the word tentative indicates that the assignment at that stage is provisional or not definite. The assignment should take into account approved leave and where practicable personal requests that may be

accommodated[9], although it was agreed that those issues are not the subject of this investigation.

[46] Although "assignment" could merely be an act by the company rather than the passing on of that information to the stevedores, in the context of a notification clause I find that the implication is that stevedores will be told of that assignment.

[47] There is no description in the clause of when the assignment must occur. However, logically it must occur after the availability of a berthing schedule "well ahead" of the relevant working week and before the obligation in clause 5.1.4 to provide a roster which "confirmed" allocations. The union promotes a two week period which is contained in the POAL's Hours of Work Policy, which was in place prior to the end of bargaining. In that policy POAL's soft rules[10] include:

> *Notification of an indicative roster will be provided every Friday of (*sic) *at least two weeks ahead.*

Clause 5.1.4

[48] The next clause, 5.1.4, then specifies that the "actual weekly work roster" will be confirmed no later than Friday of the week preceding. POAL does reserve some right to vary that roster due to various circumstances. It also shall endeavour to provide a minimum of 24 hours' notice of shift changes.

[49] The use of confirm in this suggests that something has already been done. This refers to the tentative assignment in the previous sub-clause.

[50] The requirement to provide notice for shift changes suggests that there is a shift of some clarity or certainty which has to be changed. The company's evidence was that shift changes rarely occur. However, that appears to be because with current practice the notification of a definite start time only occurs about 18 hours before the start of the shift[11].

[51] The union argues that in this context "roster" means that those covered know when they are actually working. MUNZ accepts that in some industries telling an

[9] Clause 5.1.3 of the agreement
[10] Hours of Work Policy, July 2014, p 4
[11] 1pm the previous day to 7am on the day of the shift

employee that the day that they will be working is sufficient because the shifts are always the same. But that is not the case on the waterfront.

[52] In some instances a roster might not include details of when work is to occur during a day, if there is no variation in when that occurs. However, when there are variations in what can be worked on a particular day, the word "roster" implies that when the work will occur will be specified, rather than just the day it will occur. In the present case this is reinforced by the use of the word "actual" which suggests that this is a specific roster providing the times that an employee will work.

[53] This interpretation is reinforced by the last sentence of clause 5.1.4. There would be no need for a twenty four hour minimum notice of shift change provision, if the employees are not advised of their shift until less than twenty four hours before it commences.

The whole clause

[54] I now look at the wider picture of clause 5. The clause is headed "Notification" which suggests that it is about providing notification to stevedores. It comes after clause 4 which is headed "Hours of Work and Extra Time". The sub-clause 5.1 is headed "Stevedoring Roster" which emphasises that the notification to stevedores is about rosters.

[55] Clause 5.1.1 describes the work environment, particularly the Port's duty to operate its services on a 24 hour a day, seven days a week basis. This is not an environment where everyone working there comes in around the same time and finishes at the same time. POAL has the power to assign stevedores to work at any time of the day, any day of the week, to meet the demand.

[56] That clause requires stevedores to be "rostered" for the "the ordinary hours of work" for each person. This suggests that stevedores will be told their ordinary hours of work by way of a roster which the company establishes. The reference to "hours of work" rather than "days", is significant in the context of this dispute.

[57] Then clause 5.1.2 goes on to make provision for different kinds of shift work and a range of shift lengths. POAL is restricted to giving a minimum of ten hours "rostered" between shifts and a maximum of 60 hours "rostered" per week. There are close connections between references to hours and references to rosters.

[58] Clause 5.1.2 sets out what will be included in a roster. It seems unlikely that the word "roster" is used in clause 5.1.2 in a different sense to how it is used in clause 5.1.4 referring to the actual document.

The whole agreement

[59] Reference was made to other clauses which were said to be relevant to interpretation of clauses 5.1.3 and 5.1.4.

[60] MUNZ relies on clauses which use "roster" or versions thereof in the same sense as it is promoting for clause 5.1[12]. POAL's response was to emphasise the use of roster as a verb in those clauses which it says can then be differentiated from the noun roster in clause 5.1.4.

The previous agreement

[61] I turn now to look at the wider context, beginning with the previous collective employment agreement between the parties. That agreement ran from 1 July 2009 to 30 September 2011. In the Stevedoring Schedule attached to that agreement the work week for permanent employees was set at five, eight hour shifts, with three shifts with set start and finish times[13].

[62] The 2015 agreement provisions are significantly different. It was submitted by POAL that what MUNZ was seeking through this proceeding was a return to that situation. However, there is a difference between the previous agreement which only allowed for eight hour shifts beginning at times specified in the agreement and MUNZ's claim in this case that stevedores are entitled to know in advance when their shift will be, although it may be between eight and twelve hours long and can start at any time.

The bargaining

[63] Both parties have provided evidence regarding the bargaining for the collective employment agreement. It was agreed that the major issue related to hours of work.

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[12] Clauses 4.1.4 and 4.4.2 of the agreement
[13] Night (2300 to 0700 hours), day (0700 to 1500 hours) and afternoon (1500 to 2300 hours)

[64] Bargaining for the new agreement commenced in around April or May 2011. Mr Lingard was the POAL's principal negotiator, together with Chief Executive Tony Gibson. Mr Lingard's involvement ceased at formal bargaining on 3 December 2012. Consultant Gary Blair took over as lead negotiator with Mr Gibson. When Mr Blair became ill, Mr Tuck became more involved in developing the collective agreement document but had little involvement at the bargaining table. Mr Blair subsequently died. Later in the process discussion occurred directly between representatives rather than in a meeting setting.

[65] Neither Mr Hulme nor Mr Tasi was directly involved in negotiations, other than very occasional attendance. Mr Gibson did not give evidence. POAL called no witnesses who were directly involved during the whole course of the bargaining.

[66] MUNZ's representatives at bargaining included Mr Mayn and Mr Harrison.

[67] Relatively little documentation was filed regarding bargaining. Neither party provided any notes which they had taken from bargaining.

[68] POAL wanted more flexibility and to be able to roster staff on at different starting times and with a range of different shift lengths. Members of the union wanted some security about when they would be required to work. The parties' respective evidence on the bargaining is summarised below.

[69] On 22 January 2013 the Authority's facilitator provided his recommendation to the parties. This included that rostering and allocation of work be in accordance with POAL's Stevedoring Roster proposal as presented in December 2012. That document included the statement that POAL could *"offer significant improvements in the predictability compared with the current floating roster"* with a four week in advance indicative roster, confirmed up to a week ahead.

[70] It appears that there was a lot of discussion about rosters but without reference to start and finish times as such, although it was clear that POAL wanted to move away from the previous three fixed shift model.

MUNZ evidence about negotiations

[71] Mr Mayn and Mr Harrison say that during bargaining Mr Blair said modern shipping meant that the ships were predictable and that they did not change the

windows when they arrived in port. Thus POAL could provide the details of work in advance so the stevedores knew when they were going to work. POAL strongly questioned this evidence but did not provide a witness who could affirmatively say that Mr Blair did not make these comments. Rather evidence was provided to show that shipping was not always predictable and ships did not always arrive in their window.

[72] Mr Mayn emphasised that the union was told by POAL representatives at bargaining that the company could supply confirmed rosters a week out from the work date, so people would not be sitting by the phone waiting to find out when they had to work. It was acknowledged that POAL wanted to do away with set start and finish times, in the sense of, for example, all morning shifts starting at 7am. However, the union was assured that people would know their shifts a week out.

[73] Much reliance was placed on a 9 November 2012 letter from POAL's CEO Mr Gibson to staff individually. Attached were a summary of POAL's current offer, its bargaining proposal presented to facilitation and its stevedoring roster proposal. In the summary under the heading "What does it mean for you?" is the following:

> Rosters will be published four weeks ahead so there will be no waiting by the phone. Given the nature of the shipping industry, some changes may be required, one or two hours either side but these will be with at least 24 hours notice…You can plan your life, and you'll still be able to put in your preferences…

[74] The union says that it eventually accepted a two week period for roster publication, rather than the four week period specified in the bargaining proposal. Mr Harrison described this as a realistic period. The POAL Hours of Work policy refers to a soft rule that notification of an indicative roster being provided at least two weeks ahead.

[75] POAL suggested that the environment had changed since Mr Gibson's November 2012 correspondence, although there was no evidence that any such change was expressed by POAL representatives in bargaining. The Hours of Work policy dates from July 2014. Mr Tuck considered that the November 2012 correspondence was generally speaking reflected in the final agreement regarding hours of work.

[76] I consider the 9 November 2012 letter and the attached POAL stevedoring roster proposal to be significant objective evidence of what the parties intended the meaning of the notification clause to be.

[77] Mr Mayn's unchallenged evidence was that union members at ratification meetings were told that they would get an indicative roster two weeks out and then would have their guaranteed days off and rostered days off confirmed the Friday before. An agreed draft collective agreement document was provided to union members at ratification. That included clause 5.1 of the Schedule.

POAL evidence about negotiations

[78] POAL stressed that stevedores had received a substantial pay increase in the 2015 collective, a premium well above the norm for flexibility. I accept that the increase was well above a usual annual percentage increase. However, the 2015 agreement came into force about three and a half years after the previous agreement's expiry date, so more than a usual year's percentage increase might have been anticipated. There were also a number of changes to the previous agreement and it is difficult say that a particular change led to a greater pay rise of any specific amount.

[79] MUNZ witnesses accepted that POAL wanted flexibility during negotiations.

[80] Mr Lingard says that POAL wanted to be able to set the start time of shifts (at any time) up to the start of the shift. However, there is no evidence that that was expressed to MUNZ. He acknowledged that discussions were high level, rather than detailed. When asked specifically, he said that it (the message) was in the documents which POAL presented, namely the draft clauses.

[81] POAL produced various documents about productivity showing what was concerning or motivating it in the bargaining. A Ministry of Transport May 2017 presentation showed several productivity measures at New Zealand ports including POAL and about the number and percentage of ships that arrived early or late from the proforma windows. The latter was from 2015 to 2017 after bargaining was concluded.

[82] This material was created well after the bargaining period and there was no evidence of predecessor material being put by POAL at bargaining. This type of material may have motivated POAL representatives or the company itself, but without

evidence that it was presented at bargaining it relates to one party's subjective views. What I must focus on is objective evidence.

Development of the wording of clause 5.1

[83] Given that hours of work were a central bargaining issue, there is perhaps surprisingly little evidence before me on the development and negotiation of the wording of clause 5.1. This is perhaps due to absence of Mr Blair's evidence.

[84] Somewhat similar wording for clause 5 was put up by POAL in December 2012. However, there are a number of differences between the 2012 wording and the final wording. The extent to which these were changed by detailed negotiation is not clear but there is some indication that that did not occur.

[85] The final wording is the same as the wording in the Port Pro collective agreement. Port Pro was an alternative union set up in June 2012. Its collective agreement with POAL was in place from around October 2012.

[86] Mr Lingard says that POAL was trying not to refer to Port Pro in the MUNZ negotiations as MUNZ did not hold Port Pro in high regard. He says that the clause 5 wording was based on what was in POAL's individual employment agreement, and that the Port Pro agreement was basically a collectivised version of the individual agreement.

[87] The union was not aware of the wording of the Port Pro agreement said and would not have wanted to emulate what was agreed to by that organisation. This suggests that the union were satisfied with what they were told by POAL about how the rostering system would work in practice, rather than focusing on negotiating the wording of the clause. Mr Lingard confirms that during his time these discussions were at a high level.

Rainbow roster

[88] Towards the end of the bargaining process and after ratification, discussions were occurring between POAL and MUNZ representatives about a rostering system which was known as the Rainbow roster. It was based on rostering in teams and would give some predictability to stevedores working on a three or four week cycle of working days.

[89] The rainbow roster was not adopted. POAL proceeded at some point to start operating on the current system.

Implementation of new rostering arrangements

[90] POAL suggests that post-contractual conduct is inconsistent with MUNZ's interpretation. There does appear to have initially been uncertainty as to how the new system was going to operate. Shortly before the agreement was signed a union representative asked Mr Tuck about rosters. His response was that initially the rosters would be the flexible rosters with work on the team based rosters to continue. The evidence from 2014 of the flexible roster showed that those on it were told how long their shift was to be on particular days. There was nothing to suggest that this had changed by early 2015.

[91] From May 2015 there were emails between Mr Mayn and the then POAL General Manager Operations, who did not give evidence.

[92] POAL suggests that there was a lack of complaint from MUNZ about the rostering system being used, meaning that it was in compliance with what was agreed at negotiations. However I do not read the correspondence in this way. Mr Mayn questions "whether the company is going to produce an indicative roster two weeks ahead of time …to be followed with a confirmed actual weekly roster on the Friday of the week preceding"[14]. A similar statement is made in a later email on the same day.

[93] Then the union filed its first claim in July 2015. Overall I do not consider that post-contractual conduct assists POAL.

Flexibility

[94] POAL emphasises its need for flexibility and clause 5 as being part of what it achieved in the agreement in that regard. MUNZ accepts that POAL was seeking flexibility and that it achieved that in terms of removal of set start and finish times at particular hours for all shifts (as occurred under the previous agreement) and shift length.

[95] Under the previous collective agreement all shifts had to start at particular times and had to be of a set length. The 2015 agreement allowed POAL to determine

[14] Email 1 May 2015

when shifts would start by not setting requirements in this regard. It also allowed POAL to determine how long shifts would be, within a range of 4 to 12 hours.

[96] POAL was clearly seeking flexibility at the bargaining. MUNZ understood this. I take POAL's desire for flexibility into account in interpretation. However, that does not necessarily answer the interpretation question. There are a number of aspects of hours of work and rostering within which flexibility could be achieved and some were achieved by POAL and some were not. It achieved, for example, flexibility away from the previous eight hour shift length. However, POAL did not obtain complete flexibility. So, for example, the agreement clearly prevents shifts of less than four hours being offered. That is a restriction on POAL's flexibility.

Flexibility versus certainty

[97] There was a contrast between two significant strands of POAL's evidence. First, the company emphasised its need for flexibility and pursuit of that through the negotiations. Secondly it stressed that stevedores in practice have a high degree of certainty as to when they will be working and this should be considered regarding the interpretation of clause 5.1.

[98] Mr Tasi says that stevedores know they start at 7am (for day workers) or 7pm (for night workers). The suggestion was there was no need to tell the employees that and they would only be told when their shift start time differed from the standard time.

[99] The suggestion was made on behalf of POAL that the imposition of MUNZ's interpretation would have a draconian effect on the business. However, the evidence was that in practice stevedores could have certainty that they would very often be starting at the 7am time if they were day workers and 7pm if they were night workers.

[100] MUNZ suggested that POAL commit to providing that certainty but the company did not do so. POAL did not accept that those start times had become established by custom and practice.

Rostering practice with Port Pro employees and other staff

[101] POAL witnesses stressed that MUNZ negotiators knew about how rostering worked for Port Pro members and other staff who were in around 2013 to 2014 on

what was described as the "flexible roster". These assertions were based on several grounds.

[102] Examples provided from 2013 and 2014 of what were described as forecast rosters for non-MUNZ stevedores. However, Mr Harrison, who had worked in allocations, thought they were screen shots of the allocation system. The documents had columns for night, day and afternoon shifts, although only one person appeared to have afternoon shifts. Beside the grid are lists of first shift (day shift) and third shift (night shift) work patterns, with eight or twelve (hours), or rostered day off, noted for each particular day of the week.

[103] This meant that stevedores working on that roster would know whether they were on a morning or a night shift and how long it was for. There was also evidence that at this time because MUNZ members were still on shifts starting at set times (especially 7am) the other staff were also given shifts starting at the same time in order to fit in. I am not satisfied that the flexible roster in operation at that time had the degree of flexibility which POAL now maintains that it is entitled to utilise.

[104] In addition, there is a question as to how MUNZ representatives would have known about how the flexible roster operated. Several POAL witnesses understood that MUNZ branch representatives had to "sign off" its members going onto the flexible roster. However, none were able to be specific about how this process worked. None were personally involved.

[105] MUNZ witnesses did not accept that they had been involved or knew about a process where the union had to approve members going on the flexible roster. Mr Tuck says that in February 2015 a MUNZ representative asked him how the flexible roster operated.

[106] I do not consider that the flexible roster assists POAL in its interpretation argument. The way the flexible roster operated during negotiations was not identical to the system now operated by POAL. POAL did not establish that MUNZ representatives knew in any detail how the flexible roster system operated.

Start and finish times

[107] At some point during the course of this proceeding, possibly to exclude those aspects of the application of clause 5.1 which were not to be considered, the issue

became characterised as one about whether start and finish times had (contractually) to be included in what notification was provided to stevedores.

[108] POAL emphasised that the relevant clauses do not specify that the company had to provide start and finish times.

[109] Mr Tuck says that the flexibility which POAL sought was to determine the shift right up to the time of the shift starting. However, Mr Lingard says that POAL never said, when he was present at bargaining, that I hope you (MUNZ) recognise that we are stripping out start and finish times. He says the bargaining never got into that sort of detail. There was no evidence that POAL representatives specifically expressed their desire to be able to determine the start time and length of shift right up to the start of the shift. These views are POAL's subjective intentions.

[110] One consequence of POAL's preferred interpretation is that there is then no contractual requirement to notify of start and finish times whatsoever. Although it has had a practice of providing texts the day before a work day specifying start and finish times, there is no express contractual obligation on it to do so. POAL did not accept that those notification practices had become an obligation by way of custom and practice.

[111] An interpretation which mandates employees not needing to be told of their start time effectively until that time occurs seems unlikely. That is particularly so in the context of a whole clause entitled notification in an agreement with relatively complex hours of work and work time provisions.

[112] I accept that the clauses do not explicitly state that the company will provide start or finish times. I do not consider that necessarily then answers the question of what the clause does require, and in particular, what an "actual weekly work roster" requires.

Day and night shifts

[113] Although the agreement does not differentiate between day and night shifts, POAL says that it operates a preference system with stevedores able to prefer one for the other. There were no details provided as to how this system enables employees to express a preference. The stevedores and union officials who gave evidence were not aware of such a system, although stevedores do mainly get one type of shift or the

other. It may be that new stevedores get to express a preference but the preference of existing staff appears to be taken from past work history or informally from discussions with allocation staff.

[114] This is a similar situation to the 7am start times issue. POAL says that stevedores have reasonable certainty because of being able to work mainly either day or night shifts. However, as Mr Lingard acknowledges, this is not a contractual entitlements, which presumably means that the company can change its approach.

Conclusion on interpretation

[115] As outlined above I have considered the words of clause 5.1.3 and 5.1.4, the wider agreement and the objective extrinsic evidence. My conclusion is that clause 5.1. requires stevedores to be tentatively assigned to an actual roster with confirmation of the actual roster being confirmed on the Friday preceding the week of work. At the time of confirmation, stevedores will be notified the days they will work and their start and finish times on those days.

[116] The current practice of providing what POAL refers to as its "Actual Roster" does not comply with the requirement of clause 5.1 as it does not enable stevedores to know when they are working on a particular day. The text notification of start and finish times the day before the working day cannot amount to the actual roster as it is not provided by Friday preceding the week of work.

2017 negotiations

[117] Between the various investigation meeting dates, MUNZ initiated bargaining for a new collective employment agreement with POAL. The Authority has not been informed of any settlement of those negotiations so must assume that bargaining is on-going. On that basis the 2015 to 2017 agreement continues in existence under s 53 of the Act.

Compliance order

[118] Under s 137 of the Act, the Authority may order that a person do a specified thing for the purpose of preventing further non-observance or non-compliance of an employment agreement.

[119] In order to issue a compliance order, I must be satisfied that there has been a past breach of the collective agreement. The evidence establishes here that there has been a breach of the requirements of clause 5 on a continuing basis.

[120] Although there is no requirement for proof of prejudice in s 137, I am satisfied that on occasions members of the union have suffered detriment as a result of the company's action, in the sense of not being able to plan activities or events due to uncertainty about when they were going to have to work.

[121] I accept POAL's evidence that frequently, perhaps 90 plus percent, of the time stevedores' working days would be certain that they were starting at 7am or 7pm and working a 12 hour shift. However, the company has not been prepared to offer them the certainty of that being the norm, with notification occurring within the agreement's requirements when that was not going to be the case.

[122] Having found that the POAL's current practice does not meet what is required by clause 5.1, I consider it appropriate to allow the parties to have further discussions on these issues. This is particularly so when the parties are in bargaining regarding the collective agreement. I grant the parties leave to return to the Authority regarding the compliance order issue, in the event that they are unable to come to an understanding.

Costs

[123] Costs are reserved and the parties are invited to resolve that matter.

[124] If the parties are unable to resolve that matter, MUNZ shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The company shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig
Member of the Employment Relations Authority