IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 289
3033039

	BETWEEN	MARITIME UNION OF NEW ZEALAND INCORPORATED First Applicant
	AND	CARL FINDLAY Second Applicant
	AND	PORTS OF AUCKLAND LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Simon Mitchell for Applicant Jennifer Mills for Respondent
Investigation Meeting:	12 September 2018
Oral Determination:	12 September 2018
Record of Oral Determination:	13 September 2018

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Maritime Union of New Zealand Inc (MUNZ) and Ports of Auckland Ltd (POAL) were parties to a collective agreement. That collective agreement expired on 17 August 2017. By operation of s 53 of the Act the collective agreement continued in force until 17 August 2018 while bargaining continued. At the time these proceedings were lodged with the Authority the collective agreement was still in force. Since 18 August 2018 and pursuant to s 61(2) of the Act the affected employees are now employed under individual employment agreements based on the expired collective agreement.

[2] Bargaining for the now expired collective agreement was protracted and at time acrimonious. The agreement was ratified after facilitation and further collective bargaining. Issues addressed during the bargaining included provisions for hours of work which have now been the subject of Authority and Employment Court determinations. In its judgment dated 31 July 2018 the Court held that on a plain reading of the disputed clause the actual roster implemented by POAL had to specify the starting and finishing times for rostered shifts.[1] The context included factors from the Hours of Work Policy and the Fatique Risk Management System.

[3] Concurrently with this proceeding the parties have successfully applied for a reference to facilitation to assist with their current bargaining over a new collective agreement. Dates for facilitation have been set down for the later this month.

[4] MUNZ and Mr Findlay seek compliance orders that POAL comply with provisions in the collective agreement requiring POAL to have a Fatigue Risk Management (FRM) policy in place and to operate the policy consistently with scientific principles and research.

[5] POAL opposes the application on the grounds that no terms of the agreement have been breached and MUNZ does not have standing to pursue its application.

[6] When undertaking my preparation for the investigation meeting I advised the parties that I required the issue of standing of the Union to be addressed in circumstances where there was no longer a collective agreement but a series of individual employment agreements based on the now expired collective agreement pursuant to s 61(2) of the Act. The Union is not a party to the individual employment agreements.

[7] The Union lodged and served an amended statement of problem which included the second applicant. An amended statement in reply was duly received from POAL.

[8] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and

[1] Ports of Auckland Limited v Maritime Union of New Zealand Inc [2018] NZEmpC 86 at [40].

specified orders made as a result. It has not recorded all evidence and submissions received.

Standing of the union

[9] The power of the Authority to order compliance is set out in s 137 of the Act. This section applies where any person has not observed or complied with any provision of any employment agreement. Section 137(4) of the Act sets out the list of persons that may take actions against another person and includes a union who alleges it has been affected by the non-observance or no-compliance.

[10] POAL submits that because the union is not affected by the non-observance or non-compliance it does not have standing to seek a compliance order.

[11] MUNZ submits that it has standing by virtue of section 18 of the Act which provides a statutory right for MUNZ to represent its members in relation to any matter involving their collective interests.

[12] I do not agree with the submissions made on behalf of MUNZ. Section 137(4) of the Act goes further than representation. To seek a compliance order the party to the claim must be affected by the breach. There is no evidence that MUNZ has been so affected. Examples of a union being affected by a breach include non-payment of union fee deductions, paid stop-work meetings and union access.

[13] Given that finding I have considered whether a compliance order is appropriate for Mr Findlay. For the following reasons it is not.

[14] Mr Findlay has failed to establish a breach by POAL to have a FRM policy in place. The policy was implemented in July 2014. Further, I am not satisfied the allegation that the policy is not being operated consistently with scientific principles and research has been proven.

[15] What this case is really about is the operation of the policy with respect to the maximum number of hours to be worked. I have addressed this issue below.

Principles of interpretation

[16] The starting point when interpreting a clause in an agreement is to consider the natural and ordinary meaning of the language used by the parties. Even if the words are plain and unambiguous, this does not preclude a consideration of the surrounding circumstances.[2] This acts as a cross-check as to whether some other or modified meaning was intended.

[17] An objective approach is required. Evidence of post contractual conduct may be relevant if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both parties intended their words to bear. Evidence of what a party subjectively intended or understood their words to mean or what their negotiating stance was at any particular time, is irrelevant.[3]

[18] In *AFFCO NZ Ltd v NZ Meat Workers and Related Trades Union Inc* the Supreme Court referred to its earlier dicta in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, and emphasised that the approach which applied to employment agreements was the approach applying to other contracts:[4]

> … The proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
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> …
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> While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant.But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

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[2] *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789; *Tertiary Education Union v Vice-Chancellor, University of Auckland* [2015] NZEmpC 169.

[3] *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 140; *NZ Airline Pilots' Association Inc v Air New Zealand Ltd* [2017] NZSC 111 at [71]; and *AFFCO NZ Ltd v NZ Meat Workers and Related Trades Union Inc*. [2017] NZSC 135 at [38]

[4] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2012] NZSC 147, [2015] 1 NZLR 432 at [60] and [63].

Relevant terms of the employment agreement

[19] Hours of work for Stevedores is covered in a schedule to the agreement which states:

> **4.1 Basic Working Week**
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> 4.1.4 The Company may roster permanent employees for up to a maximum of 60 hours in any one week. Additional time may be rostered with employee agreement.

[20] The agreement deals with health and safety matters and in particular provides for the management of fatigue in the following terms (et al):

> **3.2 Health and Safety**
>
> **3.2.1 General**
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> - The company will be required to have in place a Fatigue Risk Management Programme during the term of the Agreement. It is mutually agreed that the FRMS will be operated consistently with scientific principles and research that is relevant and available. The Company's Hours of Work Policy for Stevedoring employees is incorporated in the Company's Fatigue Risk Management program. Any variation to the policies provisions during the term of this agreement shall be done in consultation with H & S delegates representing unionised Stevedoring employees and other delegates representing non-affiliated employees. Any issues arising from the application or operation of the FRMS, may be subject to the Employment Relations Act Dispute Procedures.

[21] The FRM policy contains soft and hard rules. The soft rules are desirable features of allocations and actual hours worked and may be breached from time to time.

[22] The hard rules are defined as non-negotiable parameters for allocations and actual hours worked and should not be exceeded except in extraordinary circumstances. Transgressions are not possible, unless there has been a risk assessment and general manager approval.

[23] The hard rules included three rules relevant to this matter:

a) Over any seven-day period, the maximum work hours shall be 60 hours;

b) At least one continuous period of 24 hours or greater free of work shall be provided every seven-day period;

c) There will be a rest period of 48 hours or longer following an employee working the maximum number of hours across any seven day period.

[24] As stated, clause 4.1.4 of the agreement deals with a basic working week for all permanent employees and limits the number of hours to be worked in any one week to 60. Employees may agree to work more than 60 hours. The parties have not defined what "a week" means in the context of the agreement.

[25] Through the operation of clause 3.2.1 of the agreement the hours of work for stevedores is incorporated into the FRMP. That policy limits the number of hours of work to 60 hours over any seven day period. The policy provides for at least 24 hours free of work in every seven day period. The policy also provides for a rest period of at least 48 hours after an employee has worked the maximum number of hours across any seven day period.

[26] Mr Steven Groenewegen was the Health and Safety manager for POAL from January 2013 until October 2017. Mr Groenewegen told me the intended meaning of the words "over any seven days" was just that, "any" seven day period. It did not mean Monday to Sunday.

[27] A plain reading of the provisions relating to the limit of the number of hours to be worked means employees are limited to a maximum of 60 hours over any seven day period. The next question is when the seven day period starts for the purpose of calculating the number of hours worked.

Reset

[28] POAL uses a resource allocation system to assist in its management of the rosters. A warning occurs in the system that must be overridden prior to any attempt to breach the hard rules. A breach will also trigger an email to the general manager.

[29] POAL says that the resource allocation system is set up to "reset" accrued hours after one day off. POAL says this is in line with the hard rule that stevedores

will have at least one continuous period of 24 hours free of work every seven day period.

[30] Dr Naomi Rogers is an Australian based expert in sleep and circadian rhythms and gave evidence on behalf of MUNZ. Dr Rogers told me that the term "reset" usually refers to a period of time to recover from night shift and adjust back to days, to either day shift, or days off. It is considered a physiological reset.

[31] This evidence is consistent with the FRMP policy which specifically provides for Night Workers to be provided with a "minimum "reset break" of 48 hours after four consecutive shifts." There is no equivalent provision under the seven day rules except that there is provision for a rest period of 48 hours to be provided to an employee working the maximum number of hours across any seven day period.

[32] Mr Jonathon Hulme the senior manager for terminal operations and human resources gave evidence which showed a number of breaches of the 60 day rule.

[33] Mr Groenewegen told me that the continuous period of 24 hours provided for in the FRM policy is the same thing as a reset because it allows an employee to have two sleeps between shifts which is the same as the 48 hour break stipulated as a reset for night shift workers.

[34] There is no provision in the FRM policy for a reset for the shift workers working on a day shift. The plain and natural meaning of the words used in the policy means the 60 hours is calculated over any seven day period. This means that during a seven day period an employee may have a break of at least 24 hours. On a plain meaning of the words the seven day period must include any breaks or other rostered days off.

Exceptions to the hard rules

[35] The FRM policy and employment agreement allows for employees to work beyond the 60 hour limit. In order to work additional hours there must be an agreement with the employee concerned, an assessment of the risk of fatigue and approval by the general manager.

[36] While the resource allocation system automatically sends an email to the general manager alerting him to a possible breach of the 60 hour limit, there was no

evidence that the general manager then approves the breach. There was also no evidence that an employee is asked whether they agree to work the additional hours although, an employee is able to refuse to work. In my view that is not the same as seeking agreement.

Review of FRM Policy

[37] The experts in fatigue management for both POAL and MUNZ have met to review the current FRM policy. The experts agree that the rules addressing the 60 hours limit is sub-optimal. Further work by the experts is supported by POAL in developing recommendations for changes to the policy and providing guidance in the implementation of the recommendations.

[38] Clearly there are matters that require clarification and further discussion. The issues raised in this matter will benefit from those discussions.

Conclusion

[39] I have reviewed the hours worked by Mr Findlay for the period 1 May to 11 September 2018 inclusive. I am satisfied that for the seven day periods ending 23 and 24 May Mr Findlay was paid for 68 hours work. This is a breach of the FRM policy. There was also evidence from POAL that other breaches of the 60 hour work limit had occurred for other employees.

[40] Given my finding that POAL is breaching the 60 hour rule, and taking into account the review of the FRM policy and the imminent facilitation to assist the parties in their collective bargaining, it is appropriate to allow the parties to have further discussions on the issues.

[41] The parties are granted leave to return to the Authority regarding the compliance order issue, in the event they are unable to come to reach agreement.

Costs

[42] Costs are reserved. The parties are invited to resolve the matter. They should be aware that I am of a mind to let costs lie where they fall.

Vicki Campbell
Member of the Employment Relations Authority