IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2018] NZERA Wellington 13
3016893

	BETWEEN	PAN PAC FOREST PRODUCTS LIMITED Applicant
	AND	FIRST UNION INCORPORATED First Respondent
	AND	E TU INCORPORATED Second Respondent

Member of Authority:	M B Loftus
Representatives:	Jol Bates, Counsel for Applicant Simon Meikle, Counsel for Respondents
Investigation Meeting:	15 November 2017 at Napier
Submissions Received:	At the investigation
Determination:	7 February 2018

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] This is a dispute about the interpretation, application or operation of a collective employment agreement (CEA). In particular it involves the parties' rights and obligations in respect to a restructuring proposal.

[2] The applicant, Pan Pac Forest Products Limited (Pan Pac), seeks a determination:

(a) its proposal to restructure is lawful and in accordance with the CEA;

(b) it is entitled to proceed with its restructuring proposal in accordance with the CEA.

[3] The first respondent, First Union Incorporated, is of the view Pan Pac should not be granted the remedies sought. It claims that Pan Pac is now seeking to inappropriately advance a matter it chose to abandon during a collective bargaining.

[4] The second respondent, E Tu Incorporated, is only cited as it is a party to the CEA whose application is in dispute. All parties agree it has no members affected by the issues in dispute and no part to play in the investigation.

Background

[5] Pan Pac and First Union are, along with E Tu, parties to a CEA that came into force on 1 July 2016. The CEA remains in force till 30 June 2019.

[6] As part of its operation Pan Pac operates a saw mill. It is manned by three rotating shifts each comprising twenty one employees.

[7] The CEA contains the following clauses relevant to this dispute:

> 3.0 Variation of Agreement
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> 3.1 The provisions of this Agreement may be varied at any time by written agreement between the parties. Where a proposed change directly affects only one employee or group of employees such change may be agreed with the Union(s) representing the employee(s) concerned and apply only to that employee or group of employees.
>
> 3.2 Any party proposing a variation will set out the proposal in writing and provide it to the other party or parties. The variation will be discussed at a meeting between the Company, and the relevant Union Organisers and relevant delegates and then the employees directly affected prior to any negotiations. For the purpose of this clause the phrase "employees directly affected" means those employees covered by this Agreement whose terms of employment will be changed if the proposed variation is agreed…
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> 3.4 At the conclusion of the negotiations the Union(s) will conduct a secret ballot of affected employees to ratify the proposed variation…
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> 3.7 If agreement cannot be reached on the variation proposal the provisions of this agreement will continue to apply…
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> 13.0 Work schedules
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> 13.1 The applicable work schedules are as specified in Schedules A and B of this Agreement…
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> 13.3 Where a new work schedule is required, or where an employee or group of employees are required to change to a new work schedule this will be subject to clause 3 (Variation of Agreement).

[8] The CEA also contains a detailed redundancy and restructuring provision of 19 sub-clauses over some four pages.

[9] Schedule A, referred to in clause 13.1, applies to Lumber Operations. Amidst other things it specifies a Sawmill Manning Structure which, as already said, provides that each shift comprises a complement of 21 staff. Fourteen of those positions are described as "Core Manning" and must be filled to run the sawmill. A further seven are labelled "Non-core Manning" and these include positions named "CS2" and "CS2 stacker". The other five position are designated "Sawmill cover / Extras" with their incumbents available to cover absences etc.

[10] Finally, it should be noted that following the specified manning structure there is a note which reads:

> Non-core Manning – These machine centres will be manned on a shift by shift basis to allow for flexibility of operation of the Sawmill and to meet the CS2 cut plan, but will not impede the operation of the Sawmill. The need for these positions may be reviewed if new technology is introduced.

[11] On 24 August 2016 Pan Pac wrote to First Union proposing a variation to the CEA. While the statement of problem of problem says the proposal sought the removal of the CS2 and CS2 Stacker positions[1] it did not quite read that way, at least originally. It appears to seek to remove the requirement the positions be maintained at all times with their manning being specified as "0 or 1" and the total no-core complement being "5, 6, or 7". The proposal also notes the matter was discussed but not progress during negotiations for the CEA's most recent renewal and stems from declining market demand for the product about to be exacerbated by increasing shipping costs. Subsequent proposals did seek the complete removal of the positions.[2]

[12] First Union rejected the proposal and Pan Pac responded on 28 November by inviting the Union to participate in a consultative process in accordance with the restructuring provisions of the CEA. On 9 December 2016 Mike McNab (a First Union organiser) responded to Pan Pac objecting to the proposal on behalf of the union and its membership.

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[1] Statement of Problem at [2.4]
[2] See, for example, Pan Pac's proposal of 27 February 2017

[13] Further correspondence followed and this included a proposal from First Union in a letter dated 25 January 2017 which suggested a quid pro through the establishment of a third forklift operator position. It also sought an increase in the forklift operator remuneration and asked the remaining three surpluses be addressed by voluntary redundancy.

[14] Pan Pac rejected that proposal by letter dated 8 February 2017. Included therein was advise:

> The implementation of Pan Pac's proposal will take effect on 1st April 2017 at which time the current manning for the CS2 machine will be redeployed in same or similar duties or they will continue to work in the sawmill providing leave cover. The implementation of Pan Pac's proposal would take effect on 8th April 2017. You are invited to a meeting on 15th February 2017 at which time the Sawmill Operators will be advised of the company restructure and the time frame for the implementation of this change.

[15] That led to an email from Mr McNab on 13 February 2017. Amongst other things it stated:

> The Union legal team, is prepared to challenge the company's position, by filing for a compliance order in the ERA, to force the company to comply with the CEA, we believe the company has left us with no choice, but to take this line of action, as we have come to an impasse.

[16] Comment the follows that the Union considered Pan Pac was circumventing appropriate processes by going directly to members.

[17] Further correspondence followed with Pan Pac seeking to advance its restructuring proposal and First Union resisting those changes. In essence Pan Pac's position is the status quo is financially untenable and First Union is being intransigent and unreasonable by blocking its attempts to address the situation.

[18] First Union's position is probably best summarised by paragraph 4 of a letter dated 5 May 2017. It advises:

> The union's view of the collective agreement is that the company cannot restructure to reduce the agreed manning level as this is inconsistent with the collective agreement. The only way to reduce manning levels specified in the collective agreement is via a ratified variation of the collective agreement. The company is only entitled to review these manning levels as specified in the agreement, namely when new technology is introduced.

[19] Further attempts to resolve the impasse, including mediation, have been unsuccessful which has led to the current application, albeit one lodged by Pan Pac seeking permission to proceed as opposed to one from the Union attempting to halt it.

Determination

[20] Both parties provided submissions with those Pan Pac, in particular, being fulsome. The submissions will not be recorded or summarised to any extent[3] but the parties can be assured they have been considered.

[21] In essence Pan Pac's argument is the schedules, and in particular, the manning specifications do not constitute work schedules which are instead embodied in things such as rosters which are also required under clause 13.[4] It is also contended First Union's interpretation would essentially render the restructuring clause nugatory; undermine both parties express obligation to increase efficiency, flexibility and competitiveness and impose severe consequences in respect to on-going cost.

[22] Comment is also made about the principles of contractual interpretation and the task I have. In particular I note paragraph 3.10 of the submission which reads:

> The Authority as the 'reasonable bystander' must decide what the natural and ordinary meaning of the words is in their context, at the time the agreements were reached.[5] This is not an exercise of seeking an event attractive to a party and the reverse engineering the meaning.

[23] Here I note another comment in Pan Pac's submission. It is said:

> Whilst parties to an employment contract may fetter by clear express and unequivocal language the scope of an employer's right to manage its business as it sees fit, there is no constraint, express or implied, in the terms of [this] CEA…[6]

[24] I also note Pan Pac's reference to *Toll NZ Consolidated Limited (formally Tranz Rail Limited) v NZ Seafarers Union Inc and Maritime Union of NZ Inc.)*[7] That was a case which involved, in the Judge's words:

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[3] Section 174E(b)(ii) of the Employment Relations Act 2000
[4] Pac Pac's submission at [2.68] and [2.69] augmented by oral comments
[5] *Vector Gas Limited v Bay of Plenty Energy Limited* [2010] 2 NZLR 444 at [24]
[6] Pan Pac's submission at [3.11]
[7] [2004] 1 ERNZ 392

> … a conflict between two fundamental doctrines of employment law. The first is the rule that an employer cannot vary the terms of an employment agreement against the will or, indeed, without the consent of the employees. The second is the rule that an employer can change the way it runs its business as it sees fit.[8]

[25] It also involved a situation in which the employer, having failed to achieve changes in the CEA resorted to a restructuring to achieve its commercial goals. Ultimately the Court concluded Toll could proceed with its restructure as there were no obstacles in the collective agreement to Toll's restructuring proposal. It is on that point last point I believe the present case can be distinguished. Notwithstanding the contention in [3.11] of the submission[9] there is, I conclude, a clear impediment – a clear fetter Pan Pac has conceded in the CEA. On this I agree with the union and the position it has taken.

[26] Notwithstanding Pan Pac's attempt to convince me otherwise the fact is there is a clear provision which says Schedules A and B specify the applicable work schedules. In this case the applicable schedule is A and whether or not a manning structure can be properly considered a work schedule as Pan Pac argues, it is unassailable fact said structure is part of the schedules content. The specified manning structure clearly includes both the CS2 and CS2 Stacker positions.

[27] That is followed by a clause that expressly states that where change to the work schedule, which is the content of the schedule, is required the variation clause must be used. The requirement is mandatory and there is nothing that limits its effect to parts of the schedule which means the manning schedule cannot be excluded from the express requirement.

[28] Here I also comment on the fact the explanatory note limits the ability to review the schedule to situations involving technological changes. The imperative here is economic and not the result of a technological change.

[29] The CEA then provides that if agreement cannot be reached the present terms continue. Agreement has not been possible so the present terms, which include a manning schedule which specifies there be both CS2 and CS2 Stacker positions, remain.

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[8] Above n 5 at [1]
[9] Paragraph [23] above

[30] Finally I note the possibility the clear meaning of the words might, in some circumstances, be construed differently depending on the context in which they were agreed. That cannot happen here as I heard no evidence about the discussions which led to the inclusion of the various clauses or the context in which they were agreed. All I know is Pan Pac felt the need to try and address its concerns by negotiating a change to those clauses but then abandoned those efforts. Instead it chose to use a restructuring.

Conclusion and Costs

[31] For the above reasons I conclude the CEA between Pan Pac and First Union contains words which provide a clear and express fetter on Pan Pac's ability to remove the CS2 and CS2 Stacker positions via a restructuring. It is contractually bound to negotiate a variation to the CEA.

[32] The orders Pan Pac seeks will not therefore be made.

[33] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority