IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 166
3134078

	BETWEEN	E TŪ INC Applicant
	AND	NEW ZEALAND STEEL LIMITED First Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Garry Pollak, counsel for the Applicant Carter Pearce, counsel for the Respondent
Investigation Meeting:	29 March 2022
Submissions and/or further evidence	5 April 2022 from the Applicant 5 April 2022 from the Respondent
Determination:	28 April 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, E Tū Inc (the Union) seeks to have the Authority resolve a dispute between the parties which has arisen over the application, operation and interpretation of provisions in the collective agreement between it and Northern Amalgamated Workers Union Inc, and the Respondent, New Zealand Steel Limited and SteelServ New Zealand Limited (NZSL) (the Collective Agreement).

[2] The dispute has arisen in relation to how 'make-up pay' applies in the situation in which employees go onto or come off a "Critical Path' roster. That however raises a fundamental question in relation to the interpretation and application of clause 80.6.1 'Make-Up Pay' of the Collective Agreement, make-up pay.

The Authority's investigation

[3] During the investigation meeting I heard evidence from six witnesses, a number of whom have considerable experience at NZSL. There were two witnesses on behalf of the Union, Mark Palmer who was employed for 35 years prior to his retirement who occupied various positions in the Union, and Jason Coers, employed at NZSL since 1996 and currently a union delegate.

[4] Witnesses for NZSL were Ian Renall who is responsible for all Maintenance teams in the Iron Plant and has been employed for over 40 years; Brad Stark, General Manager of Steltech Structural Limited (a wholly owned subsidiary of NZSL) who has worked in all four of the major manufacturing areas over 18 years of employment; Anthony Murphy, the Kiln Shuts Plant Maintenance Engineer, employed since 2012, and Kathryn Nicholas, HR Manager, employed since July 2015.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[6] The issues requiring investigation are:

- What is the correct interpretation of clause 80.6.1 of the Collective Agreement?
- How is make-up pay to be applied when an employee is going into or coming off the Critical Path?
- Has NZSL maintained the status quo pending the outcome of the Authority's investigation?

Background

[7] NZSL operates a steel mill at Glenbrook, south of Auckland, in addition to a separate mining site at Waikato North Head. NZSL is an "end to end" steel manufacturer which mines raw iron sand at the initial end, and produces both bulk steel and finished steel products for sale to customers at the finish point of the process.

[8] The Glenbrook site is made up of several different plants or site areas:

a) The Iron Plant which includes the Kiln and Melter Plants;
b) The Steel Plant which includes Steelmaking and Casting;
c) The Rolling Mills which include a Hot Rolling Mills and a Cold Rolling Mill; and
d) The finishing Plants which include the Metal Coating Plant and the Paint Line.

[9] In addition there is a:

(i) Centralised Maintenance Group (CMG) which provides maintenance labour to the production plants as and when required. CMG is made up of trades-based employees such as electricians, fitter/welders, riggers and instrument technicians; and

(ii) A Centralised Workshop (CWS) where a small team of trades people provides in-house maintenance.

[10] The Collective Agreement came into force on 1 July 2018 for a term expiring on 30 June 2021.

Critical Path

[11] In all the Glenbrook plants there are regular maintenance events that require a plant to be shut down for 48 hours or more. These events are known as a 'shutdown' or a 'shut'. To ensure that the Plant is able to return to normal working as quickly as possible, employees work a 24/7 roster for the duration of the shut which is known as a Critical Path roster.

[12] Employees work 12 hour shifts on the Critical Path roster, usually this involves a day shift from 7 a.m. to 7 p.m. and a night shift from 7 p.m. to 7 a.m. The normal provisions for hours of work and overtime are suspended and instead employees are paid on a "20 for 12" basis. In addition: "the hours of Work, Overtime and Meals provisions" of the Collective Agreement do not apply. This provision is covered in clause 17.3 of the Collective Agreement.

[13] What has triggered the current dispute is how clause 80.6.1 applies during the Critical Path. In particular how should it be applied to employees who are asked to move onto a Critical Path Roster more than once during a shut?

[14] In order to address this issue, an interpretation of clause 80.6.1 by the Authority is required. Once that has been established, the issue of how make-up pay applies during the Critical Path can be determined.

[15] The clauses in the Collective Agreement which are the most relevant to this dispute are:

> 4 No other agreements, whether in writing or not, shall be binding on the parties to this Agreement unless it is included in its entirety, or is given binding status by specific reference in this CA.
>
> **11. Hours of Work**
>
> 11.1 the tables below outline the ordinary hours, start/finish times, meal intervals and rest intervals for employees on days, day rosters and shifts. Any changes to established hours of work shall be as per **clause 11.4 (Variation Hours).**
>
> **11.2 Hours of Work: Table**
>
> **Day Employees**
>
> **Ordinary Hours:**
>
> - Not exceed 40 hours;
> - Per week (37.5 for clerical employees);
> - Not more than 8 per day (7.5 for clerical employees);
> - 5 days per week Monday to Friday. …
>
> **Day Roster Employees**
>
> **Ordinary Hours:**
>
> - 40 hours per week;
> - Not more than 8 hours per day;
> - On each of any five of the seven days of the week;
> - Saturday and Sunday to be paid at penal rates. …
>
> **Shift Employees**
>
> **Ordinary Hours**
>
> - Not more than 5 shifts of eight consecutive hours in any week without payment of overtime. …
>
> 11.4 .4 In the event that agreement cannot be reached between the parties, then the established hours of work shall prevail.
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> **17 Shutdown Provisions: Maintenance Employee**
> (24 Hour working Provisions: Critical Path Work)
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> **17.3 GENERAL PROVISIONS**
> **(**24 Hour Working Provisions: Critical Path Work)
>
> **17.1 Definition**
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> 17.1.1 'Critical Path Shutdowns' are defined as situations where 24 hour working is required on emergency breakdowns of over 48 hours duration and/or critical activities within a planned shut which are critical to the rest of the planned shut activities.
>
> …

17.3.1 During the period of the shutdown, whilst 24 hour working is required, the following provisions shall apply to those individuals assigned to the shift crews:

- The existing shift patterns or day work provisions shall be suspended for the period of 24 hour working. Accordingly, the Hours of Work, Overtime and Meals provisions of this CA shall not apply. Specifically no change of shift or loss of rest day penalties shall apply and the general provisions relating to hours of work shall have no application; …

17.4 Payments

17.4 .1 Irrespective of the start or finish time agreed to above the following rates of pay shall be paid:

- 4 hours at ordinary rates;
- 8 hours at double time rates;

- These payments shall apply for all shifts commenced between midnight Sunday/Monday and midday Friday/Saturday;
- For shifts commenced outside of these hours the rate of pay for each 12 hour shift shall be 12 hours at double time;
- In addition to the above payments, the Shift Allowance as specified in Table 12 shall be paid for each complete 12 hour shift worked.

17.7 APPLICATION OF CLAUSE

17.7.1 This Agreement shall have no application to those employees employed on shutdowns working 12 hours under day work conditions, e.g. 8.00 am to 8.00 pm. These employees shall be paid in accordance with the relevant day work provisions.

59 Settlement of Disputes

…

59.2 Where either party interprets the agreement in a manner differing from existing custom and practice, and as a result wished to implement changes to existing custom and practice, no such changes may be implemented until either:

1) Agreement is reached on the changes; or
2) The matter is determined through the Employment Relations Authority or resolved … (by mediation)

80 Pay Rate Definitions

80.1 BASE EARNINGS

80.1.1 The normal rostered hours paid on an employee's hourly rate only.
…

80.6 MAKE-UP PAY

80.6.1 Where an employee is requested to work outside his/her established or ordinary hours of work and as a result is unable to complete his/her ordinary hours of work, he/she shall be paid make-up pay for those lost

> ordinary hours, paid at expected weekly/hourly earnings as defined above.

What is the correct interpretation of cl 80.6.1 of the Collective Agreement?

[16] The Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd* set out the approach to be used in contractual interpretation.[1] The focus is on the objective meaning of the words the parties have used. Background material can be helpful as a 'cross check' even if the words used appear to be unambiguous. However, what was discussed in prior negotiations is only helpful if it shows what the parties objectively intended the words to mean.

[17] This approach has been carried through to collective agreements.[2] In *Tertiary Education Union v V-C of Auckland University* Judge Inglis summarised the principles of interpretation in the context of collective agreements:

> [6] The starting point is an assessment of the natural and ordinary meaning of the words themselves. Even if the words are plain and unambiguous, a cross-check will nevertheless be undertaken against the contractual context. …
>
> [7] The second stage of the interpretative exercise may result in the preliminary assessment of meaning being dislodged. Such a result will not readily arise. That is because the plainer the words used, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say. However, the Court will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to them when aware of the circumstances in which the agreement was made. …
>
> [8] An objective approach is required. That impacts on the proper scope of the evidence. Evidence of facts, circumstance and conduct relating to the negotiations which show objectively the meaning the parties intended their words to convey is relevant to the contextual inquiry, including the circumstances in which the agreement was entered into. … 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] The starting pointing in analysing clause 80.6.1 of the Collective Agreement is to examine the words of the clauses regarding the special leave entitlement to see whether they are clear and unambiguous.

[19] I find that, on a plain meaning of the clause, if an employee is requested to work other hours by NZSL, and as a direct result cannot fulfil their ordinary hours of work, i.e. there

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[1] *Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] 2 NZLR 444 at [19]*

[2] *NZ Amalgamated Engineering, Printing and Manufacturing Union* v *Amcor Packaging (New Zealand) Limited [2011] NZEmpC 135 at [12]; NZ Meat Workers & Related Trades Union Incorporated v Silver Fern Farms Ltd (formerly PPCS Ltd)[2]("Silver Fern Farms")* [2010] NZCA 317

[3] *Tertiary Education Union v V-C of Auckland University* {2015] ERNZ 979 at [6] – [8]

is a shortfall in their ordinary hours, then he or she should not lose financially from that situation. Any shortfall in the employee's ordinary hours would be recompensed by 'make-up' pay to ensure that he or she received wages in respect of their ordinary hours in that week.

Ordinary hours of work

[20] It is necessary to define what constitutes 'ordinary hours of work'. During the course of the investigation the witnesses provided a number of other expressions during the course of their evidence. Of most relevance for my investigation is what is defined as 'ordinary hours' in the Collective Agreement.

[21] Ordinary hours are defined in clause 11 of the Collective Agreement. Apart from clerical workers who work 37.5 hours a week, the ordinary hours for other workers (Day Employees, Day Roster Employees, and Shift Workers), are set out as being 40 hours per week.

[22] On that basis I find that the clear and unambiguous words of clause 80.6.1 of the Collective Agreement apply to a situation in which the employee is unable to complete their ordinary hours of 40 per week because he or she has been requested by NZSL to work other hours. In that scenario the make-up pay ensures that the worker is not financially disadvantaged because they have worked fewer than their 40 ordinary hours.

[23] Clauses 11.1 and 11.4.4 refer to "established hours of work'. I note that clause 11 as a whole sets out that the parties can agree to alter the hours of work provisions contained in the Collective Agreement. Failing agreement, clause 11.4 sets out that the "established hours of work" will prevail.

[24] It is therefore necessary to determine what is meant by the phrase 'established hours of work' and whether or not it is different to the phrase 'ordinary hours' and if so, whether or not it has implications for clause 80.6.1 in order to ensure that clause 80.6.1 is interpreted correctly.

[25] I consider that the 'established hours of work' are either the same as 'ordinary hours' that is, 40 hours per week; or it means those 40 hours as further defined with start and finish times as set out in clause 11.2. On that basis, an employee asked to work outside of these defined start and finish times would be working outside of his or her established ordinary hours of work.

[26] I find that clause 80.6.1 still applies in that situation because if an employee is requested to work outside his or her expected hours of work, and as a result is unable to

complete his/her ordinary hours of work, make-up will apply i.e. the employee will not lose financially as a result of accommodating NZSL's requirements.

[27] Mr Coers stated in his evidence that an employee might be asked to work additional hours which takes the employee over 40 hours, such a situation arising if an employee works overtime. In that case the employee may complete their 40 hours before the end of the week but not have worked their 'established ordinary hours' in accordance with the start and finish times.

[28] Due to the rest required between shifts the employee may not be able to work the established ordinary hours the following day and as a result has 'lost' ordinary hours for which he or she should be recompensed.

[29] I do not find that interpretation accords with the meaning of clause 80.6.1. In that scenario the employee has not fallen short of the ordinary hours he or she was expected to work in that week because the 40 hours have been completed and there has been no financial loss to the employee as a result of accommodating NZSL's requirements.

[30] In summary, I find that the wording of the clause clarifies that the mischief it is intended to address is the inability to not complete the ordinary hours of work because of a request by NZSL. They have been 'lost' because of a request by NZSL rather than through any action or default on the part of the employee. As a result, the employee is to be recompensed for the ordinary hours of work he or she has not been able to complete.

[31] I determine that clause 80.6.1 means the hours of work an employee ordinarily works in a week as set out in clause 11.2, and if unable to complete those ordinary hours as a result of complying with a request by NZSL, the employee is to be paid for the 'lost' hours.

How is make-up pay to be applied when an employee is going into or coming off the Critical Path?

[32] An employee may move on to and off a Critical Path at any time during a weekly period.

[33] I find that based on the correct interpretation of clause 80.6.1 in either scenario the employee is entitled to make-up pay for any ordinary hours they lose either at the start of the Critical Path, or at the end of it if that is the case i.e. as a result of the employee going onto Critical Path working, he or she is unable to complete the full complement of ordinary hours in a week.

[34] There was evidence provided witnesses, both the union witnesses and NZSL's witnesses, during from the course of the investigation about how the make-up pay has been applied in relation to the Critical Path.

[35] Mr Renall gave evidence that that make-up pay was being paid to employees. In particular it appears that one round (i.e. 8 hours) of make-up pay applies when an employee went on to the Critical Path or came off, but not both.

[36] Mr Coers stated that his understanding of the correct interpretation was that because an employee might be required to go into Critical Path more than once per shut, and would resume normal working hours in between, he or she should be entitled to make-up pay for ordinary hours not worked in a week even if the employee has worked more than 40 hours in that week.

[37] Mr Murphy's evidence was that since 2018 on the Kiln shut a full round of make-up pay was paid once per stint, either going on to or coming off roster, but not both. However, he had experienced a number of different applications of make-up as applied to Critical Path with employees being paid make-up pay each time he or she came on or off Critical Path, and on one occasion he had been informed that make-up pay should be paid for the whole roster.

[38] Mr Stark's evidence was that there were differences of opinion across the Iron Plant about how make-up pay was to be applied.

[39] Ms Nicholls provided a table setting out how make-up pay was applied during the Critical Path in the various parts of NZSL. The table supports Mr Renall's evidence in that, apart from CMG- Electrical Trades and Rolling Mills, other areas of NZSL appear to be consistent in that one round of make-up pay is paid, but this can be either coming onto the Critical Path roster or coming off it, but not both. It appears that this understanding is applied irrespective of whether the employee has been unable to complete 40 ordinary hours in a week.

[40] CMG- Electrical Trades appears to be the most generous because an employee working in that area may receive make-up pay at both ends of the Critical Path. Rolling Mills will pay make-up pay more than once if an employee works multiple stints on the Critical Path roster and returns to their normal ordinary hours during the stints.

[41] I find that this does not accord with clause 80.6.1. of the Collective Agreement. However, it is submitted on behalf of the Union that there is a settled practice that has arisen in accordance with which make-up pay is to be paid at the beginning for going on to the Critical Path, and again at the end of the Critical Path i.e. that it is 'custom and practice and this accords with the words and phrases used in the Collective Agreement.

Custom and Practice

[42] Custom and practice is a term with a legal meaning derived from legal principal and case law. However, as used in clause 59.2 its purpose is to guide all employees, whether they be workers, union representatives, managers or human resource employees in their dealings on an everyday basis. As stated in *Benterman and Curd v New Zealand Steel Limited:* "The words 'custom and practice' in the NZSL context simply mean the way things are usually done and have been done".[4]

[43] The payment of 8 hours make-up pay at the start or end of the Critical Path appears to be applied in most parts of NZSL, however it is not consistently applied. There is a variance on whether payment is made at the beginning or at the end of a shift, and whether it is paid at both the beginning and the end of the Critical Path Shift i.e. CMG – Electrical Trades, or if payment is made for more than one 8 hour shift if the employee is working multiple stints on a Critical Path roster i.e. Rolling Mills Maintenance.

[44] In these circumstances I do not find that there is such consistency in the way make-up pay is paid during the Critical Path as to qualify as custom and practice and override the application of clause 80.6.1 of the Collective Agreement as I have interpreted it to mean.

[45] I determine that make-up pay is to be paid in accordance with clause 80.6.1 of the Collective Agreement so that if an employee loses any ordinary hours in a week as a result of complying with a Critical Path request by NZSL, he or she is to be paid make-up pay in respect of those lost ordinary hours.

Has NZSL maintained the status quo pending the outcome of the Authority's investigation?

[46] Clause 59.2 of the Collective Agreement requires maintain the status quo until the matter has been determined by the Authority.

[47] It was claimed in the Statement of Problem that NZSL has failed to maintain the status quo pending the determination by the Authority. This is disputed by NZSL.

[48] Mr Coers in his evidence confirmed that NZSL has maintained the status quo.

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[4] *Benterman and Curd v New Zealand Steel Limited* [2020] NZERA 37 at [54]

[49] Accordingly, I determine that NZSL has maintained the status quo pending the outcome of the Authority's investigation

Costs

[50] I consider it appropriate in this matter that costs lie where they fall.

[51] However, if a party seeks costs, they should serve a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the other party would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[52] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority