

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 317
3181719

BETWEEN ROSS MILLAR AND OTHERS
Applicant

AND TEGAL FOODS LIMITED
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Emily Griffin and Peter Cranney, counsel for the Applicants
Jane Taylor, counsel for the Respondent

Investigation Meeting: 27 April 2023 in New Plymouth

Submissions Received: Up to and including 11 May 2023

Determination: 29 May 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants are the 10 employees listed in Schedule 1, and at all material times were members of E tū, an incorporated union (E tū).

[2] E tū is party to a collective employment agreement (CA) with Tegal Foods Limited, a food manufacturer (Tegal), covering work E tū’s members do in the hatchery in New Plymouth.

[3] E tū says clause 2.6 of the CA deals with an entitlement to an unpaid meal break, and further, what is to happen when that break is not allowed within five hours.

[4] Tegal drafted a memorandum of understanding (MOU) which recorded details of a staff meeting that Tegal had with employees in February 2018. The MOU recorded that the majority of staff agreed to work 15 minutes past 11.30am, without being paid overtime rates. It further provided that if staff worked half an hour past 11.30am (until 12.00pm), they would be paid overtime for 15 minutes and so on. E tū says it was not

consulted on and nor was it a party to the MOU. It says Tegal did not seek to vary the CA. It says acting in reliance on the MOU, Tegal for a period, stopped paying the applicants overtime rates in accordance with either clause 2.6 of the CA or the terms set out in the MOU. E tū claims clause 2.6 of the CA has been breached because Tegal did not pay overtime rates in accordance with the clause.

[5] E tū seeks an order that Tegal comply with the terms of the CA and for an order for an inquiry into the quantum of arrears for each E tū member affected, and for those arrears then to be paid to each of the applicants.

[6] Tegal denies the claims. It accepts it entered into an MOU with the applicants and says it was entitled to rely upon the MOU. It says further the applicants are estopped from raising any claim relating to an alleged breach of 2.6 of the CA, as they have relied upon and enjoyed the benefits of the MOU for over three years. In any event, Tegal says it has complied with clause 2.6 of the CA.

[7] Tegal says some of the applicants were not members of E tū when the MOU was agreed to. It counterclaims the applicants have breached their duty of good faith by bringing their claims against Tegal. This is because they have enjoyed and benefited from the MOU for over three years. It asks the Authority to impose penalties against the applicants.

The issues

[8] The following issues requiring determination were identified:

- (a) Is the MOU valid to the extent it is a proper variation of the CA?
- (b) Is there evidence of acceptance?
- (c) If not, does the MOU purport to vary clause 2.6 of the CA and if so, to what extent?
- (d) If the MOU is not a proper variation, do estoppel issues arise?
- (e) If it has varied clause 2.6 of the CA, what arrears are owed?
- (f) In respect of the counterclaim, have the applicants breached any duty of good faith owing to Tegal?

The Authority's investigation

[9] At the investigation meeting I heard from Maureen Martin and Ross Millar on behalf of the applicants and from Leonard Hawley, Fiona Henry, Jason Day, and Hannah Woods-Feran on behalf of Tegal. All witnesses affirmed their evidence.

[10] 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.

[11] This determination has not been issued within the three-month period required by s 174C(3) of the Act. As permitted by s 174C(4), the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

Background

[12] In 2017, Tegal had an issue with an employee who, after getting to his five hours, would walk off the production line. This was allowed under the CA but Tegal says other staff were getting upset. Further, when the employee returned from a half-hour break, other members on the line had left for lunch so he could not operate on his own.

[13] As a result of this, a short meeting with staff took place at a lunch time on 1 February 2018. The discussion was about what the team wished to do. Tegal believed the initial response from the team was that if there was about ten minutes of work left, rather than stop and then take a break, they wanted to keep working, but if staying on was going to be longer than ten minutes, they would rather take the break. As a result of this meeting, a Memorandum of Understanding (MOU) was prepared.¹ Amongst other things the document provided:

All Hatchery staff take lunch at the same time each day. The chicks are usually processed by 11.30 am but from time to time there may be a trolley or half a trolley left still to process at 11.30 am. Rather than stop processing for lunch at 11.30 am and then have to restart again just to finish off a trolley for a few minutes, it was agreed by the majority of staff to keep working until completed.

The majority of staff agreed at the meeting to work 15 minutes past 11.30 am without being paid OT rates as that is preferable to having to stop/start

¹ Bundle of Documents (BOD), Document 9.

processing as different works is done after the lunch break and that this would be disruptive for them.

It was agreed that if staff work half an hour past 11.30 am (until 12 pm) they will be paid OT for 15 minutes and so on.

If the request to work past 11.30 am without a meal break is at the company's request due to breakdowns etc then OT needs to be paid from 11.30 am until staff have had their meal break.

At the end of the meeting we asked you to sign a register that confirmed your attendance at the meeting on 1st February 2018 and of your understanding of this agreement.

[14] The register the applicants signed was titled "Training Attendance Record" and was signed by 19 staff. The Training Attendance Record provided "Staff have agreed 15 mins before OT is payable. If b/downs etc are required & requested to work past 11.30 am then OT will be paid from 11.30 am."² The Training Attendance Record also provided: "By signing this training record I accept that I have received, understood and agreed to implement the Training."

[15] The applicable CA between E tū and Tegal provided for the following:³

2.6 Breaks

The timing of breaks should reflect our commitment to operational efficiency and be taken at reasonable intervals within the daily work period as follows:

- Where an employee works for more than three hours on any day they will be entitled to a paid 15 minute rest period to be taken within the first three hours.
- Where an employee works for more than five hours on any day they will also be entitled to an unpaid meal break of 30 minutes.
- Where the break is not allowed within five hours overtime rates will be paid until such time as the break is taken.
- Where an employee works for more than 6.5 hours on any day they will also be entitled to a second paid 15 minute rest period.
- Where an employee works for ten hours on any day they will be entitled to a third paid 15 minute rest period.

Each of the above work periods is inclusive of paid rest periods.

The above rest periods are inclusive of washing up time but employees in the hanging bay will be allowed an additional five minutes to wash up.

² BOD, Document 11, page 235.

³ BOD 2.

[16] The CA allows the agreement to be varied by agreement between the parties.⁴ However, a number of preliminary steps are required. First, E tū needs to present any proposal to employees directly affected. The variation must be ratified by a majority of at least 60 percent of the employees directly affected. The variation then must be recorded in writing and signed by Tegal and the Union.

[17] It is common ground none of the above occurred. Despite this, Tegal considers the MOU binding and says because the changes to members' working hours came about purely as a result of their request, and was agreed to by Tegal in good faith, and the fact members have now worked on that basis for some three years, it would be a breach of good faith for E tū to now object.

[18] Tegal claims the applicants have breached their good faith obligations by bringing their claims as they have enjoyed and benefited from the MOU for over three years. They say the first and ninth applicants have breached their good faith obligations to Tegal on a number of grounds, namely:

- (i) They were E tū's delegates to the Hatchery;
- (ii) They requested a meeting for 29 October 2021;
- (iii) At that meeting, the first and ninth applicants raised a number of employment matters directly relevant to the applicants' claims;
- (iv) At the time of the meeting the first and ninth applicants were aware that a dispute had arisen between the parties and would have known the matters had been escalated to the parties' legal representatives;
- (v) The first and ninth applicants' approach was done deliberately to elicit information relevant to the applicants' claims and to pressure Tegal into making a payment to one of the applicants.

The evidence

What happened?

[19] Mr Hawley, the National Hatchery Manager for Tegal, explained the background to the MOU being entered into. Employees wanted to keep working so they could finish what they were doing and then get changed into their clean uniforms to have lunch. Because of bio-security requirements, they had one uniform for the

⁴ BOD 2, page 53.

morning and then another for the afternoon. Tegal felt there was a level of disharmony within the team and Mr Hawley says Mr Day, the Production Manager, had told him the team had come up with the MOU. Mr Hawley says although he took a step back from the day-to-day management of the hatchery, to his knowledge, the MOU worked really well.

[20] Mr Day essentially confirmed that evidence and said any decision to work after 11.30 was made by the employees themselves. He said it was always their decision, and he couldn't think of any occasion where Tegal had told an employee they would need to keep working if they didn't want to. He said it was always their decision. He said he didn't think of any occasion where Tegal had told an employee they would need to keep working.

[21] He said the MOU came about following issues with an employee who caused a lot of friction within the team. The employee left Tegal on 28 September 2017. He said Tegal had asked to have a meeting with the staff at the hatchery and said the MOU was not imposed on staff. He said it was up for discussion and recorded an outcome that staff wanted. He said the motivation for the discussion was not driven by Tegal, other than to the extent Tegal wanted to address the disharmony it saw within the team.

[22] Ms Woods-Feran, a Team Leader at Tegal, said the initiative for the MOU came from employees. She said she raised the issue with Mr Hawley and Mr Day. She confirmed there was not a lot of discussion from the team about the issue, but says everyone signed the piece of paper, meaning the training attendance record (doc 11) and everyone felt good about it. She also signed the document. She said her understanding was she was signing to agree that lunch was at 12.30pm, but she had a 15 minute leeway if she wanted to keep working and that she would get paid overtime if she worked after 11.45. She said Ms Martin and Mr Millar went around telling people they had found a loophole and they would get them lots of money for overtime. She says once this issue was raised, Tegal decided to change the lunchbreak to 11.00am, and this caused the whole argument about overtime payments to end.

[23] Ms Henry, an HR Adviser at Tegal, gave evidence the training attendance record (document 11) was passed around during the meeting on 1 February and then after that, everyone signed it and returned it to her. She then wrote at the top of the form what had been agreed to, namely: "How many mins are staff okay to work over

(past 11.30am) before OT is paid?” “Staff have agreed 15 mins before OT is payable ...”

[24] Ms Henry said Tegal was trying to help the team in good faith. She says they could have said they did not agree but no one objected. She confirmed there were staff members at the meeting who were union members. She said Tegal was just trying to find a simple solution to work out a way of working that was acceptable to everyone. She said once she left the meeting, she typed up her notes of what was discussed and put together the MOU.

[25] Witnesses for the applicant had a different view. Mr Millar said that there was no member of the team who created a problem within it. He said the fact that a particular person was allowed to leave, as per the CA, shows that. He also disagreed there were any issues about backpay amongst the team.

[26] More importantly, Mr Millar says there was no leniency for the team. They had to stay on working past 11.00am. He said at the meeting which led to the MOU, the majority of attendees were non-union. He said union members never agreed to the MOU. He disagreed with Tegal’s evidence the team had a choice. He was adamant they all thought they had to keep working and were actually annoyed that they couldn’t stop.

[27] Mr Millar also took issue with Mr Day’s evidence, saying he and the other applicants often worked past 11.30am. He said they were told to get the job done. He said there was no choice. He disputed Mr Day’s evidence that if one person wanted to stay or leave, it was their choice. He stated the employees at that stage had earplugs in and couldn’t hear much. He said, “You keep going until the birds stop. Sometimes you might look up and see someone making a smoking gesture or drinking a cup of tea gesture, and you realise it’s smoko time or lunchtime.”

[28] Mr Millar was adamant he and the other union members did not sign or agree with the MOU. He said they signed the attendance register (doc 11) but that was all. Mr Millar also took issue with Mr Hawley’s evidence regarding the changes of uniform. He said they could always put a hoodie over their clothes and eat lunch – they did not have to change into a different uniform.

[29] Mr Millar also noted when he signed the training attendance record attached to the MOU, the notes which appear at the top of the page were not there. Mr Millar said

the proposal was put to the meeting and there was just a show of hands to vote for it. It was a five minute meeting and there was no chance to voice opinions. He said he and the other three union members felt ambushed. He reiterated he signed the training attendance record because he felt it was just a record of who was there, not what was agreed to. He noted new employees were not told about the MOU when they started.

[30] Ms Martin, the Site Delegate, stated when she joined the union she brought up with E tū, the issue about break times and not getting paid overtime rates. When this was raised with E tū, Tegal advised that there was the MOU, which had changed the overtime arrangement. When she and the previous delegate asked for a copy of the MOU, it was unsigned. She said the trainee attendance record (doc 11) was not provided at the time when E tū had asked for minutes and notes from the meeting. The first she saw of it was when it was provided in the Statement in Reply.

[31] Ms Martin's evidence was that the MOU wrongly recorded the lunchbreak was 11.30am, but then provided if the employees worked a quarter of an hour past 11.30am, they would not get the overtime rate provided for in the CA. Ms Martin's evidence was the employees were never paid overtime when they worked through the unpaid lunchbreak, even after the 15 minutes.

[32] Ms Martin's evidence reinforced Tegal's evidence that after the previous delegate had raised the issue in March workers were working into their breaks and should be getting overtime, Tegal agreed workers would get paid in accordance with clause 2.6 of the CA from that date.

[33] Ms Martin's evidence is in line with other evidence from other applicants. She stated if they all decided to take their lunchbreak at the correct time and walk off the line, they felt they would have been disciplined. She also said they would never refuse to work. They just wanted to get paid if they were to work through their lunchbreak.

Analysis and conclusion

Does the MOU vary clause 2.6 of the CA?

[34] 2.6 provides:

Where the break is not allowed within five hours overtime rates will be paid until such time as the break is taken. Accordingly, the clause applies in a situation where Tegal does not let the employee have the break within five hours.

[35] On the other hand, the MOU provided contrary to the above provision, staff had agreed to work 15 minutes past 11.30am without being paid overtime rates. The MOU amounts to an unauthorised variation of the CA and can be of no effect because it does not comply with the variation provisions contained in clause 1.3 of the CA. Further, the MOU was not between the parties to the CA, namely E tū and Tegal.

[36] It is also significant, as the MOU itself records, it was a majority decision of staff. The evidence was the union members present at the meeting did not agree to the MOU. Further, Tegal's own evidence was the list of signatures attached to the MOU were signed by staff, as a training attendance record. The training topic and learning objectives contained in the document, were not included in that document when the signatures were added.

[37] The evidence makes it clear all union employees believed the MOU was binding on them. They believed they had no option but to work in accordance with it.

[38] I have considered the defence put forward by Tegal that the MOU was essentially a guideline and staff were free to either accept or reject working the extra 15 minutes before overtime. I do not accept that argument. The point of the MOU was to fix a problem which Tegal perceived existed. Tegal knew there was an issue with the MOU, which was why when eventually the union delegate questioned the practice, the MOU was put aside in favour of adherence to clause 2.6 of the CA. Under these circumstances there can be no basis for an estoppel argument preventing E tū bringing its claims.

Have the applicants breached the good faith provisions of s 4A of the Act?

[39] Tegal has counterclaimed against the applicants saying they benefited from the MOU. Tegal were aware the MOU purported to alter the provisions of the CA. If it wished to negotiate a variation, the CA provided a process for this to happen. Any variation needed to be negotiated with E tū. There is no basis for Tegal's claims that the applicants breached their good faith obligations. The MOU amounted to an unlawful variation of the CA.

[40] During the investigation meeting, the parties advised the Authority they wished the Authority to issue its determination on liability only. The intention was if the Authority found in favour of the applicants, then the parties would undertake the necessary work to calculate overtime payments. The Authority agreed with this

approach. However, this means there is a need to reserve leave to the parties to return to the Authority should they be unable to reach agreement on the calculation of overtime payments.

Orders

[41] Tegal Foods Limited is ordered to comply with the terms of the collective employment agreement between the parties specifically clause 2.6.

[42] The parties are to engage in good faith to enquire into the quantum of arrears for each employee and once those arrears have been established, to arrange payment to each of the applicants. As provided for above, should the parties not be able to agree on the quantum, then leave is reserved to return to the Authority to assess those arrears.

Costs

[43] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[44] If the parties are unable to resolve costs and an Authority determination on costs is needed, the applicants may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the respondent will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[45] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁵

Geoff O’Sullivan
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

Schedule 1 | List of Applicants

1. Ross Millar
2. Caleb Toia
3. Renee Burn
4. Vanessa Steadman
5. Doreen Ngatai
6. Brendon Shepheard
7. Joel Burgess
8. Vincent Burns
9. Maureen Martin
10. Keiran Woodhead