IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 508
3230219

	BETWEEN	E TŪ INCORPORATED Applicant
	AND	MAINLAND POULTRY LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Emily Griffin and Nina Santos, counsel for the Applicant Geoff Bevan and Gerrard Brimble, counsel for the Respondent
Investigation Meeting:	1 May 2024 in Dunedin
Submissions Received:	3 April & 20 May 2024 from the Applicant 15 April & 24 May 2024 from the Respondent
Date of Determination:	26 August 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] E tū Incorporated (E tū) and Mainland Poultry Limited (Mainland) are party to a collective agreement which covers union members employed at various Mainland facilities, including Waikouaiti.

[2] Mainland operates a 4 on 2 off roster across seven days each week for workers at Waikouaiti employed to do packing and grading. Mainland only operates a morning shift for that work.

[3] The collective agreement provides shift allowances for morning, afternoon and night shifts. The agreement also says that a morning shift allowance shall only be paid when it forms part of an alternating or rotating shift pattern.

[4] E tū says that the workers should be paid the morning shift allowance as they work an alternating or rotating shift pattern. It seeks a determination to that effect and a compliance order requiring Mainland to pay the allowance (including backpay).

[5] Mainland says that the packing and grading employees are not entitled to a morning shift allowance because they work a fixed shift, not an alternating or rotating shift pattern.

[6] The employment relationship problem is essentially a dispute about the interpretation of the collective agreement.

Applicable principles

[7] To paraphrase,[1] the proper approach is an objective one, with the aim of ascertaining the meaning that the document would convey to a reasonable person with the background knowledge which would have been reasonably available to the parties at the time of the agreement.

[8] This objective meaning is taken to be the meaning intended by the parties.

[9] The context provided by the contract as a whole and relevant background informs the meaning, even without ambiguity in the contractual language.

[10] If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that is a powerful indicator of what the parties meant.

[11] However, the wider context may point to some other interpretation, and may assist in determining the meaning intended, especially in cases of ambiguity or uncertainty.

[12] Collective agreements are not contracts, are not drafted by practicing lawyers and people covered by them are not party to the negotiation. They represent the development of

[1] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, applied in *E Tū Inc v New Zealand Steel Limited* [2004] NZEmpC 29.

the employment relationship between an employer and a union and its members over time. Agreements expire by effect of the Employment Relations Act 2000, but are generally renegotiated. They are relational agreements.

The agreements

[13] The earliest agreement produced in evidence is dated 25 August 2013. However, it is not disputed that earlier agreements included a clause covering shift work. The union party to the 2013 and earlier agreements later became part of E tū, but the change in the union as party to the agreement has no material effect on the approach to resolving the dispute.

[14] I will start with an overview of the agreement current at the time the problem was lodged in the Authority, before looking at the disputed provisions.

The 2023 -2024 Agreement

[15] The agreement covers union members employed at several sites operated by Mainland. Only salaried management are excluded. There are definitions of full-time, part-time and casual employees.

[16] Clause 9 is headed "HOURS OF WORK". Ordinary hours of work shall generally be as specified in Schedule 1. Mainland is entitled to operate a roster in which case the employees will be employed to work shift work. Otherwise, employees will work ordinary hours as per Schedule 1. The normal working week commences on Monday at the employer's normal starting time.

[17] The table in Schedule 1 sets ordinary hours at Waikouaiti up to 8 hours per day or 80 hours per fortnight Monday to Friday 6.00am – 6.00pm. It also provides for an alternative 4 on 4 off roster of 10-hour days at Waikouaiti in packing and grading with a "roster allowance" per rostered day.

[18] Clause 9 also permits Mainland to review rosters as required operationally, to request and consult about change of roster and to alter rosters on notice, if not agreed through consultation.

[19] Clause 11 is headed "SHIFTS". For the purpose of the clause a shift refers to a single period of work to be performed by one or more employees. Shifts are defined as morning, afternoon or night shifts, depending on when ordinary hours are worked. However, where an employee is employed to work during ordinary hours Monday to Friday, that work is not shift work for the purposes of the agreement.

[20] Ordinary hours cannot exceed five consecutive shifts of the same type of no more than 8 hours per shift. Time worked in excess of 8 hours per shift or 80 hours per fortnight is deemed and paid as overtime.

[21] Where shifts are worked, a shift allowance shall apply per shift. Different rates are set for morning, afternoon and night shifts. There is a qualification about when a morning shift allowance is payable.

[22] Shift allowances are part of ordinary pay. The rate is determined by the time slots within which the majority of hours are work, if the work period straddles two shifts. Those regularly employed on afternoon or night shifts are entitled to an additional holiday after twelve months' continuous service.

[23] Clause 12 applies where employees perform "shift work". Mainland must give reasonable notice prior to the start of "their shift" if they are not required to work "the shift". The clause sets out pay requirements, depending on the notice provided.

[24] Clause 31 provides for wages to be paid fortnightly.

Clause 11 Shifts

[25] The packing and grading work at Waikouaiti is done in accordance with Mainland's 4 on 2 off roster, as permitted by clause 9(b). Employees are organised into three teams, so two teams are rostered on and one team is rostered off on any day across the whole week.

[26] Employees are employed to work "shift work", as provided by clause 9(b). As a result, time worked (up to 8 hours) regardless of the day of the week will be ordinary hours.

[27] Clause 11(a) provides that for the purposes of the clause "a **shift**" refers to a single continuous work period with a defined start and finish time, performed by one or more employees.

[28] In clause 11(c) shifts are defined as follows:

> (i) **Morning Shift**
>
> Shift work that is alternating, rotating or fixed, where the ordinary hours of work fall between 6.00am – 2.30pm.
>
> (ii) **Afternoon Shift**
>
> Shift work that is alternating, rotating or fixed, where the ordinary hours of work fall between 2.00pm – 10.30pm.
>
> (iii) **Night Shift**
>
> Shift work that is alternating, rotating or fixed, where the ordinary hours of work fall between 10.00pm – 6.30am.

[29] Clause 11(f)(i) provides that where shifts are worked, shift allowances apply. Different rates are set for "Morning", "Afternoon" and "Night". Morning shifts attract the lowest allowance, afternoon shifts a higher rate and night shifts the highest rate. Then clause 11(f)(ii) states:

> A morning shift allowance shall only be paid when it forms part of an alternating or rotating shift pattern or such shift is of a temporary nature being worked for a period up to and including four weeks duration.

[30] Clause 11(g) provides an additional holiday of one week for employees regularly employed on afternoon or night shifts after 12 months continuous service.

[31] The dispute is whether the morning shifts worked by affected union members form part of an alternating or rotating shift pattern for the purpose of clause 11(f)(ii) of the agreement.

Analysis

[32] The words "alternating", "rotating" and "fixed" have ordinary meanings. Alternating often refers to two or more things that succeed each other by turns; rotating refers to a recurrence at regular intervals; and fixed connotes definitely and permanently placed.

[33] A single, continuous period of work of ordinary hours performed by an employee between 6.00am and 2.30pm is always defined as a morning shift, whether that happens to be the employee's fixed shift, an alternating shift or a rotating shift.

[34] It is not suggested that the proviso in clause 11(f)(ii) about payment of the allowance applying if the morning shifts are of a temporary nature for up to four weeks shift work has any current relevance.

[35] That leaves a morning shift allowance payable, but only where the single continuous period of ordinary hours performed between 6.00am and 2.30pm forms part of an alternating or rotating shift pattern. I will refer to the first part of clause 11(f)(ii) as the qualifying provision. By comparison, the afternoon shift allowance and the night shift allowance are payable regardless of the shift pattern.

[36] The word "rotating" in particular gives rise to some ambiguity. Work under a 4 on 2 off roster across 7 days of the week means that there is a recurring six weekly pattern. For example, only every six weeks would the roster give both weekend days off together. Another way of expressing the pattern would be to say that two weeks in every six provides 4 working days and 3 non-working days, with reduced income for waged employees. Read on its own, the qualifying provision points towards payment of the morning shift allowance for employees working a 4 on 2 off roster.

[37] A similar point could be made with respect to "alternating".

[38] However, use of the phrase "an alternating or rotating shift pattern" in clause 11(f)(ii) draws a distinction with the phrase "alternating, rotating or fixed" used in the definitions at clause 11(c). The parties must be taken as having intended to exclude employees who work a "fixed" morning shift pattern from the qualifying provision.

[39] If employees on the 4 on 2 off roster who work fixed morning shifts were treated as working an alternating or rotating shift pattern, the qualifying provision would be unnecessary.

[40] I conclude that the phrase "an alternating or rotating shift pattern" in the qualifying provision understood in context refers to alternating or rotating between a morning shift, an

afternoon shift and a night shift not the day of the week on which the work is performed. It does not refer to a morning shift that alternates or rotates across different days of the week.

[41] Consideration of the wider context does not point to a different meaning. There is evidence for E tū and for Mainland about what would have been intended, in effect supporting the positions taken on this dispute. However, that must be treated as evidence of subjective intentions, so takes the matter no further.

[42] Mainland has operated a 4 on 2 off roster at Waikouaiti for a morning shift to do packing and grading work for quite some time but has not paid the allowance to those shift workers. That went unchallenged until later in 2021. There have been several iterations of the agreement since 2013, but the substance of the qualifying provision and the shifts definition provision were unchanged.

[43] Mainland operated a 4 on 4 off 10-hour day roster during the Covid pandemic. Affected employees received an allowance identified as a "shift allowance" in their pay advice. However, I accept the explanation that what was paid was the roster allowance in accordance with Schedule 1 clause 2(c) of the applicable agreement, but the payment was wrongly called a "shift allowance" on employees' payslips.

Summary

[44] Mainland employees at Waikouaiti employed to do packing and grading on a 4 on 2 off roster are employed to do shift work, in accordance with clause 9(b) of the agreement. They work a fixed morning shift, as defined by clause 11(c)(i) of the agreement.

[45] The affected employees are not entitled to the morning shift allowance under clause 11(f)(ii) of the agreement because their fixed morning shift is not part of an alternating or rotating shift pattern.

[46] I am asked to reserve costs and do so. The application was lodged after the Authority's practice note was updated to record that the Authority's discretion would generally be exercised in favour of parties bearing their own costs in matters such as the present. However, that approach to costs in disputes about collective agreements is not new. If there is a claim for costs, a supporting submission may be lodged and served within 14 days

of this determination. The other party may lodge and serve a reply within a further 14 days. I will then determine costs with regard to those submissions and the Authority's practice.

Philip Cheyne
Member of the Employment Relations Authority