**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI**
**TĀMAKI MAKAURAU ROHE**

[2025] NZERA 372
3299939

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| | BETWEEN | AMALGAMATED WORKERS' UNION OF NEW ZEALAND INCORPORATED<br>Applicant |
| | AND | GOLDEN BAY CEMENT, a division of FLETCHER CONCRETE AND INFRASTRUCTURE LIMITED<br>Respondent |

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| Member of Authority: | Alex Leulu |
| Representatives: | Garry Pollak, counsel for the Applicant<br>Barnaby Locke, counsel for the Respondent |
| Investigation Meeting: | 18 March 2025 in Auckland |
| Submissions received: | 18 and 27 March 2025 from the Applicant<br>18 and 21 March 2025 from the Respondent |
| Determination: | 26 June 2025 |

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## DETERMINATION OF THE AUTHORITY

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### Employment relationship problem

[1] The Amalgamated Workers' Union of New Zealand Incorporated (the Union) applied to the Authority for a determination in respect of a matter arising from the collective agreement (the collective agreement) between it and Golden Bay Cement, a division of Fletcher Concrete and Infrastructure Limited (GBC).

[2] The Union sought a determination as to whether GBC has and is continuing to breach both the terms of the collective agreement and an alleged customary practice which benefited members of the Union. GBC opposed the Union's claims saying its

actions were in accordance with the requirements of the collective agreement and it disputed the Union's claims of an existing customary practice.

**The Authority's investigation**

[3] For the Authority's investigation written witness statements were lodged from union organiser, Richard Palmer and GBC Manufacturing Manager, Kelly Stevens. Both witnesses answered questions under oath from me and the parties' representatives. The representatives also gave oral closing submissions.

[4] 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.

**The issues**

[5] Leading up to the investigation meeting, attempts were made by the Authority and both parties to confirm the issues which properly addressed the Union's claims. At the start of the investigation meeting the parties agreed to the following as the disputed issues requiring investigation and determination:

(a) Does the collective agreement confer a preference to the Union's members requiring GBC to offer fire watch duties to them before any other employee or contractor?

(b) Was there a custom and practice requiring GBC to offer fire watch duties to the Union's members before any other employee or contractor?

(c) In accordance with the relevant provisions of the collective agreement, was GBC required to consult with the Union and agree for fire watch to be classified?

(d) If so, should fire watch be classified as "mixed work" in accordance with both clause 27 and the third schedule of the collective agreement?

**Context**

[6] GBC operates as a manufacturer and distributor of cement products throughout New Zealand including a manufacturing plant and two quarries in Whangarei. GBC employs around 130 people with over half being members of the Union, around 17 per

cent being members of another union and 24 per cent as non-union employees. Members of the Union are covered by the collective agreement which is in place from 1 November 2022 to 31 October 2025.

*What is fire watch?*

[7] The main dispute between the parties related to a workplace practice called "fire watch." Fire watch is a safety monitoring role where a worker is assigned to oversee any work which presents a fire risk. This type of work is described as "hot work." Hot work is any activity such as cutting, welding, soldering, blow torching, or grinding that can generate heat, sparks or flames which could ignite combustible materials and cause a fire.

[8] GBC have in place a work permit process which amongst other things, identifies whether fire watch is required. For the hot work to be approved and a permit to be issued, a person must be assigned as fire watch. A person carrying out the fire watch duty must also be appropriately trained to carry out the role. Around 80 per cent of GBC's employees are trained to undertake fire watch duties.

[9] In most cases GBC can anticipate the need for hot work through pre-planned work in advance. This allows for ample time to plan and assign a person to fire watch. On the odd occasion, unplanned work may also arise where imminent steps need to be taken to address any required hot work. An example of this is if GBC is required to undertake an unplanned shutdown resulting from a maintenance issue.

[10] Prior to 2019 GBC only required fire watch in parts of the workplace deemed as hazardous areas. Because of a major fire incident in 2019, GBC reviewed its fire watch practice which led to changes in 2023. The changes meant fire watch was extended to all work situations involving hot work. As a result, this led to an increase in the need for fire watch.

*The collective agreement*

[11] Clause 1 of the collective agreement is the coverage provision of the agreement and stated the following:

> **1 Coverage**
>
> 1.1 This collective agreement shall apply to work that is usually carried out by employees of the company who are members of the Union

> AND
>
> Is directly or indirectly associated with cement manufacturing and/or dispatching and/or maintenance of production equipment

[12] Clause 27 of the collective agreement outlined the employment security provisions of the agreement and set expectations between the parties as to the use of contactors. Clauses 27.2 to 27.5 set out the definition of different types of work and the circumstances for engaging contractors for each type. Clause 27.2 stated:

> The Third Schedule to this Agreement lists the work and roles within each classification. When work arises that has not been previously classified then the Company and Union will consult and agree the classification of the work. The Third Schedule will be amended accordingly.

[13] The third schedule was labelled as "Classifications of Work" and listed various classifications or roles that fall under three different types of work described within clause 27 of the collective agreement as follows:

> In-house work is work that was always or usually performed by employees of the Company who are members of the Union
> Mixed work is work that is sometimes performed by employees and sometimes performed by contractors
> Contracted work is work that is always or usually performed by contractors

[14] The fire watch duty or role was not listed under any of the categories within the third schedule.

**The dispute between the parties**

*The Union's argument*

[15] The Union's arguments relied on the importance of the provisions of the collective agreement relating to its members' employment security and the limitation on the use of contactors. Given the nature of the fire watch role, the Union said it was work usually carried out by its members because it:

(a) fell within the coverage provisions of the collective agreement as work "directly or indirectly associated with cement manufacturing" and "maintenance of equipment;" and

(b) was work customarily offered to them first and carried out more often by them.

[16] The Union also said its position was consistent with other provisions within the collective agreement which it said were longstanding provisions which provided priority employment conditions to its members.

[17] The Union acknowledged fire watch could also be carried out by contractors and non-union members. However, this will only be if the members of the Union were not available to assume the duty (after being offered it first). For this reason, the Union argued fire watch would likely be classed as "Mixed work".

[18] Due to the increase in the need for fire watch in 2023, the Union said the scope of fire watch had increased. In accordance with clause 27.2 of the collective agreement, it said consultation should have commenced between the parties about whether fire watch should have been expressly classified within the third schedule of the collective agreement.

[19] The Union said fire watch should be added to the third schedule because it would enhance the job security of its members in accordance with the preference provisions of the collective agreement.

*GBC's arguments*

[20] GBC submitted there were no express or implied provisions within the collective agreement which required it to offer fire watch to members of the Union first. Furthermore, it argued there was no evidence to show fire watch was usually allocated to Union members as a customary practice.

[21] GBC said the reference in clause 27.2 of the collective agreement to "when work arises that has not been previously classified" was a reference only to new work which had not been previously classified. Because the fire watch role existed well before 2023 it said it did not count as new work and therefore did not trigger the consultation requirements of clause 27.2.

[22] GBC also described fire watch as a role carried out by an appropriately trained person, regardless of whether they were a member of the Union. In comparing the nature of fire watch work to the other roles in the third schedule, GBC also said fire watch work was not the type of work that is required to be classified under the third schedule. The reason for this was because fire watch was a health and safety compliance task which was different to the roles specified within the third schedule of the collective agreement. GBC also confirmed fire watch was not explicitly specified as a role or task within any GBC employee job description.

**Was GBC required to offer fire watch duties to Union members first?**

*Does the collective agreement confer a preference?*

[23] A central issue in dispute between the parties arise from interpretation of the collective agreement. The starting point for addressing a dispute of interpretation of an employment agreement is to take an objective approach. The approach being to ascertain the meaning of which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time they entered into the agreement.[1]

[24] The Employment Court also provided guidance when interpreting collective agreements:[2]

> The starting point is an assessment of the natural and ordinary meaning of the words themselves. The second stage of the interpretive exercise may result in the preliminary assessment of meaning being dislodged. Such a result will not readily arise … 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.

[25] As argued by the Union, fire watch is a type of work that is directly or indirectly associated with cement manufacturing and fell within the coverage clause of the collective agreement. However, no provision within the collective agreement clearly identifies fire watch as work to be offered to members of the Union first.

[26] The Union's reference to other provisions such as the terms of agreement (clause 24), variation of agreement (clause 25) and suspension without pay (clause 26) provided little assistance in clarifying the preferential treatment of Union members for fire watch duty over others.

[27] The Union also relied on clause 23 of the collective agreement which explained Union member preference where job vacancies arise for work usually carried out by them. Although this provision clearly refers to preferential treatment of Union members, it did little to clarify whether there was a preference of members to be first offered fire watch over others.

[28] Based on an objective assessment of the collective agreement (and the Authority's assessment of clause 27 later in this determination), there was either no

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[1] *Firm PI 1 Limited v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].
[2] Tertiary Education v V-C of Auckland University [2015] ERNZ 979 at [6] to [8].

express provision or a sufficient interpretation within the collective agreement which conferred a preference for fire watch to be first offered to members of the Union. The Union's claims in this respect were unsuccessful.

*Does custom and practice confer a preference?*

[29] Much of whether there was an established custom and practice of Union members being offered fire watch work first depended on the available evidence before the Authority.

[30] In support of the Union's claims, Mr Palmer accepted fire watch was performed by all employees (including contractors). However he maintained it was work usually carried out by members of the Union.

[31] In response, GBC provided evidence in the form of a sample set of hot work permits which were issued to those carrying out fire watch in 2023. The sample set clearly showed fire watch being carried out by members of the Union, the other union and contactors.

[32] Apart from Mr Palmer's evidence, there was insufficient evidence to show who was offered fire watch work first. Both Mr Palmer and Ms Stevens disagreed in their evidence as whether the Union members was usually allocated to Union workers first. Apart from the sample set of hot work permits, there was no other evidence to corroborate the Union's claims.

[33] Given the limited amount of evidence before the Authority, there was insufficient evidence to support the view of a workplace custom of fire watch being offered to Union members. The Union's claims in this respect are also dismissed.

**Was GBC required to consult with the Union and agree for fire watch to be classified within the third schedule?**

*Is consultation required only on new work?*

[34] A key dispute between the parties is about the reference in clause 27.2 to work that would require consultation and agreement for classification and addition to the third schedule. The reference being consultation and agreement to "when work arises that has not been previously classified."

[35] Since clause 27 of the collective agreement is about managing expectations around the use of contractors, the focus of the clause should be on the process of consultation and agreement between the parties. For this reason, interpretation of "when work arises" should be considered in line with this expectation and should take into account:

(a) fire watch being a role which had been in place since the early 2000s; and

(b) by the time of the current dispute, fire watch was already carried out by other non-members of the Union (which included contractors). Ms Stevens confirmed contractors were predominantly used during shutdowns when there was a shortage of trained labour on hand.

[36] Based on the above factors, the reference in clause 27.2 to "when work arises that has not been previously classified" should be afforded its plain meaning in the context of the above factors. The meaning being reference to new work which requires consideration, consultation and classification within the third schedule. As work already carried out by employee and contractors, fire watch is not new work and therefore not captured by clause 27.2.

[37] Although I accept there was a change in how often fire watch was required, the nature of the task remained the same. The increased requirement for fire watch did not amount to new work for the purposes of clause 27.2.

*Should fire watch be work consulted and agreed on for the third schedule?*

[38] Given fire watch is not captured by clause 27.2 of the collective agreement there was no requirement by GBC to consult with the Union and agree for fire watch to be classified. As a result, there was no need to determine the fourth issue as to whether fire watch was to be classified as "mixed work" in accordance with both clause 27 and the third schedule of the collective agreement.

[39] For the sake of completeness and putting aside fire watch not being new work, it is arguable that fire watch was not the type of work intended for the third schedule. This was due to several reasons.

[40] Firstly, no other classified task or role within the third schedule appears to be of the type dedicated solely to health and safety compliance. The types of work classified within the third schedule range from roles which require operation of machinery to tasks or services provided by certain trade experts.

[41] Secondly, the consultation clause of the collective agreement (clause 27.7) specifically identifies health and safety as a factor to consider when determining the use of contractors. A unique situation given the fire watch task itself is a health and safety related task.

[42] Thirdly, any significant change in scope to a health and safety task would likely be covered in another internal process. GBC's change in scope for fire watch duties was addressed though its internal health and safety process in 2023. The decision to change the scope of fire watch was managed through GBC's health and safety committee which included members from both unions. It should be noted that the Union did not provide feedback to the proposed changes.

**Costs**

[43] Based on the claims before the Authority, I determine this matter as one concerning a dispute over the application, interpretation, or operation of terms of a collective agreement. The Authority generally applies a presumption that parties will bear their own costs.[3] There are no compelling reasons which would suggest this matter to be treated otherwise. Accordingly, the costs will fall where they lie.

[44] Should either party consider the presumption should not apply, a memorandum to that effect should be lodged and served within 28 days.

Alex Leulu
Member of the Employment Relations Authority

[3] See "Costs in the Authority", Practice Direction of the Employment Relations Authority.