IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 103
WRC 32/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	PROGRESSIVE MEATS LIMITED Plaintiff
AND	TOM POHIO, ERU TE RITO, CARL BERG, KEVIN BLANE, WAYNE GERBES, PAUL COOKE, HAMISH WALDON, JAMES CAMPBELL, ROBERT AIRD, DAVID BLUE BROWN, SHANE STEPHENS, SONYA WALLACE AND RIKI HILTON Defendants

Hearing: 11 June 2012
(Heard at Napier)

Appearances: Tim Cleary, counsel for the plaintiff
Simon Mitchell, counsel for the defendants'

Judgment: 5 July 2012

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The plaintiff, Progressive Meats Limited (Progressive), was described by its counsel, Mr Cleary, as a "toll processor for ovine and venison meat exports". Unlike other meat companies which purchase livestock from farmers before processing and on-sale (usually for export), a toll processor does not purchase livestock but contracts with its customers to process livestock to the customers' specifications. In other words, the customers provide the live animals and for an agreed fee, the toll

processor then processes the stock which involves slaughtering, boning and producing cuts to the customers' specifications.

[2] The case before the Court involves Progressive's Hastings plant which operates on a toll basis. The Hastings plant has two departments: slaughtering and boning. The boning department comprises of both boners and packers. All of the defendants are employed in the boning department and all but one are boners. Ms Sonya Wallace is a packer.

[3] The parties are in dispute over the interpretation of a clause in their collective employment agreement[1] (the collective agreement) relating to layoff situations. The clause, cl 22.1.1., provides that in the event of a seasonal layoff situation, a system of ranking employees according to skill levels will be operated to ensure that sufficient people are retained to operate each department at its most efficient level of productivity. When skills are equal then length of service will determine ranking. The principal issue at stake relates to the interpretation and method of assessment of "skill levels".

[4] The defendants referred personal grievances to the Employment Relations Authority (the Authority) alleging that in August 2010 they were unjustifiably laid off because their layoff did not take place on the basis of skill and other less skilled staff were retained. The company disagreed. In its determination[2] dated 30 September 2011, the Authority concluded that, "both parties were equally mistaken in adopting a too restrictive approach to the meaning of the disputed words". Mr Cleary described the Authority's conclusions as a "halfway house" approach. In this proceeding Progressive has challenged the Authority's determination.

[5] Before turning to consider the respective stance of each party, it is necessary to explain more about the background to the dispute.

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[1] Progressive Meats Limited Collective Employment Agreement Dec 2008 – Dec 2010.
[2] [2011] NZERA Wellington 151.

Background

[6] Apart from the differences already noted, there are other relevant distinctions between the operations of conventional meat processing plants and a toll processor. For example, whereas processing plants invariably process carcasses through the use of conveyor chains with each boner assigned a particular processing task, in a toll situation each boner processes a whole carcass working at what is referred to as a "boning station". This is the main task in the boning room. At the Hastings plant there are 20 such boning stations.

[7] Another relevant distinction relates to layoff situations generally. In my judgment in *New Zealand Meat Workers Union of Aotearoa Inc v AFFCO New Zealand Ltd*,[3] I noted, with reference to earlier authorities, that one of the features of the meat industry is that the plants operate on a seasonal basis with the customary yearly layoffs being determined under a seniority system of longstanding provided for in relevant collective agreements and awards. At Progressive's toll processing plant, however layoffs are a relatively rare event. The evidence was that, apart from what occurred in 2009 and 2010, the only other layoff in the last 30 years took place in 1991.

The relevant provision in the collective agreement

[8] The key provision in the collective agreement is cl 22.1.1. but for completeness I set out the whole of cl 22:

> **22. LAY OFF**
>
> **22.1. Skill Based Ranking**
>
> 22.1.1 In a lay-off situation, a system of ranking employees (within the departments remaining operating) according to skill levels will be operated to ensure that sufficient people are retained to operate each department at its most efficient level of productivity. When skills are equal then length of service will determine ranking. Temporary employees shall be laid off before permanent employees.
>
> **22.2. Length of Notice**

[3] [2011] NZEmpC 32.

22.2.1. Upon realising that a lay-off situation is going to be inevitable, the employer will advise all employees of the impending situation 14 days prior to the termination date of the affected employees. The affected employees will be given a minimum of 7 days written notice prior to the actual date of their employment termination.

22.2.2. Re-employment: Should an employee having been laid off in one work period be re-employed in the subsequent work period, then that employee shall retain their skill margin and sick leave entitlement attained at the date they were laid off. The employee's sick leave anniversary date will change to the date of re-employment.

The case for the defendants

[9] Because it relates to another provision in the collective agreement, it is convenient to consider first the interpretation contended for by the defendants. In essence, it is the case for the defendants that the term "skill levels" in cl 22.1.1. refers to training modules obtained by workers through the plaintiff's skill based training system provided for in cl 10 of the collective agreement. That provision states:

10. SKILLS & TRAINING

10.1. A skills and training committee shall be established comprised of one member per shift per department and two representatives appointed by the Plant Manager.

10.2. The skills and training committee shall have full authority to make modifications or changes to the training system as deemed necessary by the committee, provided these changes do not hinder the ability to maintain and increase knowledge and skill levels.

10.3. It is the function of the skills and training committee to administer, review or change the skills training system; including module composition, waking and training priorities, to ensure equity and fairness and the efficient operation of the system. Suggestions for change from staff are to be directed in writing through the relevant committee representative. A unanimous decision of the skills and training committee is required to allocate additional units to any department.

10.4. Employees may appeal to the skills and training committee regarding individual issues pertaining to the application of the training system.

10.5. Staff rotation between slaughter and processing, where staff levels allow, will be encouraged to maintain staff flexibility for backup.

> 10.6. The Company is committed to training one staff member in 20 (5%) in each department, on average, until quotas are filled.
>
> 10.7. The quota number shall be a minimum of three people per module or a minimum of 25 % over the required manning per module or rotation whichever is the greater.

[10] Counsel for the defendants, Mr Mitchell, also referred in argument to Schedule B of the collective agreement which deals with the hours of work and wages of boners. Clause 3 of Schedule B provides for a "processing rate" which is described as an accumulation of various components including an hourly rate of $10.70 and a skill margin which is based on the number of modules held by the individual worker.

[11] The various modules were listed on a spreadsheet produced in evidence (the spreadsheet). The collective agreement provides that each module is graded 1, 2 or 3 units depending on the degree of difficulty. "Induction" is a module common to all boners and the "induction module" is graded at 3 units. There are three other modules common to all lamb boners, namely leg boning (worth 3 units); shoulder boning (worth 3 units) and "mid-boning" which refers to loins, saddles and flaps (worth 2 units), giving a combined tally for the "boning module" of 8 units. Most of the boners listed in the spreadsheet have the 11 units made up of the 3 units for induction and the 8 units for boning. Other modules listed in the spreadsheet, which are not directly relevant to the boning task, are "Sawman" (3) units; "Pre-trim" (1) unit; "Skinner" (2) units; "Chiller" (units not stated in spreadsheet); "Mid-process" (1) unit; "DLM" (units not stated); "Forklift" (units not stated); "Packaging" (4) units; "Pre-Op" (1) unit; "Scanning" (units not stated); "Ven/Lamb Slaughter" (units not stated); "Venison" (units not stated). The range between the total number of units held by the 73 boners listed in the spreadsheet varies between 27 and 3.

[12] The defendants contend that the reference to skill levels in cl 22.1.1. of the collective agreement is a reference to the modules the workers obtain through the plaintiff's skill based training programme as provided for in cl 10 of the collective agreement. Where workers' skills are equal under that approach then length of service becomes the criteria for determining who is laid off and who is retained.

The approach contended for by the plaintiff

[13] Progressive contends that in a layoff situation the focus under cl 22.1.1. should be on the retention of staff with skill levels to ensure that the department concerned (in this case the boning department) is able to operate at "its most efficient level of productivity" and that involves ranking the performance of individual boners under a computerised assessment method referred to in evidence as the "Marel System".

[14] The Marel System is a computerised system which, it is claimed, captures two measures for assessing the skill levels of boners, namely, (1) speed, which is a measure of how many carcasses a boner can process in a set time, usually within an hour, and (2) yield, which is a measure of the quality and quantity of the meat removed from each carcass (this is also referred to as the value index).

[15] The Marel System is not referred to anywhere in the collective agreement but the data captured under the computerised system for the "Boning period: 1/11/09 to 23/5/10" is recorded under various headings in the spreadsheet. The data sets out the individual assessments for each individual boner of his yield and speed during the stated boning period. The data captured under each heading was explained in evidence in relation to the first named boner listed in the spreadsheet, Mr Daniel King, in these terms:

1. "Avg per Hr" – The figure shown in this column records the average number of carcasses processed each hour by the named individual according to the computerised records. (The figure recorded under this head for Mr King is 16.52)

2. "Value index" – Under this head, the figure of 1,000 is used as a benchmark for determining the yield percentage. The highest figure recorded for a boner under this head is 1,026 and that person's figure then becomes the 100 per cent benchmark which is used to compare in percentage terms the performance of all the other boners. Mr King has a value index figure of 1,001 which meant that he had a yield percentage of 97.56 as against the top performer on 1,026.

3. "VI%" – This column simply records the value index figure as a percentage. For Mr King, the figure shown is 97.56.

4. "CCS/HR%" – This column rates the individual's speed in percentage terms. Mr King's throughput of 16.52 carcasses per hour was the highest figure achieved and 16.52, therefore, was taken as the 100 per cent figure against which the speed of other boners was measured in percentage terms.

5. "VI+CCS/HR" – This column records the total of the two percentage figures for speed and yield. The figure shown for Mr King is 198 which is a total of his speed figure of 100 per cent and his value index percentage figure, rounded off at 98 per cent.

[16] The range of figures in the last column of the Marel System under the heading "VI+CCS/HR" ran from 198 down to 145. The cut-off point chosen by Progressive for the layoff retention was 173 which meant that boners with a figure between Mr King's figure of 198 and the cut-off figure of 173 were retained whereas, with certain exceptions which I will need to return to, those below 173 were selected for layoff.

The evidence

[17] There was only one witness called on behalf of Progressive – the plant manager, Mr Vernon Piwari. Mr Piwari joined Progressive in 2009 after a 26-year history in the meat industry. In reference to the recent layoffs, Mr Piwari told the Court:

> 9. In 2009 there was a lay-off due to a shortage of livestock and the nightshift was stopped. Because of that clause 22.1.1 was used to select who from the day shift and night shift would stay on. The system used to select employees to be laid off in 2009 was exactly the same as for the following year when there was also a lay-off also due to seasonal shortage of livestock. There was some complaint about this from some individuals in 2009 but it was not pursued. Lay-off is a very difficult situation and whatever method is used will have different sets of people unhappy depending on how they are personally affected.

[18] Mr Piwari confirmed that the Marel System was used for layoffs in the boning department. He said that the skill levels of boners were ranked so as "to ensure that the department remains operating at its most efficient level of productivity." Mr Piwari described the data captured by the Marel System as an objective measure producing a 50/50 weighting of both speed and yield to calculate each boner's ranking.

[19] In cross-examination, Mr Piwari confirmed when it came to wages, the skill margin included in the processing rate paid to workers was calculated based on the skill modules held by the worker. He also confirmed that each worker is issued with a "Certificate of Achievement" recording the name of the modules held, the process, the level of achievement and the completion date. Mr Piwari agreed with Mr Mitchell that attaining a module was an acknowledgment that the worker was competent to complete the tasks involved to a satisfactory standard at a satisfactory speed. He also confirmed that if, for any reason, the worker was no longer competent to carry out the tasks identified in the module then the module could be withdrawn.

[20] In one passage of cross-examination Mr Piwari was asked about the nature of the skills required in relation to layoff situations:

> **Q.** Well what you're trying to do, I put it to you, when you have a layoff, is you need a range of skills present, don't you?
> **A.** Correct.
>
> **Q.** You need to make sure that every duty, every task is covered, that's fair isn't it?
> **A.** Correct.
>
> **Q.** Because as you identify there will be some people with some skills, that are specifically required?
> **A.** Correct.
>
> **Q.** And you have to cover a broad range with fewer people?
> **A.** Correct.
>
> **Q.** So you need to make sure that the people who you retain are adaptable and cover every duty?
> **A.** That's correct.
>
> **Q.** And that they can do that competently?
> **A.** Correct.

Q. Because in terms of that clause you need enough people to operate each department so that requires all of the modules to be present doesn't it?
A. [NO AUDIBLE REPLY FROM WITNESS]

Q. You need somebody with each module to be present?
A. That is correct.

Q. And at its most efficient level of productivity so you need to ensure that you are still retaining an efficient level?
A. Correct.

[21] Mr Mitchell referred Mr Piwari to the names listed on the spreadsheet, in particular to the names of six workers who had been retained at the time of the 2010 layoff, even though they were listed below the cut-off figure of 173. The witness agreed that they were retained out of sequence in terms of the Marel System because the company needed to retain their particular skills. He also agreed that length of service had not been given any weight in the selection process in relation to the 2010 layoffs.

[22] Mr Piwari was cross-examined at some length about the percentage figures for speed and yield produced by the Marel System and it was put to him that the difference between the figures for Mr Teepa Tehemopo (the last person retained on the layoff) of 12.35 for average carcass numbers per hour and 98.25 per cent for yield were "pretty insignificant" compared with Mr Kevin Blane (listed as the first person laid off) whose figures were 12.31 for carcass numbers and 96.49 per cent for yield. The witness accepted that proposition.

[23] The principal witness called on behalf of the defendants was Mr Brett Taylor who has worked for Progressive since 1999. He told the Court that he is a union delegate and Vice President of the New Zealand Meat Workers & Related Trades Union Inc. Mr Taylor said:

10. The reference to skills in relation to a layoff, has always meant that employees are retained who have the most modules, and therefore have the widest range of skills. As a result once the numbers of employees reduces, the company can still be sure that all of the work required can be completed.

In cross-examination, Mr Cleary put it to Mr Taylor that he had not been present at the time of the 1991 layoff. The witness agreed but pointed out that another witness to be called on behalf of the defendants, Mr Dan Gallagher, had been present in 1991. When Mr Gallagher was called to give evidence he was not asked any questions about the 1991 layoff.

[24] Mr Taylor told the Court that the Marel System was first introduced in May 2005 and the Union was heavily involved in its introduction. In uncontested evidence, however, he explained that the Marel System was not introduced for layoff purposes but for "traceability" purposes in terms of the yield factor so that farmers could be paid "based on their primal cuts". When asked if the union had been told at the time of the introduction of the Marel System that it was going to be used in layoff situations, the witness said:

> Absolutely not. At no stage not even when about four weeks before the 2009 layoff we were told about that. That was clear.

[25] Mr Taylor produced a half-page memorandum headed "Progressive Meats Lay off Criteria". The document is undated but the witness said it was a company document that had been placed on the notice board about six weeks prior to the second layoff in 2010. It confirmed that layoffs for the boning department would be based on the Marel System but Mr Taylor explained that in relation to other departments, the document confirmed that "skills will determine selection for lay-off as per training records and modules, along with supervisors/department managers' knowledge of current competencies". That explanation was consistent with other evidence which confirmed that for the layoffs in 2009 and 2010, the Marel System was applied only in respect of boners in the boning department. Retentions in other departments and for the packers in the boning department were determined in reliance on skill modules obtained under cl 10 of the collective agreement.

[26] When asked about the 2009 layoff, Mr Taylor told the Court that the union disagreed with Progressive's intention to apply the Marel System to the boning department in 2009 but no Court action was taken over the matter at that stage because, with one exception, the same people would have been laid off if the module system for selection had been applied.

[27] Mr Taylor also referred to an issue which was canvassed in different ways by two other witnesses who gave evidence on behalf of the defendants, namely, Mr Gallagher and Mr Stephen Harmer. The evidence dealt with ways in which the Marel System could be manipulated to produce unfair results. Mr Taylor, for example, spoke about the advantage boners working on the nightshift had over dayshift workers in terms of achieving a high Marel figure for speed:

> ... The manning levels on the two shifts are totally different. Nightshift have way less people on average therefore there are more boning stations free if you have got less people there the carcasses get to the remaining people a lot faster. On the dayshift if the boning stations are fully manned with 20 boners you are waiting, and waiting, and waiting for product so therefore your productivity goes down because you are waiting. That's a huge factor. You are not on a level playing field within the Marel System. Yes it's a great system for the boss to record all the information and pay the farmers on and traceability from the farm gate right to the cart it's excellent for that but as a tool it's not a level playing field.

[28] It is not necessary for me to detail the evidence given by Mr Gallagher and Mr Harmer on the topic but I do accept that there is some substance in the allegations made by both witnesses. Mr Gallagher was an impressive witness. He has been with Progressive since 1991 and is a former boning tutor. He told the Court that his task as a boning tutor was to certify workers for the modules and he would not have given a pass mark to a boner who had not met all the set criteria for any particular module and that included boning to the required specifications and speed. Mr Gallagher explained that there were a number of ways in which employees can override the computerised Marel System so that "their statistics show the employee up as faster than the others, when in fact they are not." The witness said that he was so concerned about the manipulation of the computer system that he raised his concerns with his supervisor and also with the managing director of the company. Neither the supervisor nor the managing director gave evidence in rebuttal.

The law

[29] There was no dispute between counsel as to the applicable legal principles in the interpretation of collective agreements. Mr Cleary referred to the well-known five principles of contractual interpretation articulated by Lord Hoffmann in

Investors Compensation Scheme Limited v West Bromwich Building Society[4] which were adopted in *New Zealand in Boat Park Ltd v Hutchinson*[5] and recently reaffirmed in *Vector Gas Ltd v Bay of Plenty Energy Limited*.[6] As both counsel relied on the stated principles, I set them out in full:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as a meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945)
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera SA v Salen Rederierna AB* [1985] 1 AC 191,201:

[4] [1997] UKHL 28: 1 WLR 896 at 912-913.
[5] [1999] 2 NZLR 74.
[6] [2012] NZSC 5.

> "... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

[30] In *Dwyer v Air New Zealand Ltd No 2*,[7] the full Court of this Court stated:

> We accept that our task in this part of the case is objectively to ascertain the mutual intentions of the parties and that by doing so we not only have regard to the particular words in the particular clause at issue but also to the nature and purpose of the employment contract. Reasonableness of result is a relevant consideration also in choosing between rival constructions and the contextual matrix is also to be taken into account.

Submissions

[31] Both counsel made the point that the words at issue in cl 22.1.1. of the collective agreement cannot be read in isolation but must be considered in the context of the rest of the agreement. Mr Cleary referred the Court to the dictionary definitions of "efficient" and "productivity" and submitted:

> 14. It is respectfully submitted the meaning of the sub-clause is clear. It says staff should be ranked at skill levels so that each department is operated at "it's most efficient level of productivity". The department concerned is the boning department and the particular employees concerned are the boners within that department.
>
> ...
>
> 17. It is trite that in assessing the most efficient level of productivity the focus must be on both the time taken and the quality of yield. Thus boners' productivity is at its most efficient level when the best (fastest and highest value yield) boners are working together. Anything less than that, for instance a ranking based on training results – where competence in any given departmental task is the only standard – will result in a level less than the most efficient level of productivity and be inconsistent with what the sub-clause says.

[32] In relation to the defendants contention that the assessment of skill levels for layoff purposes under cl 22.1.1. should be based on the training module provisions in cl 10, Mr Cleary submitted that cl 10 "relates only to skills in the context of training (which is necessary for all employees) and not to levels of productivity".

[33] In response to the defendants' evidence as to how the Marel System can be manipulated to produce distorted results, Mr Cleary submitted that the allegations

[7] [1996] 2 ERNZ 435 at 474.

were unproven and that, in any event, the evidence was irrelevant to the interpretation question, "because it must be assumed from an interpretation perspective that employees will not knowingly distort results".

[34] Mr Mitchell submitted that the term "skills" has a specific meaning in the collective agreement, namely, the attainment of modules pursuant to cl 10. As counsel expressed it:

> 14. The Plaintiff has set up a comprehensive programme of training in which workers attain skills, recognised in their modules. This training is an essential aspect of the Collective Agreement, and workers are paid according to the modules received.

[35] Mr Mitchell highlighted the undisputed evidence that it was only the boners who were laid off pursuant to the Marel System of assessment whereas layoffs in other departments and in relation to packers in the boning department were based on the training module method. Counsel submitted that the efficient operation of the plant was protected under the training module method stating:

> The certificate of achievement provided to employees setting out the modules they hold includes that the employee is competent, meaning "that it has met knowledge, speed and quality requirements".

[36] In reference to the Marel System relied upon by the plaintiff, Mr Mitchell submitted:

> 23. What the Plaintiff's interpretation of the clause creates is an entirely arbitrary assessment where there is in effect very little difference between workers who are retained at layoff, and those who are made redundant. The differences taken into account when the average per hour and the value index are compared between employees, results in the most tiny differences leading to determining whether an employee is selected to be laid off or not. As an example, Teepa Tehemopo was retained at an overall score of 173, while Kevin Blane, who was selected for redundancy had an overall level of 171. These measures are so tiny that it will not determine that the plant operates more efficiently.

[37] Finally, Mr Mitchell stressed the relevance historically in the meat industry of seniority as the criteria in layoff situations and submitted:

> 26. Tiny differences in productivity that are barely measurable, and certainly not noticeable in the day to day operation of the department, are then taken into account to determine layoff. It is submitted that it

is unreasonable for the clause to be interpreted to mean that such measures could determine layoff, and override the provision in relation to length of service.

27. In effect, length of service only becomes relevant to the Plaintiff's assessment if two workers have exactly identical levels of speed and yield. It is not reasonable that this is the basis of the measurement. It is submitted that the Plaintiff is unable to identify any real difference between say 173 and 172. This should not be the basis of selection.

28. It is submitted that length of service is an important part of the clause, and is not provided for in the Plaintiff's interpretation.

Discussion

[38] In *Vector Gas Ltd*, Wilson J stated:

> [199] The general principle is that the words of an enforceable commercial contract should be given their ordinary meaning in the context of the contract in which they appear, because the parties are presumed to have intended the words to be given that meaning.

It is common ground that there is no reference in the collective agreement to the Marel System relied on by the plaintiff. There was no challenge to the evidence given on behalf of the defendants that the Marel System was introduced by Progressive in May 2005 for reasons which had nothing to do with layoff situations. When the company then proceeded in 2009 to rely on the Marel System for determining the layoff criteria, it did so unilaterally without any prior consultation with the union. There was also no dispute that in the layoff situations in 2009 and 2010, the Marel System was applied only to boners in the boning department. The criteria used in relation to other departments, and for packers in the boning department, was the training module system provided for in cl 10 of the collective agreement.

[39] Against that background, I accept Mr Mitchell's submission that the reference to "skill levels" in cl 22.1.1. is a reference to the training module system. Under that system the range of duties a particular employee is certified to carry out is recorded in his or her "Certificate of Achievement". The certificate records details of the number, type and completion date of training modules held. The certificate also records that the worker is certified as being able to carry out the skills detailed to the company's "knowledge, speed and quality requirements". That was the criteria

applied in the 2009/2010 layoff situations to all workers apart from boners. I see no basis in the wording of the clause for concluding that it is to have one meaning in respect of layoff situations involving boners, namely, the Marel System data, and another meaning based on training modules in respect of all other workers, including other workers in the boning department.

[40] In other words, I see no necessity for the objective observer to go outside the terms of the collective agreement itself and invoke the Marel System in order to ascertain the meaning of cl 22.1.1. The "skill levels" referred to in 22.1.1. are those achieved pursuant to the skills and training system provided for in cl 10 of the collective agreement. Any issue about whether the skills and training system is able to meet the efficiency level envisaged in 22.1.1. is addressed in cl 10.3. which deals with the function of the skills and training committee. Clause 10.3. states, relevantly:

> 10.3. It is the function of the skills and training committee to administer, review or change the skills training system; including module composition, weighting and training priorities, to ensure equity and fairness and the efficient operation of the system.

[41] The equity and fairness requirement is also highlighted under the "Statement of Intent" provisions in cl 3 of the collective agreement. The relevant clauses provide:

> 3.3. Accordingly this agreement is drafted to reflect the balance of rights and responsibilities between the employer and its management on one hand, and the employees on the other, without detracting from the employer's right to manage and control its business for the employees' right to protect their interests.
>
> 3.4. Therefore, the wish of the parties is to create a co-operative and participatory climate of industrial relations based on mutual respect and trust between all levels of management and the employees, and which recognises their interdependence.
>
> 3.5. The employer and the employees agree that it is in their mutual interest to operate an efficient, competitive and profitable plant and that consultation and employee involvement are vital to the success of the operation.
>
> 3.6. The parties to this agreement are committed to safeguarding the safety, health and welfare of the employees and providing conditions of employment and payments which are fair and equitable to employees and the employer, and which safeguard the various

> interests while providing maximum possible continuity and security of employment.

[42] It is difficult to see how these commendable aspirations in the statement of intent involving concepts such as mutual respect and trust, consultation and employee involvement, security of employment, fairness and equity, can be satisfied by the company's unilateral introduction of the Marel System for layoff situations.

[43] I also agree with Mr Mitchell's submission that the application of the Marel System "effectively means that the use of length of service to determine layoffs, provided for in the agreement, becomes redundant." The significance of length of service in the meat processing industry was recognised by Judge Inglis in the recent decision of *South Pacific Meats Ltd v Mohammed*.[8] The relevant provisions in that case relating to seasonal terminations appear to have been more akin with the provisions in the collective agreement in the present case than with those in other meat processing agreements. One of the clauses (cl 3.2) provided: "... In selecting employees to be terminated, the employer shall take into consideration the skills required to operate a balanced workforce. All things being equal the Company will observe the principle of first on last off." Commenting on this provision, Judge Inglis observed:[9]

> ... The recognition given to those with longer service is also reflected in the provisions relating to termination before the close down for the season, where (all things being equal in terms of skill) the company is to observe the "first on last off" principle (cl 3.2) ...

[44] The thrust of Mr Mitchell's submission on this issue was that, given the specific recognition of length of service as a factor in layoff situations, the differences in the productivity figures produced under the Marel System were so insignificant that it is, "unreasonable that such measures could determine layoff, and override the provision in relation to length of service". The point made can be highlighted by reference to the relative production figures under the Marel System for Mr Tehemopo, the last person retained and Mr Blane, who was selected for layoff. Mr Tehemopo had 12.35 for carcass average, a value index figure of 98.25 per cent and an overall score of 173 compared with Mr Blane who had 12.31 for

[8] [2012] NZEmpC 96.
[9] At [56].

carcass average, 96.49 per cent as his value index figure and an overall score of 171. Mr Piwari was asked in cross-examination about the differences between the two lots of figures:

> **Q.** Now those differences are pretty insignificant aren't they?
> **A.** Between the two?
>
> **Q.** Between the two.
> **A.** That's correct.
>
> **Q.** They're not actually even a real difference are they, in terms of the productivity of the Department?
> **A.** They aren't, but somewhere along the lines you need to have a number that you can rank the employees.

[45] This exchange highlights the point Mr Mitchell was making about the Marel System effectively making length of service an irrelevant factor. Mr Tehemopo had only been with the company since 15 January 2010. Mr Blane's length of service went back to 27 May 1997. In other words, Mr Tehemopo was not even working for Progressive on 1 November 2009 when the company began collecting the computerised data under the Marel System which was used for determining layoffs for the 2010 season (see [15] above). In fact, he did not commence his employment until the data collection process had been underway for in excess of two months. Mr Blane, on the other hand, at that stage had been with the company for more than 12 years. On any view of the matter, given that the clause in question provides that length of service is to be the determining factor where skills are equal, an interpretation producing such a result can fairly be described as unreasonable or absurd.

[46] The situation in terms of fairness and equity is further aggravated by reason of the fact, which I accept on the evidence, that the figures produced by the Marel System can be manipulated by "cheating", as one of the witnesses described it. Mr Cleary submitted that the training module method is susceptible to the same criticism but there was no evidence to that effect.

Conclusions

[47] For the reasons stated, I do not accept that cl 22.1.1. does mean that for those in the boning department the Marel System was the appropriate method of deciding

who should have been laid off in 2010 and for that reason I decline to make the declaration sought.

[48] This appears to have been a test case involving the interpretation of a disputed provision in a collective agreement and my preliminary view is that costs should lie where they fall but if the defendant wishes to pursue the matter of costs then, in the absence of agreement, Mr Mitchell has 30 days from the date of this judgment in which to file and serve a memorandum and Mr Cleary will have like time from the date of service in which to respond.

A D Ford
Judge

Judgment signed at 11.00 am on 5 July 2012