IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 211
CRC 8/11

BETWEEN	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA First Plaintiff
AND	KATHLEEN PAGE Second Plaintiff
AND	SEALORD GROUP LIMITED Defendant

Hearing: 21 October 2011
(Heard at Nelson)

Appearances: Tim Oldfield, counsel for the plaintiffs
Rob Towner as counsel and Justine O'Connell as advocate for the defendant

Judgment: 10 December 2012

JUDGMENT OF JUDGE A A COUCH

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[1] The first plaintiff, the Service and Food Workers' Union Nga Ringa Tota (the Union) and the defendant, Sealord Group Ltd (Sealord) have been parties to a series of collective agreements covering work at Sealord's processing plant at Vickerman Street, Nelson. The second plaintiff, Mrs Page, is employed at the Vickerman Street plant and is a member of the Union. Her employment was covered by the collective agreements. This case concerns the interpretation and application to Mrs Page of aspects of the collective agreement which was current in 2009.

[2] Mrs Page has worked at the Vickerman Street plant for about 17 years. In terms of the collective agreement, she was paid on grade 2K. The parties are in dispute over the interpretation of clause 12 of the collective agreement which allows

employees who are multi-skilled to be assessed for a higher grade if certain criteria are met. The essential issue is whether Mrs Page met the criteria in clause 12.

[3] The Union and Mrs Page say that, on the evidence, she does meet those criteria if clause 12 is interpreted in the way they submit. Sealord disagrees with that interpretation of the collective agreement and the conclusion that Mrs Page qualified for advancement under clause 12. The outcome therefore depends on both findings of fact and interpretation of the collective agreement.

[4] The dispute was referred to the Employment Relations Authority which determined it in favour of Sealord. [1] The plaintiffs challenged that determination and the matter proceeded before the Court as a hearing de novo.

The collective agreement

[5] The particular collective agreement in issue in this proceeding is the one which was in force from 11 May 2008 to 10 May 2009[2]. The provisions of that agreement included the following:

> **11. WAGES/CLASSIFICATIONS**
> ....
> (b) The jobs covered by this agreement are as follows
>
> Grade 1AK
> - Knife handling Factory Leads with over three month's service as a Factory Lead.
>
> Grade 1A
> - Factory Lead with over three months service as a Factory Lead
> - Coldstore, Chiller, Blast and Dry Store areas Forklift Driver (where a driver is capable of and contributes to increased inventory accuracy recording)
> - *Machine Technician/Operator – for filleting machines where the Operator is capable of making mechanical adjustments which impact on machine performance*
> - Compliance Auditor
> - Fishmeal Plant Operator *with more than 12 months experience*
> - *Designated Knife Sharpener*

[1] [2011] NZERA Christchurch 17.
[2] Sealord Group Ltd Nelson Plant and Service and Food Workers Union Collective Employment Agreement (11 May 2008 to 10 May 2009).

Grade 1K
- Filleter with more than 10 months experience
- Trimmer with more than 10 months filleting experience (provided they are competent with Hoki, Orange Roughy and Dory)
- Kirimi Portion Cutter cutting a set volume (currently cutting an average of 170kg per day)
- *Designated Trainer*

Grade 1
- *Machine Operator (set up, operate, maintain and strip equipment)*
- *Designated qualified packer with more than 10 months experience*
- *Fishmeal Plant Trainee Operator*
- Speciality cleaners
- Line Quality Staff
- Forklift Driver

Grade 2K
- Qualified Trimmer
- Qualified Packer
- Qualified Fish Filleter

Grade 2
- *Machine Feeder*
- *General Hand*
- *Chiller Hand*
- *Coldstore General Hand*
- *Tally Clerk*

Grade 3K
- *Knife Hand start rate for the first 20 days of employment*

Grade 3
- *General Hand start rate for the first 20 days of employment*

....

12. GRADE ASSESSMENT CRITERIA

The following clause allows employees to be considered for a higher grade based on the following criteria. Forms for assessment can be found on the Intranet under Processing-Nelson Factory.

(a) Criteria:
   a. No previous service required.
   b. Employees who wish to be considered for appointment to the next grade up.
   c. Employees must be currently performing to a satisfactory level, in terms of their current grade in relation to:
      i. Attendance.
      ii. Can perform consistently under minimal supervision.
      iii. Possess the skills and knowledge to perform assigned work without Supervisor present.
      iv. Have the ability to or is already performing at least two other duties within their current grade.

v. Trains other staff as required by the Supervisor when seeking Grade 1 or higher

d. An employee who holds a merit payment at the time of seeking assessment shall not lose such as part of this process.

e. Note: It is accepted between the parties that in order to retain skills and expertise in a particular processing area, an employee may be considered for a higher grade despite not meeting all the multi-skilling criteria.

(b) Definitions

i. Attendance- No unreasonable unauthorised periods of absenteeism.

ii. Performing under minimal supervision – can be trusted and relied upon to carry out duties in a competent way.

iii. Performing two or more roles in their current grade roles or have the ability to – Supervisor can direct their staff to other roles as required.

iv. Can train other staff (isn't required to be a designated Trainer). Can induct and train new staff, operate with a buddy system.

(c) Assessment/recommendation for attainment:

i. If any employee considers themselves to be qualified for meeting the criteria, they can request an assessment by first approaching their Supervisor and Union Delegate and filling in the appropriate application form.

ii. The Supervisor will then commence the assessment process with a recommendation or explanation as to why the application was rejected.

iii. Where an application is rejected the employee will have the right to have that decision reviewed in accordance with the on-site mediated disputes procedures.

…

Origin of the dispute

[6] The Vickerman Street plant has two departments. One is the wet fish section, where whole fish are filleted, trimmed and packed. The other is the coated products section, where raw fish is turned into fish fingers and other crumbed products. Mrs Page initially worked for 6 years in the wet fish department. For the last 10 years and more, she has worked in the coated products section. Her principal role is cutting kirimi portions[3] but, from time to time, she does other work including kirimi portion alignment, packing of finished product and wet fish trimming.

[3] Kirimi is uncooked fish fillet cut into specific shapes and coated with bread crumbs.

[7] The origin and form of the dispute is not in issue and is largely summarised in three letters between the parties.[4]

[8] Mrs Page was graded 2K. On 10 December 2009, she applied for re-grading to grade 1. The application was decided by Kevin Sowman, Sealord's Coated Products Supervisor who, by a letter dated 16 December 2009, declined it in the following terms:

> 16 December 2009
>
> Kathleen Page
> (By Hand)
>
> Dear Kathleen,
>
> RE: Claim for Grade 1
>
> Thank you for your application for Grade 1 Assessment dated 10 December 2009. I have considered your application in accordance with the criteria set out in the CEA and, after discussion with you; my decision is set out below. You are currently on grade 2KM. Your application for Grade 1 was based on a claim that you perform a grade 1 duty and you are also capable of performing three duties in your current grade as follows:
>
> 1. Kirimi portion and Bar Bite portion cutter
> 2. Aligning - Kirimi
> 3. Wetfish - Trimmer
> 4. Packer
>
> To qualify as a grade 1 Kirimi portion cutter you are required to be able to cut a set volume (currently cutting an average of 170kg per day), however, you are currently not reaching this required threshold.
>
> To be recognised as a qualified grade 2 trimmer there is an expectation that you will be competent in the various trimming tasks, for example, headbone, fatline, defects and portion cutting. I acknowledge your competency in relation to trimming bloodspots; however you are not currently competently carry out the remaining tasks as you do not have the sufficient experience or skill level in the headbone, fatline or portion cutting trimming tasks.
>
> In relation to aligning skills, prescribed as a Grade 2 duty in the CEA. Kirimi aligning tasks are paid by way of an allowance; this is equivalent to the packing allowance payment of which you receive by way of "K" in your current grade.
>
> In regard to your 900ml line competencies, as a qualified 900ml line packer you are required to carry out a number of tasks, for example (however not limited to), grading and packing portions along with being able to operate

[4] These letters are set out in following paragraphs in their original form including layout and spelling.

> packet erectors and sealers. Currently you are not trained and unable to carry out all these tasks.
>
> In summary I do not consider that you meet the criteria in clause 12 of the CEA. I appreciate your application and your wish to be multi-skilled. I will meet with you in the New Year and we can discuss a development plan for me to assist you to meet the grade progression criteria.
>
> Yours sincerely
>
> SEALORD GROUP LIMITED
> Kevin Sowman
> Coated Products Supervisor

[9] There was subsequent discussion between Mrs Page, supported by officials of the Union, and members of management. In that discussion, it was suggested to Mrs Page that she could achieve progression to grade 1 through her kirimi portion cutting work if she averaged between 150 kg and 170 kg per day. She was given time to achieve that level of output but was unable to do so.

[10] Through its Assistant National Secretary, Neville Donaldson, the Union then sought a review of Mr Sowman's decision. Following discussion with management, Mr Donaldson set out the Union's submission in an email dated 20 April 2010:

> I am prepared to agree to disagree on the process and discussion to date and for the sake of getting this matter progressed I will restate the following for further consideration. This outline should not however be viewed as the argument in full and I reserve the right to present additional argument should the matter not be resolved at this level.
>
> The Basis of the claim is around the ability to perform two other duties within the grade currently held by Kathleen
> I say this on the basis that it is the only area of the assessment criteria challenged by the company to date.
>
> What must also be remembered is that all duties carried out under the terms of the CEA are a minimum grade 2 after 20 working days.
>
> So an employee performing some or all components of a particular duty where this is defined are performing a grade 2 duty after 20 working days service.
>
> The other issue we have is that a number of explanations presented by the company in relation to the skills or responsibilities required are that they have been unilaterally incorporated in to the skills necessary without any support or definition to support this in the terms of the collective, for example the definition of a packer outlined in the employer response.

We would also challenge the argument that you can't claim a duty you are requested to perform when it is recognized by way of an allowance payment.

Claim
Kathleen is employed in coated products and is required to perform a number of different duties within this department that in their own right have differing skill requirements.

These duties include but are not limited to
Krimi cutter
Aligner
Trimmer
Packer

All of these duties qualify as grade 2 but the positions of Krimi cutter and packer become grade 1 duties when an employee is fully qualified in that duty

I understand that Kathleen is normally in the top three for volume per day in her duty of Krimi cutter however this is not her permanent roll and therefore she does not average the 170kg necessary to qualify as a grade 1. There can be no doubt however she is a grade two minimum.

In her role as packer she performs all the tasks asked of her when she is allocated this duty, must be a minimum grade two.

In her role as trimmer she again performs all the tasks asked of her when requested to perform this role, must be a minimum grade two

The aligner position is clearly a separate duty as it is recognized as skilled and the equelivant to the duty of a packer which is confirmed in the wording providing for an additional payment when requested to perform this duty. Must be a grade two minimum.

If you then access the above then Kathleen hold the skills to perform 4 duties, all of which are a minimum of grade two, In addition having been employed for greater than 20 days any duty she performs must be a minimum of grade2.

Summary
Kathleen only needs to hold the skills to perform 3 grade two duties to qualify for the promotion to grade 1 rate of pay. It is therefore our contention that Kathleen meets if not exceeds this bench mark and must be up graded to grade one from the date of her application.

I await your response.

Regard's
Neville Donaldson
Assistant National Secretary
SFWU Nga Ringa Tota

[11] The response to this submission was given by Nick Romano, the Coated Production Manager for Sealord:

Re: Kathleen Page

Kirimi Cutting:

- We have reviewed Kathleen's grade application; we agree that she is able to cut Kirimi.
- Her current role is as a grade 2 Kirimi cutter by default in the CEA
- It is a grade 2 role as she is not cutting at an average g of 170kg per day.
- It is incorrect to say that she is in the top 3 as she is unable to make the 170 kg threshold.
- It is incorrect to say it is not her primary function to work as a Kirimi cutter.
- In the last 45 ordinary working days Kathleen has worked 32.5 of these on the Kirimi line.
- We have provided support to Kathleen in the past to reach the required volume to achieve the 170kg volume required for grade 1

Other Grade 2 duties:

- The CEA refers to qualified trimmer and qualified packer as grade 2 duties.
- It is reasonable for SLG to determine what qualified means in regard to its operations.
- We have consistently regarded a qualified packer on the 900ml line to have the following skills:

    1. Grading portions to specification
    2. Packing portions to specification
    3. Maintain a packet erector - feed the machine and clear blockages
    4. Maintain a sealer - clear blockages
    5. Pack inner cartons into outer cartons
    6. Float - supply staff with packaging and cover other staff
    7. Staff sales - weigh 2kg bags into 10kg boxes

- Kathleen is saying that she qualifies as qualified packer, the Coated Products packing line staff are required to rotate within all the duties of the operation each 15 minutes.
- We are unable to fully integrate Kathleen into this rotation as she is currently unable to perform all the duties required of a qualified Coated Products 900ml line packer.
- She has been given the opportunity to have the support to obtain these skills in the pastand has not met the required skill level.

Trimming:

- The basis of Kathleen's claim is not specific as to why she regards herself as a qualified trimmer.
- We assume the basis of her claim is that she has trimmed in the HS 2009.
- That isn't in our view a qualified trimmer. A qualified trimmer consistently regarded as someone who is able to cut more than one species.
- If you have more information we will consider it.
- There is no trimming role in Coated Products, however, she did work to a Wetfish cascade in the 2009 Hoki season.
- Kathleen to our knowledge can only trim hoki.

Should she wish to obtain more wetfish experience we would be able to facilitate this as part of a training plan.

Kirimi Aligning:

- We consider kirimi aligning as a General Hand duty as it is not referred to as a specific skill as per the CEA.

It is our intention to expand the opportunities of our employees and to support their ability to acquire multiple skills.

We do consider it timely to look at a training plan for Kathleen. We propose by way of resolution to develop a training plan to give her further opportunity and will do so as a priority.

- The intention of this clause was to recognise those staff that have multiple skills.
- It appears that if we exercised your suggested approach this would effectively entitle all staff to grade 1 classification more or less after their first 21 days of their employment and would not in effect produce a multi skilled workforce.

Principles of interpretation

[12] The principles of construction applicable to collective agreements are relatively well settled and are based on those applicable to contracts. In their submissions, both counsel relied on *Association of Staff in Tertiary Education Inc: ASTE Te Hau Takitini o Aotearoa v Hampton*[5] where Judge Colgan summarised the relevant principles:

> [19] Next, what is the correct approach? Agreements should be interpreted with reference to their factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question. The law has now moved on from the earlier position that such evidence was only admissible when the words of the agreement were ambiguous or unclear. Indeed, the current state of the law appears to be that in all cases such reference is possible and even desirable. The Court of Appeal has developed the following approach in contract cases. One looks first at the words used — they must obviously be the starting point — and then at the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words. This approach has been described as "cross-checking": *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789 (CA).
>
> [20] The Court is required to adopt an objective approach to interpretation and this has always been so. What matters is not what the parties say they actually intended the words to mean, but what a reasonable

[5] [2002] 1 ERNZ 491

> person in the field, knowing all the background, would take them to mean. So evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier drafts. That is because if such evidence was admissible, it would often, perhaps inevitably, be concluded that the parties disagreed. Second, the whole point is that a final written agreement supersedes the negotiations; positions may have changed in the course of negotiations and the final document is the agreed version which might involve a compromise of the respective parties' positions. Third, there is a sense in which an agreement takes on a life of its own, liable to be used and relied on by third persons who were not privy to the negotiations. That is particularly so in the case of employment agreements. Those other parties may include new employees, persons wishing to purchase a business whose operations are covered by an employment agreement and other employer/employee/unions in the same sector looking to settle their agreements.

[13] In addition to this passage, Mr Towner relied on paragraph [23] of the decision in which he emphasised the reference to an interpretation which is "in accord with business commonsense".

[14] Mr Towner also referred me to the decision of Judge Travis in *Hansells (NZ) v Ma*[6] where, in discussing the construction of collective agreements, he said:

> [23] It is the duty of the Court in construing contractual documents to discover and give effect to the real intention of the parties, ascertained from the factual matrix, the background, the object and purpose of the contract, viewed in an objective way: *A-G v Dreux Holdings Ltd* (1996) 7 TCLR 617 (CA). The interpretation of an agreement is not to be narrowly literal but must accord with business commonsense. If the words are clear and could have only one possible meaning that may be determinative: *Assn of Staff in Tertiary Education: Te Hau Takitini o Aotearoa v Hampton, Chief Executive of the Bay of Plenty Polytechnic* [2002] 1 ERNZ 491.
>
> [24] It is accepted by counsel that the words must be given their ordinary and grammatical meaning unless this would lead to an absurd or irrational result: *Sword v Telecom NZ Ltd* [1998] 3 ERNZ 1228, at p 1235.
>
> [25] There was no issue between counsel that the Court may, in appropriate cases, have regard to prior collective agreements to ascertain history of the clause under consideration, to obtain some guide to industry practice and to assist in the interpretation of the current collective agreement: *Assn of Staff in Tertiary Education v CEO, Unitec Institute of Technology* [2006] 1 ERNZ 37. Further, in *NZ Merchant Service Guild IUOW Inc v Interisland Line* [2003] 1 ERNZ 510 Judge Shaw stated:
>
> > "[19] To these general rules of contract interpretation is added the recognition that employment agreements are often the product of a history of instruments of varying sorts by which the parties have attempted to define their relationship. The result may be a document

[6] [2007] ERNZ 637.

> which is a mix of new provisions designed to meet changing statutory or industrial requirements grafted onto existing and long standing provisions. The agreement in this case is such a document. ”

[15] Mr Towner noted as well the acceptance by Judge Travis in that case of two other propositions. The first is that that the whole collective agreement is to be taken into account in ascertaining the meaning of any particular aspect of it. The second is that evidence of subsequent conduct may assist the Court in the interpretation of a collective agreement.

[16] None of these principles is controversial and I have regard to them in the approach I take. It seems to me, however, that the essential starting point was succinctly stated by Wilson J in *Vector Gas Ltd v Bay of Plenty Energy Ltd*,[7]:

> [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.

Issues and Discussion

[17] The broad issue before the Court is the interpretation, and application to the facts of this case, of the criterion for advancement under clause 12(a)c. of the collective agreement that the employee:

> Have the ability or is already performing at least two other duties within their current grade.

[18] The meaning of this provision must be decided by applying the principles of construction referred to above.

[19] The parties were agreed, and I accept, that the overall purpose of clause 12 was to encourage multi-skilling by providing a financial reward to employees who were able to perform more than one role. In a seasonal industry, such as fish processing, this is of particular value to the employer as it enables temporary demand for particular skills to be met more economically. It also benefits employees

[7] [2010] 2 NZLR 444.

who are able to switch to alternative work and maintain their hours when there is reduced need for their primary role.

[20] The criteria for advancement on the basis of multi-skilling were set out in paragraph 12(a). The focus in this case is on sub-paragraph c. which requires that the employee "have the ability to or is already performing at least two other duties within their current grade." That requirement is apparently defined in clause 12(b)(iii):

> iii. Performing two or more roles in their current grade roles or have the ability to – Supervisor can direct their staff to other roles as required.

[21] I say "apparently" defined because the criterion refers to "duties" whereas the definition refers to "roles". In normal usage, these words are not synonymous. A role usually comprises a number of duties. In the context of this agreement, however, there can be no doubt that this particular definition was intended to explain that particular criterion and the words "duties" and "roles" in those provisions of the collective agreement must be regarded as having the same meaning. This is the way both parties framed their submissions and I proceed on that basis. It was also common ground, and I agree, that the words "duties" and "roles" must be taken to include "jobs" referred to in clause 11.

[22] There was no dispute between the parties that the requirement in clause 12(a)c. that the employee be able to perform two "other duties" meant two duties or roles in addition to the employee's primary role. I agree with that construction which effectively meant that, to satisfy the criteria for advancement, Mrs Page had to be able to perform to the required standard at least three roles at grade 2 level.

[23] It was common ground that Mrs Page's primary role was as a kirimi portion cutter. She was competent in that role but not to the level of output required for grade 1K. Kirimi portion cutting is not specifically provided for as a grade 2 role in clause 11 but both Mr Sowman and Mr Romano gave evidence that they saw it as a grade 2 role and that, because it involved the use of a knife, it was properly regarded as grade 2K. That was a sensible assessment, consistent with the purpose and structure of the grading system.

[24] Mr Sowman and Mr Romano also acknowledged that Mrs Page was performing the role of general hand at a grade 2 level. That included her regular work aligning kirimi portions. Again, that assessment was not questioned by the plaintiffs and I accept it. Specifically, Mr Sowman said in his evidence in chief:

> 8. I was very familiar with Kathleen and her work, and I had all the information necessary to make a decision on her application. I assessed Kathleen as currently performing two roles in Grade 2, Kirimi cutter and General Hand.

[25] Mr Romano said in his evidence in chief:

> 23. After reviewing all the materials, I came to the conclusion that Kevin Sowman had been right to decline Kathleen's application. While Kathleen is currently performing two of the roles in grade 2, (Kirimi cutter and General Hand), she does not have the skills across a total of three roles or duties that she would need to qualify for grade 1k. Specifically she does not perform or have the ability to perform all the tasks of a Qualified Packer or a Qualified Trimmer.

[26] Accepting that evidence, the issue becomes whether Mrs Page was performing or able to perform at least one other role at a grade 2 level. She advanced her case on the basis that she was sufficiently competent as both a trimmer and as a packer. Those are specific jobs included in grade 2K as "qualified trimmer" and "qualified packer".

[27] Against this background, counsel focussed much of their submissions on the meaning of the word "qualified" in the context of the expressions "qualified trimmer" and "qualified packer". Those terms are not defined in the collective agreement, nor are the specific tasks associated with them set out. Their meaning can only be decided by reference to other aspects of the agreement and the business to which the agreement applies.

[28] The case for Sealord was that a worker is only "qualified" to carry out a particular role when that person has the skills and experience to perform all tasks associated with the role accurately and at the speed required to keep up with production lines. This was the effect of the evidence given by Mr Sowman and Mr Romano and was the basis on which they both concluded that Mrs Page was neither a qualified trimmer nor a qualified packer.

[29] As to trimming, the evidence was that staff in the coated products section usually spent several weeks trimming wet fish during the height of the hoki season. Although Mr Towner amended the statement of defence in the course of the hearing to deny that Mrs Page was skilled and experienced in trimming any species of fish, both Mr Sowman and Mr Romano accepted that she was experienced in trimming hoki. That was consistent with the letters they wrote at the time and I find as a fact that Mrs Page was a capable hoki trimmer. Having made that concession, both Mr Sowman and Mr Romano relied on their perception that Mrs Page had very little experience in trimming other species of fish. They said that trimming was a function very largely carried out in the wet fish part of the plant where it was necessary to be able to trim at least three, or in Mr Romano's evidence, five species to be regarded as a "qualified trimmer".

[30] Turning to packing, the evidence was that work on the packing lines in the coated products section usually involved at least five different tasks for any one product and up to 12 different tasks across the range of products. At the time in question in this case, those tasks included operating two machines known as the erector and the sealer. The erector folded flat cardboard blanks into boxes. The sealer closed and sealed the boxes after product had been put into them. The erector needed to be kept filled with cardboard blanks. The sealer had to be cleared and restarted if it jammed. The evidence was that Mrs Page was not competent in either of these tasks but satisfactorily performed all of the other tasks involved with packing. In rejecting Mrs Page's claim that she was a qualified packer, Mr Sowman and Mr Romano said that a packer could not be regarded as "qualified" unless he or she could perform all of the tasks competently, including operating the erector and the sealer.

[31] Although Mr Sowman and Mr Romano expressed their views confidently and consistently, they could not point to anything in the collective agreement or in any other agreed document which supported their view. Rather, they relied on their lengthy experience of working in the plant to say that this was always their understanding of what the terms used in the collective agreement meant in practice.

[32] In his submissions, Mr Towner accepted that the expressions "qualified trimmer" and "qualified packer" were not defined in the collective agreement either by description or by the tasks associated with those roles. He submitted that the terms were "to be construed from the factual matrix, background and object and purpose of the agreement." He also submitted that their meaning "must accord with business common sense." On this basis, he submitted that the terms should be interpreted as requiring competence in all of the tasks expected by Sealord through Mr Sowman and Mr Romano.

[33] Mr Oldfield criticised this approach as being "subjective". He submitted:

> The parties have agreed on a wage matrix that sets out particular remuneration for particular jobs within the collective agreement. It is not open to the defendant to determine the content of those jobs any more than it is open to the first plaintiff to determine the content of those jobs. That would defeat the purpose of agreeing on wage rates for those particular jobs.

[34] With respect, that misunderstood the basis of Sealord's case. The evidence of Mr Sowman and Mr Romano about the tasks involved in each position was not simply what they thought the relevant provisions of the collective agreement ought to mean but rather the meaning they perceived those provisions had been given in practice. That can be a legitimate aid to interpretation. Mr Oldfield was right, however, to criticise Mr Towner's submission that the parties' use of the word "assessment" in clause 12 conferred on Sealord a prerogative to decide what the criteria for advancement were. The criteria for advancement were set out in clause 12(a) and there is nothing in the collective agreement to suggest that either party was entitled to unilaterally decide what those criteria meant. That must be determined objectively.

[35] For the plaintiffs, Mr Oldfield's primary submission was that the key aid to interpretation of clause 12(a)(c)(iv) lay in the definition in clause 12(b). The evidence was that, although Mrs Page was primarily employed as a kirimi portion cutter, she was directed from time to time by her supervisor to do trimming and packing work. Mr Oldfield submitted that she would not be directed to do this work unless she was qualified to do it and that a specific definition of "qualified trimmer"

and “qualified packer” was therefore not required. It was enough, he suggested, that she was directed to do this work by her supervisor.

[36] I do not accept that submission. While it is superficially attractive, it overlooks the reality that being a “qualified trimmer” or “qualified packer” must include the ability to perform multiple tasks required of that role. The logical extension of this submission would be that every employee who performed a single packing task must be regarded under the agreement as a “qualified packer” and every employee who was directed to perform a task associated with trimming would be a “qualified trimmer”. That would deprive the word “qualified” of any meaning and cannot have been the parties’ intention.

[37] This submission also overlooks the requirement of the definition that the staff member can be directed to perform another role “as required”. The only sensible meaning to be given to those words “as required” is that the supervisor must be able to direct the employee to perform the other role in the manner necessary to meet staffing needs. That must mean that the supervisor is able to direct the employee to perform all or any part of the other role. In order to ascertain whether that definition was satisfied, therefore, it is necessary to consider what the scope of each role was.

[38] The overall structure of the grading system in clause 11 of the collective agreement provided for three broad grades but grade 3 was a transitory classification for new workers who, by definition, had to progress to grade 2 after 20 days of employment. That means there were only two grades applicable to most staff; 1 and 2. As the collective agreement applied across both the wet fish and the coated products parts of the plant, the meaning given to each of the jobs specified had to be appropriate to both divisions.

[39] Trimmers were provided for in both grades 1K and 2K. Packers were provided for in grades 1 and 2K. As Mr Romano fairly conceded in his evidence, the threshold of skill and experience required to qualify as a grade 2K trimmer or packer must be significantly lower than that for grade 1. Otherwise there would be no point in having two grades.

[40] A major difference in the description of the trimming and packing roles was that an employee only qualified in grade 1 after 10 months' experience. Grade 2 had no requirement for experience. This suggests a scheme within the grading system whereby employees came within grade 2K on the basis of their skills and that they then progressed to grade 1 on the basis of their experience.

[41] Some aspects of the role descriptions were consistent with this analysis. The use of the word "qualified" in the grade 2K descriptions clearly suggests achievement of a standard, the most sensible standard being the ability to carry out all tasks associated with the position without supervision. Grade 1 included "Designated qualified packer with more than 10 months experience." The use of the word "designated" suggests recognition by Sealord that the worker was a qualified packer. The description of the role then required that the employee have 10 months' experience after being recognised as a qualified packer.

[42] On the other hand, the description of a grade 1K trimmer was, to an extent, inconsistent with that scheme. It referred to "Trimmer with more than 10 months filleting experience (provided they are competent with Hoki, Orange Roughy and Dory)". In normal usage, a trimmer is not the same as a filleter. Also, as Mr Oldfield observed, if it was necessary to be competent in trimming all three species to be a "qualified trimmer", that requirement would not have been specified for grade 1K.

[43] Mr Oldfield submitted that another indicator of the meaning of "qualified packer" was the fact that Sealord paid Mrs Page a packing allowance even though she was unable to competently perform two of the tasks associated with the packing role. He suggested that it does not make sense to say that Mrs Page was not qualified to be a packer when she was performing packing work and being paid a packing allowance for doing so.

[44] The answer to this submission lies in paragraphs (l) and (m) of clause 14 of the collective agreement which provided for packing and knife handling allowances:

> (l) A packing allowance shall be paid to packers who are required to identify product / boxes with their individual code/signature and do identify with their code/signature. These packers shall be paid in

> accordance with the knife handling pay matrices in Appendix A. All other packers shall also receive a packing allowance to be paid in accordance with the knife handling pay matrices in Appendix A. Once the new classification system is in place and each packer has been assessed, (and their pay adjusted if necessary) or has been offered the opportunity to be assessed, and has not taken the opportunity, the packing allowance shall no longer apply.
>
> (m) A knife allowance shall be paid to employees required to use a knife. This is reflected in the K matrices in Appendix A.

[45] As Mr Romano explained in his evidence, the effect of these provisions is that all staff either engaged in packing or working with a knife were paid an identical allowance which was shown in the pay schedules as a knife handling allowance. These provisions made no distinction in the allowance to be paid to "qualified packers" and packers who are not "qualified". It therefore assists little in deciding what the expression "qualified packer" meant.

[46] Mr Oldfield noted that the collective agreement did not explicitly provide for an "unqualified trimmer" or an "unqualified packer". He submitted that the inference to be drawn from this is that, whenever Mrs Page was directed to perform trimming or packing tasks, she could only do so as a "qualified trimmer" or "qualified packer". This was really a variation on Mr Oldfield's primary submission and I reject it for the same reasons. To take this approach would be to deprive the word "qualified" of any meaning and cannot have been the parties' intention.

[47] Evidence was given of the collective agreement subsequent to that with which this case is concerned. It provided more detailed definitions of trimmer and packer jobs. I accept Mr Oldfield's submission that a subsequent agreement generally provides no help in interpreting a previous agreement and that, in this case, the content of the 2009 2011 agreement does not assist either party.

[48] Having regard to all of the evidence and counsel's submissions, I find that the parties' intention was to create a grading system where qualification for grade 2K was based on skills and qualification for grade 1 or 1K was based on experience when skilled. There are aspects of the collective agreement which are inconsistent with that conclusion but it provides the best overall fit with the agreement as a whole. It also accords with business common sense. Applying this interpretation, I

find that an employee had to be competent in all necessary aspects of a role before he or she could be regarded as "qualified".

[49] It follows that Mrs Page was not a "qualified packer" as she did not have the required skills in handling the erector or the sealer.

[50] I also conclude that Mrs Page was not a "qualified trimmer" as that term is used in clause 11(b) of the collective agreement. The agreement applied equally to employees working in all parts of the Vickerman Street plant. The terms used must therefore have had a single meaning appropriate to both wet fish section staff and coated products section staff. The evidence was that a range of species were routinely processed in the wet fish department and I am satisfied that the parties cannot have intended that an employee would be regarded as a "qualified trimmer" unless he or she was competent in trimming several species. Mrs Page was not.

[51] Those conclusions, however, do not necessarily decide this case. The ultimate question is whether Mr Sowman and Mr Romano were correct to reject Mrs Page's application for advancement on the grounds they did. In terms of clause 12(a)c. that turns on whether they were correct to conclude that she was not performing or able to perform at least two other duties within her current grade. That in turn, must be assessed in light of the definition in clause 12(b)(iii) that this means her supervisor could direct her to other roles as required.

[52] The position is clear in relation to packing. The packing line in the coated products section included erector and sealer machines on which Mrs Page was not fully competent. It follows that, in terms of clause 12(b)(iii), her supervisor could not direct her to perform those tasks "as required". Mr Sowman and Mr Romano were justified in concluding that Mrs Page did not meet the criteria for advancement in this regard.

[53] The position regarding trimming is different. Although Mr Romano was clear in his general view that a trimmer should be able to trim several species of fish to be "qualified", he agreed that workers in the coated products section only ever trimmed hoki. Mrs Page was employed in the coated products section. The

evidence was that workers from that section were required to work in the wet fish section for a brief period in 2009 but that this was a rare occurrence. The logical conclusion is that, other than in exceptional cases, the only trimming work Mrs Page would ever be directed to do would be trimming hoki. Relating that back to the definition in clause 12(b)(iii), the only work which she might be required by her supervisor to do would be trimming hoki. That was work she was competent to do.

[54] On the issue of Mrs Page's ability as a trimmer, I find that Mr Sowman and Mr Romano erred in concluding that she did not meet the criteria for advancement. Although she may not have met the general criteria for recognition as a "qualified trimmer" under clause 11(b) of the collective agreement, she was able to perform that role to the extent required to meet the criteria in clause 12(a) for advancement on the basis of multi-skilling.

[55] It follows that, on the evidence adduced before the Court, Mrs Page did satisfy the criteria in clause 12(a) of the collective agreement for advancement to grade 1.

Remedies

[56] In the statement of claim, the remedies sought were:

> 17. A judgment that the second plaintiff has the ability to or is already performing the duties of a grade 2K qualified trimmer and qualified packer under the CA.
>
> 18. A judgment that the duties of a grade 2K qualified packer under the CA do not include operating a packet erector and sealer.
>
> 19. A judgment that the duties of a grade 2K qualified trimmer under the CA do not include having to trim all of the three main fish species.
>
> 20. An order that the second plaintiff is entitled to be regraded to grade 1 under cl 12 of the CA from the date of the application for regrading; or an order requiring the defendant to reassess the second plaintiff under cl 12 of the CA from the date of the application for regrading.
>
> 21. Costs

[57] Having regard to the conclusions I have reached and the reasons for them, there is no basis to grant any of the relief sought in the first three paragraphs above. Rather, I have found:

(a) Mrs Page was not performing or able to perform the role of qualified packer or qualified trimmer as those jobs are provided for in clause 11(b) of the collective agreement.

(b) The duties of a grade 2K qualified packer included operation of the erector and sealer machines.

(c) The duties of a grade 2K qualified trimmer included the ability to trim multiple species of fish.

[58] Mr Towner made submissions about the relief sought in the fourth paragraph above. He noted that clause 12 of the collective agreement did not give employees a right to be regraded if they satisfied the multi-skilling criteria. Rather, they were entitled to have an application for regrading fairly assessed by their employer. He submitted that, in enforcing Mrs Page's rights under the agreement, the Court could do no more than require Sealord to reassess her claim for regrading according to the construction of the collective agreement decided by the Court.

[59] In support of this submission, Mr Towner referred me to the decision in *Ruddlestone v Unisys New Zealand Limited*[8]. In that case, Judge Shaw found that the employer had failed to properly interpret and apply terms of the applicable employment agreement by failing to increase the plaintiffs' salaries. When considering what remedies were appropriate, she felt constrained by s 161(2) of the Employment Relations Act 2000 which expressly excludes fixing terms of employment from the jurisdiction of the Authority and, by implication in a challenge, from the jurisdiction of the Court. The nature and extent of that constraint were considered by the Court of Appeal in *Canterbury Spinners Limited v Vaughan.*[9] In the circumstances of the *Ruddlestone* case, Judge Shaw concluded that the salaries to be paid were ultimately a matter for the employer to decide provided that it was done in accordance with the construction of the employment agreement as decided by the Court.

[60] I accept that the essential principles which guided Judge Shaw's decision in that case should also guide me in this case. The decision about whether Mrs Page

[8] [2004] 2 ERNZ 163.
[9] [2002] 1 ERNZ 255.

should be on a higher grade is one to be made by Sealord. That decision, however, must be made in accordance with the proper construction of the collective agreement as I have found it to be in this judgment. That should include my conclusion that, by including the detailed criteria for advancement in clause 12, the parties intended that the natural consequence of an employee satisfying those criteria would be an advance in grading. The decision is to be made on the basis of the situation as it existed in December 2009 when Mrs Page's application for advancement was made and the result applied from 16 December 2009, being the date of Mr Sowman's original decision.

Decision

[61] In summary, my decision is:

(a) The challenge is successful.

(b) Sealord erred in concluding that Mrs Page did not meet the criteria for advancement in clause 12 of the collective agreement.

(c) Sealord must reconsider Mrs Page's application for a higher grade made on 10 December 2009.

(d) That reconsideration must be undertaken on the basis of the situation as it was in December 2009 and the result applied with effect from 16 December 2009.

(e) In making that reconsideration, Sealord must apply the construction of the collective agreement decided in this judgment.

[62] If any issues arise about implementation of this decision, leave is reserved to apply for further directions.

Costs

[63] Although the challenge has been successful for Mrs Page personally, the Union has been unable to persuade the Court to make any of the specific declarations about the meaning of the collective agreement sought by way of relief. Assuming that Mrs Page's costs of representation have been met by the Union, my initial

inclination is that there should be no order for costs. If any party wishes to seek an order for costs, however, I will certainly entertain it. In that event, a memorandum should be filed and served within 25 working days after the date of this judgment. Other parties will then have a further 20 working days in which to respond.

A A Couch
Judge

Signed at 12.30pm on 10 December 2012.