IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 89
ARC 74/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NZ DAIRY WORKERS UNION TE RUNANGA WAI U INCORPORATED Plaintiff
AND	FONTERRA BRANDS (NEW ZEALAND) LIMITED Defendant

Hearing: 8 and 9 May 2013
(Heard at Auckland)

Counsel: Ms H White, counsel for plaintiff
Ms S J Turner and Ms B A Heenan, counsel for defendant

Judgment: 23 May 2013

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] This matter has come before the Court as a challenge to the determination of the Employment Relations Authority[1] at Auckland (the Authority) dated 12 October 2012. It proceeded by way of a hearing de novo.

[2] The dispute relates to the interpretation of a clause in the collective employment agreement (cea) applying between the parties. As the evidence disclosed, the workers affected by the dispute are employed on various duties at the food manufacturing plant operated by the defendant (Fonterra). The clause in the

[1] [2012] NZERA Auckland 359.

cea deals with the process to be applied by Fonterra for roster and shift changes and how that process is to be implemented.

[3] The clause in question is cl 3.6.1.2 of the cea for the period 1 November 2010 until 31 October 2013.

[4] Prior to Fonterra applying this particular clause in the cea in the present circumstances its proposed roster and shift change had failed to pass through a ballot process by the members of the plaintiff union (the Union). This ballot process is contained in the immediately preceding clause in the cea (3.6.1.1). That clause required Fonterra's proposals for the change in roster and shift patterns to be subject to a ballot conducted by the Union with the affected work group. For the changes to be brought in without the parties having to proceed under the disputed clause 3.6.1.2 the ballot required acceptance by 66 percent of the work group. In this instance it failed to achieve that margin of acceptance.

Collective employment agreement clauses

[5] I set out the two sub-clauses from the cea in their entirety (cl 3.6.1.2 as it appears in the cea contains several enumeration and format errors I have corrected) as follows:

> **3.6.1.1 Changing Roster and Shift Patterns**
>
> (a) A proposal, in writing, will be made available to all employees within the affected workgroup(s).
>
> (b) The proposal must show/detail:
>
> i. The workgroups covered by the proposal
>
> ii. Hours of work, inclusive of start and finish times
>
> iii. Smoko and meal time intervals
>
> iv. All payments applicable within this agreement
>
> (c) Adequate time will be made for employees and the union to consult on this proposal.
>
> (d) The Union will conduct a ballot, as per Union Rules, with the affected workgroup on the basis that a proposal will be accepted by the workgroup if accepted by a majority of 66% of the workgroup.
>
> (e) An accepted proposal shall be forwarded to the Site Delegate and the Union Organiser to be signed off as the accepted Roster Agreement.

(f) A Company representative must also sign the accepted Roster Agreement.

(g) If a variation to the CEA is required it will be dealt with as per the variation clause.

(h) Where a roster or shift change proposal does not achieve acceptance by the affected workgroup and the company identifies that the roster change is still required, 3.6.1.2. will apply.

3.6.1.2 Roster and Shift Change process

If a roster or shift pattern change proposed by the company does not receive acceptance from the affected workers and 3.6.1.1(h) is applied, the process below will be followed where the change is identified as a significant change (defined in 3.6.1.2(f)):

a.) The Company will continue to consult with the Union and affected employees as per 3.6.1.1(a), (b) and (c) above to understand any concerns associated with the proposal;

b.) Having discussed the proposal further with employees and the Union, the Company will call for volunteers to transfer to the new roster, then;

c.) The process below will be followed (in the order specified) for any employees who have not volunteered to move onto the new roster:

i. If operationally possible, the workers remain in their current position on their current roster. If this is not practicable then:

ii. Begin a 3 month trial in their current role on the new roster pattern (exceptions may be granted by agreement under exceptional circumstances). This will not involve any loss of pay.

Then

iii. At the end of the 3 month trial period, in consultation with the worker, one of the following options will be agreed:

(a) Confirm the move onto the new roster pattern;

(b) Redeployment as per Clause **6.2**;

(c) if (a) or (b) are not agreed and the worker cannot be returned to their pre-trial position and roster, the worker may choose to be made redundant in accordance with Clause **6.4**

d.) In any case when 3.6.1.2 applies, the Company may hire new workers to work the proposed New Roster.

e.) If there is a change in pay in c)iii(a) or (b) then the buyout under **6.2.3** will apply.

f.) Definition of Significant Roster Change

> For the purpose of this clause significant change is defined as any one of the following:
>
> i) Change from Weekday roster to Weekend roster
>
> ii) Any loss of earnings (exclusive of overtime)
>
> iii) Any change in days off in combination with ordinary hours per day
>
> iv) Or any change to a rostered shift combination (e.g. 4 days on, 4 days off, 4 nights on to 2 days on, 2 nights on, 4 days off).

Factual summary

[6] Following the failed ballot under clause 3.6.1.1, a group of employees in the food manufacturing plant then came under the process provided for in cl 3.6.1.2. Fonterra consulted with the Union and presumably then called for volunteers to transfer to the new roster. Insofar as workers remaining in their current positions and on their current roster were concerned it was determined that this was not operationally possible and therefore not practicable. The affected employees then began the three month trial in their current roles but on the new roster pattern. At the end of the three month period some of the workers confirmed an election to move onto the new roster pattern while others elected redeployment in alternative roles as filler and packer operators. A small group of employees are not prepared to agree to either working on the new roster pattern or accepting redeployment and wish to leave the employment and receive their entitlement under the cea to the equivalent of redundancy compensation. It is in respect of these few employees that the present dispute arises, although it has wider ramifications if Fonterra wishes to introduce roster and shift changes for employees in other parts of its business.

Nature of the dispute

[7] The primary dispute between the parties relates to the interpretation and therefore application of the third step in the process once the trial period is complete. No dispute arises if a worker elects to remain on the new roster pattern following the trial. It is accepted that none of the workers involved can be returned to their pre-trial position and roster. Despite this, in view of the dispute, those workers

remaining affected by the dispute are temporarily working on their previous rosters and shifts pending resolution.

[8] Each of the parties called evidence as to the bargaining process, which preceded the insertion of cl 3.6.1.2 into the cea. The witnesses gave evidence as to their intentions as to the clause and their perceptions as to its meaning. One thing of note and providing some information as to the interpretation of the present clause is the comparable clause, which existed in the previous cea applying for the period 1 November 2008 until 31 October 2010. That is also cl 3.6. It is headed: "Rosters". Under cl 3.6 in that cea and its sub-clauses, the same ballot process was to be adopted for any proposed change in roster and shift patterns. If the required margin of acceptance was not reached, Fonterra was able to go through a similar process to the present clause although it did not include the three month trial. After calling for suitable volunteers, workers who did not volunteer were able to remain on their current roster or be redeployed or declared redundant, but only as Fonterra may have decided in consultation with the Union. The fact that under the new cea cl 3.6.1.2 c.)(iii)(c) the worker is now given the final right to choose to be made redundant gives some insight into an interpretation of the new clause when compared with the previous clause.

[9] Under both ceas Fonterra was given the right to hire new workers. The two agreements have differing although similar provisions as to the nature and periods of rosters and shifts pattern changes, which may be proposed.

[10] Fonterra submitted that, because in cl 3.6.1.2 c.) the words "(in the order specified)" are inserted, a process of sequential application throughout the process prescribed in the entire clause is required. This, it submitted, means that if a worker, having passed through the three month trial process, does not agree to move to the new roster then the worker must agree to actually trial a redeployment option before being in the position to choose the final option of redundancy. That submission had been earlier upheld by the Authority's determination.

[11] The Union disagreed with this interpretation. It submitted that if a worker is compelled to trial the redeployment option and go through that process as prescribed

by cl 6.2 of the cea, it would only be in rare cases that a final redundancy option would ever become available to the worker. Such an affected worker would have effectively given up a previous position with acceptable roster and shift patterns and in a situation where a majority of workers had not agreed to such an outcome being imposed. This, it submitted, would abrogate the rights of the workers under the clause.

[12] Two witnesses gave evidence for Fonterra. The first was Helen Blair who was, at the time of the negotiations for the cea, Human Resources Manager Operations. The second was Brian How who was, at the time of the negotiations, Strategic Projects Manager. Both represented the company in the negotiations. They each gave evidence of their specific understanding of the clause in question in this dispute.

[13] Ms Blair, on the contentious issue of whether the employees affected had to go through the redeployment option as part of the sequential process, stated:

> 17. The next step in the process that was negotiated was redeployment. I accept that the Dairy Workers Union, and I recall it may have been Mark Apiata-Wade, did say that he wanted his members to have a choice to be made redundant. Brands did not agree with this. We consistently held the position we did not want to make employees, or let employees choose to be, redundant. It was integral to our position that this was about greater flexibility for change, not letting people go. We thought we were in a growth phase so we wanted to keep our employees to meet those needs.
>
> ...
>
> 21. The third and final step in the process is that once the redeployment obligations in clause 6.2 have been exhausted, then redundancy can be considered as per the provisions set out in clause 6.4 of the 2010 CEA.
>
> ...
>
> 23. The purpose and intent of the clause was to exhaust all possibilities and if you could not find an employee something that matched their skills or with some retraining they could not do something else, then in that unfortunate situation, where it was not possible to find them anything else, they were made redundant as a last resort.

[14] Mr How corroborated Ms Blair's evidence as to her understanding of the meaning of the clauses. At paragraphs 26 and 27 of his brief he stated:

> 26. The wording that was included in the 2010 CEA is clear to me. We never put in the wording put up by the Dairy Workers Union. The clause seems perfectly clear to me and under it an employee does not have the right to "choose redundancy" until after the redeployment process in clause 6.2 has been followed (ABD-12).
>
> 27. Having been at the negotiations, the meaning of clause 3.6.1.2 of the 2010 CEA is that where there are employees who have not volunteered or do not wish to move to a new roster then, if operationally possible, those employees remain in their current position on their current roster. If that is not possible, the employees can have a 3 month trial on the new roster pattern and then following that 3 month trial period the 2010 CEA requires the following to occur in the following order:
>
> (a) confirmation of the employees move to the new roster pattern;
>
> (b) redeployment of the employee is considered under clause 6.2 of the 2010 CEA;
>
> (c) if an employee cannot be redeployed following the requirements of clause 6.2 then, as a last resort, the redundancy parts of the CEA kick in.

[15] This evidence was directly contradicted by the witnesses called for the plaintiff union, Mark Apiata-Wade and Richard Everson. Both are union organisers and were the union's representatives during negotiations. On the contentious issue, Mr Everson stated at paragraphs 17-21 of his brief as follows:

> 17. Clause 6.4 is the compensation provision and that is all that was intended to be referred to. It is intended to give access to the redundancy compensation formula only.
>
> 18. In a normal restructure, redeployment can occur more than once before redundancy compensation is offered. Here the intention was that compensation was an extra choice these particular workers got if they did not agree to the new roster or redeployment.
>
> 19. The individual's right to opt for redundancy compensation if the individual did not agree to work the new roster pattern or be redeployed, after the trial, was enough of a sweetener that the workers agreed to the new clause. It was an additional option given to these workers and so it never occurred to me that it was in conflict with the provision obliging use of [every] endeavour to redeploy workers. I understood and continue to believe the wording means the employer still had to and has to generate this option if it can. What has been agreed here allowed the defendant to do something it

> otherwise could not do in exchange for an additional option. This was in accordance with my understanding of the agreement made.
>
> 20. What surprised me was the insistence by the defendant that it could redeploy these workers to other roles and not offer them the choice promised specifically in the clause of redundancy compensation. I was really taken aback as it was completely contrary to the deal done at negotiations. It was our mutual intention and I had sold it [to] the workers in this way at ratification.
>
> 21. The individual worker needs to agree to move to the new roster or be redeployed. If they don't agree the clause clearly states they may choose to access the redundancy compensation provision. To read this clause the way the Authority and the defendant has takes [away] that choice.

[16] Mr Apiata-Wade, whose evidence was specifically in reply, stated:

> 19. My understanding is the employer started the process here and the workers have all participated in the second step; the trial period on the new roster and then been returned to the original roster.
>
> 20. Immediately after the trial the workers should have individually been given the options (a), (b) and (c). But there was a dispute over whether such workers were able to do so. I accept that redeployment options should be explored and any such option put to the affected workers but I disagree that if such options can be generated they loose the right to choose redundancy compensation as per clause 6.4.
>
> 21. My understanding is in this case after the trial 4 workers indicated that if given the options they would have chosen to go to the new roster, only 4 wanted redeployment and 4 wanted redundancy.
>
> 22. In this case where the employer was given the right to alter the roster workers who have trialled the new roster were consciously given a choice. Those words are plain.
>
> 23. I understand the workers are being offered grandfathered terms in a lower grade job on the same roster. If the 4 workers who indicated they do not want to go to this new position or the new roster are obliged go to the new position they will be denied the choice contained in option (c) and option (c) is meaningless.

[17] As can be seen from these exchanges the parties have quite different perceptions as to the effect of the clauses inserted in the cea during the bargaining process. I consider the Union is correct in its analysis of the effect of cl 6.2 of the cea. Redeployment and redundancy are covered by the same overall clause in the cea (cl 6). The redeployment options include either alternative upgraded positions, with limited option for redundancy, or lower graded or alternative positions on another site. With an upgraded position it is the case that the option of redundancy is

then limited. Lower graded positions also involve a cash buyout. I am unclear whether the redeployment in the filler and packer operator position offered in this case involved up-graded or lower-graded employment. The suggestion during evidence was that some status and position was affected and that terms and conditions were to be ‘grandfathered’, but I did not hear any evidence as to cash buyouts.

[18] What the Union submitted as to the meaning of the clause, therefore, is that while a sequential process is to be followed through cl 6.3.1.2 c.)(i), (ii) and (iii) once the three month trial is completed the three choices then remain, two of which require agreement between Fonterra and the workers. First, Fonterra and a worker may agree that the worker will remain on the new roster pattern. Or secondly, Fonterra and a worker may agree the worker will try the redeployment option. Or, finally, Fonterra and the worker having failed to agree to either of those previous options, the worker may then choose to be made redundant. While clause (iii) uses the words: “one of the following options will be agreed”, it is clear that logically (c) is not an option requiring agreement between Fonterra and the worker. It covers the situation where there is no agreement and to resolve the matter finally the worker has a clear choice to select the redundancy compensation. Clause 6.4 is not the sole clause dealing with redundancy (it is also covered by clause 6.3) but deals with the calculation of compensation. In addition this process of change to roster and shift patterns does not, in fact, give rise to a true redundancy as that is defined in cl 6.3.1 of the cea or as generally understood in employment law. However, if the choice of being made redundant is selected, then cl 6.4 of the cea comes into play, but merely for the purposes of providing the basis for the calculation of compensation to be paid to the worker who chooses that option.

[19] This interpretation, Ms White for the Union submitted, is a logical analysis of the plain meaning of the words of the clause. Ms Turner, for Fonterra, however, referred me to authorities dealing with the adoption of extrinsic material as an aid to interpretation of commercial contracts.[2] She submitted that the Union’s interpretation of the final options is not correct. Reference was particularly made to

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[2] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] ERNZ 317.

partly typed and partly handwritten documents passing between the parties during the negotiations, produced at the hearing and allegedly showing that Fonterra was not prepared to agree to the procedure, which the Union now argues applies.

[20] Care must be taken as to the extent to which such extrinsic material is used to modify what, in all respects, appears to be clear language contained in the employment contract. Ms White, in her submissions, referred to this in the context of the ratification process where individual workers not present at negotiations rely on the plain meaning of the words in the contract when ratifying it under the approved processes provided in the Employment Relations Act 2000. This was alluded to in an authority referred to by Ms White: *Association of Staff in Tertiary Education Inc: ASTE Te Hau Takitini o Aotearoa v Hampton, Chief Executive of the Bay of Plenty Polytechnic.*[3] In that decision Judge Colgan stated:

> [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 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.

[21] Ms Turner referred to the decision of *Service and Food Workers Union Nga Ringa Tota v Sealord Group Ltd and Page*[4] which in turn applied the following statement from *Vector Gas* to establish a general principle in interpretation of employment contracts:[5]

> [199] The general principle is that the words of an enforceable commercial contract should be given their ordinary meaning in the context of the

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[3] [2002] 1 ERNZ 491.
[4] [2012] NZEmpC 211.
[5] At [16].

> contract in which they appear, because the parties are presumed to have intended the words to be given that meaning.

Analysis

[22] I am not satisfied that it is necessary to go beyond the words of the clause. This case does not involve the type of issues considered, for example, in *Vector Gas* and *Silver Fern Farms.* It is not necessary in this case to deal with extrinsic material. It would, in the context of the bargaining for the cea which preceded it, be inappropriate to do so. As stated in *ASTE* one feature which always needs to be taken into account in this context is the likelihood that in the entire process of bargaining for the collective agreement, other conditions may have been fought for and conceded as part of the overall settlement of terms and conditions. As I have indicated earlier, in addition the members have ratified the agreement on the basis of what they would see as the clear words of the agreement and reach their decision on ratification accordingly. Any departure from or modification to the words should therefore only be made after careful consideration and upon strong evidence as to an alternative intended meaning or in a case of clear mistake or ambiguity.

[23] In this case there is really no dispute between the parties as to the process proposed under cl 3.6.1.2 down to sub-clause c.)(ii). It is the proper interpretation of sub-clause c.)(iii)(a), (b) and (c) upon which this case centres. I do not accept the position put by the defendant in this regard. It was submitted that the parties are required to move sequentially through (a), (b) and (c) and in particular require the worker to undertake redeployment prior to being able to elect their redundancy related compensation option under (c). There is a certain lack of logic in that submission because if (a), (b) and (c) are required to be worked through and tried sequentially then (a) would have to be the first option tried. That cannot be correct because it would mean that having just completed the three month trial; the worker would then be required to try it again. The cea clause, at this point, requires agreement and therefore if a worker were to adopt the redeployment option having rejected the new roster and shift change, it could only be by agreement. Agreement must infer acquiescence by both parties.

[24] I agree with the submission of Ms White that the whole of c.)(iii) involves options, one of which is to be agreed at that point, but that if no agreement is reached then a final selection of termination of employment with compensation calculated as if it was a redundancy would apply. The words "will be agreed" prior to (iii)(a) and (b) make this plain. Sub-clause (iii)(c) then goes on to state:

> If [(a)] or [(b)] *are not agreed…* the worker may choose… (my emphasis).

[25] The clause is not well drafted as has been adverted to already. For instance use of the word "will" is unusual but I consider it means in this context that the final options must lead to a concluded position one way or another for the worker affected and for that matter a conclusion on the issue for Fonterra. However, I find that the words "(in the order specified)" refer to working through c.)(i) and (ii) sequentially and then, if the worker does not by agreement confirm remaining on the new roster pattern or agree to the redeployment option, there is in fact no agreement. Clause c.)(iii)(c) then comes into effect because the other options "*are not agreed*". It seems illogical that the defendant would claim, in respect of this final sub-clause that a worker must proceed through redeployment (b) and yet accept that the worker prior to this may refuse to proceed through confirmation of the new roster (a).

Conclusions and disposition

[26] I have carefully considered the well prepared submissions of both counsel. In particular I have considered Ms Turner's submissions as to the legal principles relating to guides to interpretation. It is not necessary in this case to adopt that approach as the clause can be interpreted on the plain meaning of the words. Ms Turner, in paragraphs 14 and 15 of her submissions stated that the clause does not allow a worker to simply elect the redundancy option. She submitted that following the process and order specified, a worker must under c.)(iii)(a), (b) and (c) first *try* to move into the new roster pattern, then *explore* redeployment and only then finally choose to be made redundant. The clause does not use those words emphasised by her and introduces concepts into the final sub-clause which are simply not present and as I have already indicated, introduce illogical consequences.

[27] I agree with Ms White that by the time the process under c.)(iii)(a), (b) and (c) is reached the workers affected have carried out the trial and either agreement is reached on one of the first two remaining options, or if agreement is not reached, then it is the worker who may choose the compensation for termination of employment. That is specifically what (c) states. I referred earlier to the previous cea where the choice of selection at a comparable point in the process remained with the employer Fonterra. It assists in the interpretation of the new cea clause that a significant amendment transferring that final selection to the employee was introduced when the later agreement was negotiated. It provides fortification to the interpretation I have adopted. When Ms Blair stated in paragraph 23 of her brief of evidence: "...they were made redundant as a last resort" that would only be true under the earlier cea where Fonterra had that prerogative, admittedly in consultation with the Union. However, the wording agreed to in the current cea means that position has changed to one where that choice now rests with the worker.

[28] I can understand the Authority Member in his determination grappling with the concepts of redeployment and redundancy referred to in the clause. What needs to be kept in mind with this dispute is that none of the workers are redundant in the traditional sense, or within the definition in the cea. Indeed, the very reason this dispute has arisen is because Fonterra wishes to retain the workers involved in employment. However, the only reason that cl 6.4 is referred to in the final clause involved here at c.)(iii)(c) is simply to provide a convenient negotiated method of calculating compensation payable to an employee who has been shifted from their customary roster and shift pattern and makes the final choice to leave.

[29] In reaching my decision I am conscious that this interpretation is contrary to that believed by Ms Blair and Mr How to be the case. It seems to me that the difficulty arising from the clause, so far as Fonterra is concerned if it had wished to only allow the termination option to be selected after the other options had actually been tried, is in the use of the words "agreed" and "not agreed' in clause c.)(iii). These words must be given their ordinary and natural meaning and effect in the context of the clause as a whole. If the gloss on the language as Ms Turner submitted was intended to apply then such language should have been maintained during negotiations. It is understandable that in the circumstances prevailing in this

case Fonterra would wish to retain valuable, well qualified and long standing employees. It is unusual that a union, which under normal prevailing circumstances would be resisting the termination of workers' employment on the grounds of redundancy or otherwise, should in this case be the advocate for that very thing. However, this is a case where a ballot of workers has failed to achieve a necessary consensus to relinquishing a substantial benefit relating to rostered work time and shift patterns. In return for the employer having the benefit of an alternative process to achieve its roster and shift pattern changes the cea contains clearly negotiated entitlements to the affected workers. One of these is to select termination of employment with monetary compensation.

[30] For these reasons the challenge to the determination of the Authority is allowed and that determination is set aside. Similarly, if any determination as to costs has been made that is also set aside and there will need to be a review of the issue of costs. If those workers who undertook the trial are still not prepared to agree to accept the new roster and shift pattern or agree to undertake the redeployment option they may now choose termination of employment with compensation calculated in accordance with cl 6.4 of the cea as if it was a redundancy.

[31] The entire matter of costs including costs in this Court and the Authority are reserved. The plaintiff shall have 14 days to file a memorandum as to the costs sought and the defendant shall then have a further 14 days to file a memorandum in answer.

M E Perkins
Judge

Judgment signed at 10am on 23 May 2013