**IN THE EMPLOYMENT COURT**
**WELLINGTON**

**WC 8/08**
**WRC 2/08**

| | |
|---|---|
| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | SEALED AIR (NEW ZEALAND)<br>Plaintiff |
| AND | THE NEW ZEALAND AMALGAMATED ENGINEERING PRINTING & MANUFACTURING UNION INCORPORATED<br>Defendant |

Hearing: 5 May 2008
(Heard at Wellington)

Appearances: Lorne Campbell, Counsel for Plaintiff
JA Wilton, Counsel for Defendant

Judgment: 19 May 2008

---

**JUDGMENT OF CHIEF JUDGE GL COLGAN**

---

[1] This challenge to a determination of the Employment Relations Authority by hearing de novo decides whether the relevant collective agreement permits the employer to direct staff to take staggered meal breaks. The Employment Relations Authority, in a determination issued on 6 December 2007, found in favour of the union's position that the employer was not entitled to alter unilaterally meal break times so as to have part of its workforce operating machinery at all times and to thereby increase production.

## Relevant facts

[2] The following are taken from the parties' agreed statement of facts.

[3] Of the approximately 250 employees at the company's Porirua site, about 173 are members of the union. This dispute involves a sub-group of union members, approximately 56 printers.

[4] The company's business is seasonal. From early October until about April of the following year, the Porirua plant operates on a "*four on, four off*" rostered work pattern, each employee working for a 12-hour period beginning at either 6 am or 6 pm on any rostered day of work. These rosters cover full weeks so production is continuous. During such periods, employees enjoy a 30-minute paid rest period about midway through the shift, that is at about 12 noon or 12 midnight, and two 10-minute rest periods that are not in issue in this case. For the balance of the year, the relevant employees work on rostered periods of 8 (or currently 12) hours beginning at either 6 am or 2 pm or 10 pm (or currently 6 am and 6 pm) from Monday to Friday of each week. During the current "off season", employees take a paid 30-minute mid-shift meal break.

[5] These work patterns have been in place since about the year 2000. They were recorded originally by a variation to the then applicable collective employment agreement and this has formed the basis, since then, of pay calculations for work throughout the year.

[6] The printers operate five printing machines on a rostered basis, ten printers being rostered on each day and each night period, two to a machine. Their duties include monitoring the machines to ensure that quality standards are met and, from time to time, checking samples and changing rolls of plastic being printed.

[7] The ten printers working at any one time take their 30-minute paid meal break together, requiring the printing process to be shut down for that period. Associated shut down and start up procedures mean that production ceases for about 45 minutes.

When the shorter 10-minute refreshment breaks are taken at other times during the shifts, one printer from each machine is absent at a time so that production does not cease during those periods.

[8] In August 2007 the company indicated its intention to work immediately adjacent but staggered meal breaks. The affected employees, through their union, asserted that their agreement to this intended change was required but would not be forthcoming. This dispute has been brought and, recently and without prejudice to their rights, employees have begun to trial staggered meal breaks to maintain production.

## The collective agreement

[9] Until now, the parties' collective work arrangements have been portrayed as being contained in two separate documents, a collective agreement and a written variation to parts of that. That is a fictitious portrayal of the position at law. Although an earlier collective agreement entered into about 8 years ago was subsequently varied, the union and the employer have, since then, maintained the charade of a collective agreement and a variation to it although these dual documents have been entered into repeatedly at the same time. Such arrangements are not drawn up by lawyers and the documents are not, of course, contracts. There may be practical reasons for perpetuating the fiction of a collective agreement and a variation to it and the parties have gone to some trouble to alter dates and otherwise dress up the so-called variation.

[10] The reality of the position is, however, that both documents together form the collective agreement. There is no separate variation of it. For the sake of convenience and ease of identity of what had been referred to, however, I will continue to refer to the separate documents as the collective agreement ("ca") and "the variation". Decision of the challenge does not turn on the categorisation of the so-called "variation" as part of the ca. After almost 8 years of these fictitious arrangements, however, the parties may consider it high time to have a single consolidated ca.

[11] The ca between the union and the employer is current, being in operation from 1 October 2007 to 30 September 2008. Relevant provisions of that agreement include the following. Employees may be called upon to work, ordinarily, 40 hours per week on a maximum of 5 days per week between 6 am and 6 pm (clause 3.1). When the agreement came into force, employees' existing hours and days of work could not be varied other than by agreement (clause 3.2). The agreement provided for the working of shifts *"as or when required by the employer"* but *"so far as is possible, … arranged in accordance with the wishes of the workers concerned."* (clause 4.1). Shift work is defined in clause 4.2 as being work the hours of which fall wholly or partly outside the ordinary hours outlined above. Shift workers *"shall be afforded a reasonable opportunity during [their] shift to take a half hour paid meal break, and it is understood that the scheduling and taking of meal breaks is subject to the needs of the particular operation and that the employer can require that machinery be kept fully working and production not be impeded."* (clause 4.4).

[12] Clause 7 (*"BREAKS AND REFRESHMENTS"*) provides materially as follows:

> ***7.1*** *Employees (other than shift workers) shall be provided with an effective accumulated fifty minutes rest period in each ordinary day's work (inclusive of a thirty minute unpaid rest period).*
>
> ***7.2*** *The time and method of allocation of the period provided in Clause 7.1 shall be agreed between the employer and the employee/s concerned.*
> *Demands of plant maintenance frequently require variation of allocation of such periods. Casual variations of such demands may be agreed with the employee/s affected, and such variations do not require the formal procedures of Clause 1.3, and need not be reduced to writing.* (my emphasis)

[13] In the current ca, meal breaks for staff are dealt with in two ways depending upon whether the employees are or are not shift workers. For those employees who are not shift workers, clause 7 provides for a 30-minute unpaid rest period at a time and the method of allocation of which is to be agreed between the employer and the employees concerned. For shift work employees (as defined by clause 4.2) meal breaks are dealt with by clause 4.4. Although for shift workers these are paid breaks, their timing is for determination by the employer rather than agreement with the employees. That is because it is *"subject to the needs of the particular operation*

*and that the employer can require that machinery be kept fully working and production not be impeded."*

[14] Although clause 7 of the agreement, dealing with meal breaks for employees who are not shift workers, is not affected by the variation, clause 4 of the ca is. Clause 5 of the variation (*"AGREEMENT CLAUSES AFFECTED BY THE INTRODUCTION OF THIS VARIATION"*) provides relevantly: *"All of Clause 4 SHIFTS – not applicable."*

[15] Clause 6 of the variation (*"HOURS OF WORK"*) is relevant. This includes the following provisions:

> *Workers party to this variation agree that, they shall work such reasonable hours as are required by the Employer and perform any and all duties that fall within the general scope of their job description, to the Employer's satisfaction.*
>
> *Roster patterns and daily hours will be worked as or when required by the Employer and, so far as is possible, be arranged in accordance with the wishes of the workers*

[16] Although the variation is said to *"apply only to the workers named in the Schedules to this variation"* (clause 2, *"SCOPE"*), the schedules do not name any employees. It is common ground, however, that although employees were not named, their position descriptions identified them and all affected by this case are subject to the variation.

[17] The stated purpose of the variation includes:

> *… to enhance both the productivity of the company and the job satisfaction and security of its employees. It is a fundamental principle of this Agreement that employees who are party to this variation agree to work all reasonable hours (including call-backs) as required by the Company …*
>
> *… Accordingly the intended application of this Agreement shall be in line with the principles set out in the Policy Statement contained in Clause 7 of this Agreement.*

## The Employment Relations Authority's determination

[18] The Authority viewed its task as determining whether the absence of mention in the variation of clause 7 of the ca means that it does not apply to the relevant employees. The Authority determined that the variation was to be read subject to the terms of the ca unless expressly varied or excluded by that variation or it is a necessary implication of the terms of the variation that parts of the ca are not to apply. The Authority concluded that shift workers are dealt with by clause 4 of the ca and although it found there were then no shift workers employed by the company, that was not relevant for the purposes of interpreting the agreement.

[19] Because the variation excluded the application of clause 4 of the ca that defined and dealt with the terms and conditions of shift workers but the variation did not refer to them as shift workers, such employees ceased to be shift workers by virtue of the variation. The Authority concluded that the variation did not extend to depriving relevant employees of 50 minutes' rest per day inclusive of a 30-minute unpaid rest period under clause 7 of the agreement. The Authority concluded that while flexibility of overall work hours including call-backs was clearly intended, it could not have been the intention of the parties agreeing to the variation that employees would forgo altogether rest periods during periods of continuous work of up to 12 hours.

[20] It is implicit from the Authority's determination that although employees must agree when meal breaks are to be taken, the 30-minute meal break will be unpaid. That may have contrasted with the position in which, if the time of the meal break could be set by the employer unilaterally, such break was to be on pay.

## Shift workers?

[21] The decision of the case turns on this question. There is no statutory or other like definition of the phrases "shift work" or "shift worker" in New Zealand, although cases in this jurisdiction have, from time to time, determined whether that status is applicable in the circumstances.

[22] Although not to determine the question in New Zealand, it is notable that reg 22(2) of the Working Time Regulations 1998 (SI 1998/1833) in the United Kingdom provides that *"'shift work' means any method of organizing work in shifts whereby workers succeed each other at the same workstations according to a certain pattern, including a rotating pattern, and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks"*[1]. In New Zealand, the concept of shift work was discussed in *NZ (with exceptions) Food Processing etc IUOW v Skeggs Foods Ltd* [1984] ACJ 85, 87 as follows:

> *What is a shift? A shift as we understand it is normally considered to be a relay of workers working successive periods usually at substantially the same tasks. … We note that Judge Jamieson in Inspector of Awards v. Caxton Printing Works 75 B.A. 6445 said:*
>
> > *"… the term 'shift' does not today connote, as it once did, 'a relay of workers following each other on a continuous process'. In this particular award, as in others, a 'shift' means no more than a period of work permitted at ordinary rates of wages at a time which would otherwise attract overtime rates because the work is performed outside the declared hours."*

[23] So although it may be said that the notion of "shift" has developed more generally in New Zealand in recent decades, the original concept of relays of workers following each other on a continuous process is still applicable.

[24] At paragraph [1828] (Shift work) of volume 2 of Mazengarb's Employment Law: Wages, John Hughes (the author) adopts what might colloquially be called the duck test[2] where he writes:

> *What is "shift work"? What is a "shift"? In the absence of some express contractual definition, it is usually easy to say whether a particular system of work is or is not a "shift", but difficult to define "shift" or "shift work" in the abstract.*

---

[1] Halsbury's Laws of England: Employment (4th ed, vol 16(1A)), para 278

[2] A form of in**duc**tive reasoning so that: "If a bird looks like a duck, swims like a duck and quacks like a duck, then it probably is a duck." The test implies that a person can figure out the true nature of an unknown subject by observing this subject's readily identifiable traits. It is sometimes used to counter abstruse arguments that something is not what it appears to be. In the United Kingdom it is occasionally called, whimsically, the "British Standard Duck Test".

[25] Certainly by applying the parties' own definition in clause 4 of the ca, all relevant employees are shift workers. But even absent the definition, it is irrefutable that they are shift workers by the commonly understood meaning of that term. Whether they work two shifts of 12 hours on 7 days per week, two shifts of 12 hours on 5 days per week, or three shifts of 8 hours on 5 days per week (all of which shifts rotate from time to time), the employees are part of a team that takes over a continuous production from a similar team and subsequently hands it on to a successor. That is arguably except where operations are taking place from Mondays to Fridays and employees are either engaged in the first shift on the Monday or the last shift on the Friday. Even then, they will be part of an almost continuous operation, either at its beginning or its end.

[26] This is not one of those cases where it is necessary to give the phrases "shift" or "shift worker" an unnatural meaning. Although not determinative of the issue, it is not surprising that in correspondence about it, the union referred to these arrangements as shifts. By any commonsense and colloquial definition, these employees are shift workers. They did not cease to be shift workers when the "variation" to the ca purported to make inapplicable the clause in the ca that defined shift workers. They did not become thereby, as the union was driven to argue artificially, other than shift workers with correspondingly different meal break arrangements. The affected employees are shift workers for the purposes of the ca and the variation.

## Decision of challenge

[27] In this respect at least, the "variation" is poorly drafted and confusing. In these circumstances it is necessary to try to ascertain sensibly what the parties intended would be the position of meal breaks for affected employees under the *"Annualised Hours"* "variation" document.

[28] The ca provided two regimes depending on whether the employees were shift workers or not. If not, the main 30-minute meal break is unpaid but its timing had to be agreed with the employees. Shift workers, on the other hand, are paid for that 30-minute meal break but its timing is for determination by the employer.

[29] The employees had not ceased to be shift workers even although the variation purports to exclude the operation of the clause that defined shift workers. Shift workers are employees employed in shifts that consist of gangs or teams that follow each other performing the same duties. It is also a feature of shift work that the gangs or teams of employees will regularly change the times at which they work. So, to use the example of this case, employees worked either of two 12-hour shifts every 24 hours for 4 days, or one of three shifts of 8 hours for 5 consecutive days depending on the season. In each case, however, the next shift of workers would begin a similar pattern of work immediately after the finish of the first. The evidence is that this has been the long-standing pattern of work at Sealed Air's Porirua plant. It is shift work and therefore the employees are shift workers. That is so even though the definition under clause 4 of the ca appears to have been excluded by the variation.

[30] The next logical assumption is that employees would continue to have breaks during their working days or nights. These would consist of two of about 10 minutes at about one-third and two-thirds of the way through the shift period. The "smoko" would be paid and arranged so that the machinery would keep operating. The mid shift break of 30 minutes would be a meal break and, under the ca as unvaried, whether this was paid would depend on the classification of the employees. Shift workers would have a paid meal break and for others the break would not be on pay.

[31] The evidence tends to show, however, that all relevant employees were shift workers so that the break would be paid but also that such employees would not have an entitlement to require their agreement to its timing. Although that appears not to have been followed in practice, the agreement appears to have provided the company with the entitlement in law to determine when the break would be taken and a commensurate obligation to pay employees for that time. It is very unlikely, in my assessment, that the parties, in executing the variation, intended to remove the three breaks, especially during seasonal 12-hour shifts. Any alteration that may have been intended would have been to when these breaks were taken (so as to enhance productivity) and perhaps also whether they would be paid meal breaks.

[32] For the reasons given, the Authority's determination is wrong and must be set aside.

[33] The employees concerned are "shift workers" and, as such, are entitled to a paid meal break, the timing of which does not require employee or union agreement. They are not subject to clause 7 of the ca. The employer is entitled to determine their meal break arrangements in return for both payment for those periods and the remuneration advantages of the annualised pay under the so-called "variation".

[34] The company's proposal to have two immediately adjacent meal breaks on pay does not seem unreasonable in all the circumstances.

[35] Each party having been successful at one level, and the case being one about a genuine dispute, costs should lie where they fall.

GL Colgan
Chief Judge

Judgment signed at 12 noon on Monday 19 May 2008