

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 68  
5299475

BETWEEN

PETER BLOM, ALAN  
COULAM, ROBERT KING,  
ALAN NEWTON, JOHN  
PERKINSON, ANTONY  
TOLICH  
Applicants

AND

PORTS OF AUCKLAND  
LIMITED  
Respondent

Member of Authority: R A Monaghan

Representatives: H McAra, advocate for applicants  
K Dunn, counsel for respondent

Investigation Meeting: 28 January 2011

Determination: 21 February 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Peter Blom, Alan Coulam, Robert King, Alan Newton, John Perkinson, and Antony Tolich are employed on individual employment agreements by the Ports of Auckland Limited (POAL).

[2] In December 2009 the POAL sought to replace a productivity incentive plan in which the applicants were entitled to participate. It was common ground that the plan was introduced in 2002 as a term of the applicants' employment, and that changes to the way associated productivity payments were calculated were introduced in 2003 on what was said to be a trial basis. The changes were still in force in 2009. When the applicants did not agree to replacement arrangements proposed in or about December 2009, the POAL reverted to the method of calculation as it was in 2002.

[3] The applicants say the changes made in 2003 were contractually binding, and could not be varied without their agreement. They seek a declaration to that effect. They also seek compliance orders and orders for the reimbursement of remuneration lost as a result of the reversion to the 2002 provisions.

[4] The POAL says it was entitled to revert to the 2002 provisions in the absence of any other agreement.

### **The productivity incentive plan**

#### 1. The 2002 terms

[5] A letter to the applicants dated 15 February 2002 set out the terms of the productivity incentive plan, including a formula for calculating payments under the plan. For work done at container terminals payment was to be made at the specified rates with reference to whether a stepped series of targets for monthly average straddle moves per engine hour and monthly average crane moves per hour were met.

[6] The minimum qualifying targets were 10.5 straddle moves and 24 crane moves.

[7] The letter also addressed the establishment of a productivity task force (the task force) which would 'meet weekly in the initial stages and then monthly'.

#### 2. The July 2003 change

[8] The targeted moves proved difficult if not impossible to reach, and few if any productivity payments were made. The task force reviewed the scheme and proposed an alternative with targets that were easier to achieve. The minimum qualifying average number of straddle moves and crane moves were lowered to 9 and 22 respectively, with a linear rather than a stepped increase in productivity payments applicable once the minima were met.

[9] By memorandum dated July 2003 the scheme was amended or varied in part in the following terms:

*Following discussions at the taskforce meetings and after careful consideration we have changed the payment formula on a trial basis without prejudice to any of us. The system now moves from a series of threshold steps to a straight line and additionally we now start the payments above 22 crane moves per hour instead of 24 moves per hour.*

### 3. Developments in 2003 - 2009

[10] The POAL's position was that while on the one hand it sought to reward and encourage employee productivity, on the other developments in technology can make it easier to achieve targets without any change in individual performance. Such developments can be difficult to predict or provide for in a productivity plan, and this was a reason why the 2003 variation was said to be on a 'trial' basis. For similar reasons, the matter was to be kept under review.

[11] There were a number of developments in the period 2003 – 2009 which affected overall productivity. They included the introduction of significant new machinery and equipment, software, and processes. None of these, whether separately or cumulatively, resulted in a review of the productivity incentive plan until 2009.

### 4. The change in 2009

[12] In 2009 it became apparent to the POAL that the time and money invested in these developments had 'lifted the bar', so that overall productivity increased without necessarily being accompanied by increasing individual productivity. In a memorandum dated December 2009 the POAL advised:

*We are proposing a change to the PIP payment formula on a trial basis without prejudice to any of us. The proposed system continues with the straight line formula that starts at a combined average crane rate per hour of 26 instead of 22. The gate for the payout continues at 9 straddle moves per hour.*

[13] In a form dated 18 December 2009 the POAL offered affected staff three options under which 'the trial' implemented in 2003 would cease. One of the options was a return to the 'original contractual plan signed off in February 2002'.

[14] The applicants did not agree to any of the options. The POAL has applied the 'original contractual plan' to them.

### **Determination**

[15] At the core of the dispute between the parties is whether the POAL could rely on the references in the 2003 memorandum to the words 'trial basis' and 'without prejudice' to justify its view that the arrangement did not become a term of employment, and in turn justify its unilateral reversion to the 2002 arrangement for calculating productivity payments.

[16] The existence of a 'trial' incorporates an intention to test the suitability of something or someone for a particular purpose. If for present purposes I accept that the 2003 arrangement was initially intended as a trial, there was no evidence that, from 2003, there were any regular or further reviews of the continuing suitability of the changed formula for calculating productivity payments. More particularly, there was no evidence that the operation of the scheme was reviewed when significant technological or systems changes were introduced. On the facts, the 2003 arrangement was simply allowed to continue in operation until, some 6.5 years later, a decision was made that it was time to address the matter. The extent of this mutual acquiescence in the 2003 arrangement means I conclude that, from a point I do not need to determine here, the scheme could no longer be regarded as merely a trial.

[17] For those reasons I find that, even if this was not so at the outset, by the time action was taken on the matter the terms of the 2003 memorandum had become binding and enforceable between the parties and could be amended only by agreement.

[18] It was appropriate that, as it did, POAL should attempt to resolve by negotiation its wish to introduce a more suitable productivity plan. However it was obliged to continue to observe the terms of the 2003 memorandum until agreement on an alternative was reached.

[19] Accordingly the declaration sought by the applicants is granted.

**Compliance orders**

[20] The applications for compliance orders are adjourned to allow the POAL the opportunity to reinstate the 2003 provisions pending the outcome of any further negotiations.

**Reimbursement of remuneration**

[21] The claims for payment of lost remuneration are also adjourned to allow the parties to resolve the matter themselves.

**Applications to lapse**

[22] If, within a 90-day period commencing with the date of this determination, there has been no approach to the Authority by either party regarding any application for an order for compliance or for the reimbursement of lost remuneration, the application in question shall lapse.

[23] If an approach is made regarding an application, the Authority will contact both parties regarding a procedure for addressing the application.

**Costs**

[24] Costs are reserved.

[25] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority