IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 196
5405424

	BETWEEN	CRAIG KIRKPATRICK AND FOUR OTHERS First Applicants THE NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INCORPORATED Second Applicant
	A N D	RAVENSDOWN FERTILISER CO OPERATIVE LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Karina Coulston, Counsel, for the Applicants Scott Wilson, Counsel, for the Respondent
Investigation Meeting:	10 September 2013 at Christchurch
Submissions received	10 September 2013
Date of Determination:	18 September 2013

DETERMINATION OF THE AUTHORITY

A. **The applicable collective agreement does not allow the respondent to transfer six day roster workers to a five day roster pattern and to reduce their pay rates.**

B. **The terms of the offer letters signed by the first applicants do allow such action by the respondent, and these terms are not inconsistent with the terms and conditions in the collective agreement.**

C. **Accordingly, the applications of the first and second applicants are dismissed.**

D. **Cost are reserved.**

Employment relationship problem

[1] The first and second applicants claim that the respondent unilaterally (and unlawfully) reduced the wages of the first applicants during five weeks of the seven week 2012/13 closedown of the Hornby plant contrary to the terms of the applicable collective employment agreement (the collective agreement). The applicants allege, in addition, that the respondent's action amounted to a breach of s. 4 of the Employment Relations Act 2000 (the Act) and that the first applicants suffered unjustified disadvantage in their employment as a result of the alleged breach.

[2] The first and second applicants also seek a compliance order preventing further alleged unilateral reductions of wage rates during future closedown periods, the imposition of a penalty for the alleged breach of the collective agreement and a further penalty for the alleged breach of s. 4 of the Act.

[3] The first applicants, apart from Mr Kirkpatrick, are Mr Stephen (known as John) Barr, Mr Malcolm Morgan, Mr Michael Standen and Mr Samuel Parker.

[4] Mr Parker did not attend the investigation meeting and, because Ms Coulston was unable to take instructions from him at the time she lodged briefs of evidence, she ceased to represent him shortly after that time. However, as I am told that Mr Parker was aware of the application made in his name, and given the nature of the applications against the respondent, which do not require specific evidence from each applicant (save with respect to the effects of the alleged unjustified disadvantage in employment) the Authority investigated Mr Parker's application notwithstanding that he did not give any evidence.

[5] The statement of problem asserts that all of the first applicants were six day roster workers and I infer from this assertion that it refers to the situation that prevailed immediately before the 2012/13 closedown period. In the case of Mr Parker, who was recruited as a seven day roster worker, I assume that he somehow became a six day roster worker sometime before the 2012/13 closedown period. Although I saw no evidence to explain to me how that change was effected, I shall take the assertion in the statement of problem at face value, and treat him as a six day roster worker immediately before the 2012/13 closedown period for the purposes of this investigation.

[6] The respondent denies that it has breached the terms of the collective agreement and the duty of good faith, and denies that any remedies are due to the first applicants, that any penalty should be imposed upon the respondent and that it is appropriate to order compliance.

Brief account of the events leading to the dispute

[7] The first applicants are all members of the second applicant union and all fall within the coverage clause of the applicable collective agreement, formally called the *South Island Chemical Fertiliser and Acid Workers Collective Employment Agreement 2012/2013.*

[8] Two of the applicants (Mr Morgan and Mr Standen) were initially recruited into the despatch department of the company and were designated as *5 day roster Workers.* Mr Kirkpatrick was also recruited to work in the despatch department but, as there was an expectation for him to also cover the manufacture department, he was designated as a *6 day roster Worker*. Mr Barr was recruited to the position of *Plant Operator (Manufacture/Despatch)* and was designated as a *6 day roster Worker* and Mr Parker was recruited as a *Plant Operator (Manufacture)* and was designated as a *7 day roster worker*.

[9] Messrs Morgan and Standen subsequently became 6 day roster workers by agreement prior to the 2012/13 closedown. No evidence was presented as to whether Mr Parker was a seven or a six day roster worker immediately prior to the start of the 20012/13 closedown but, as stated above, I make that assumption for the purposes of this determination.

[10] The relevant clauses in the collective agreement provide as follows:

> ***PART I***
>
> ***5 Day Roster Workers – Monday to Friday inclusive***
>
> ***2. HOURS OF WORK***
>
> *(a) Subject to the provisions hereinafter contained an ordinary week's work shall consist of 40 hours, which shall be worked as required between the hours of 6.00 am and 6.00 pm up to five days of the week from Monday to Friday, both days inclusive. All start times, finish times, and breaks may be staggered.*
>
> *(b) Not less than half an hour shall be allowed for lunch except where mutually agreed on site.*

(c) *If on any day a worker is asked to start work and the work done is less than four hours he shall be paid as if he had worked four hours.*

(d) *All hours including those in excess of 40 hours per week shall be paid at the appropriate flat rate as specified in Wages Schedule (a) except for Sundays, Easter Saturday and Easter Sunday where the appropriate flat rate as specified in wages schedule (c) shall be paid and for Public Holidays as specified in Wages schedule (c) shall be paid at time and ½.*

(e) *In the event of a worker being required to work without a clear break of eight hours between the time of ceasing work and commencing the next roster, wages schedule (c) rates shall be paid until a break of eight hours has been achieved.*

(f) *Rosters shall be notified at least one week in advance of coming into effect however wherever possible workers shall receive a minimum of 24 hours notice if there is a change in rostered hours. Rosters shall be discussed with affected employees prior to the roster coming into effect. However the ultimate decision on rostered hours shall remain the prerogative of the employer.*

…

PART II

6 Day Roster Workers – Monday to Saturday inclusive

4. HOURS OF WORK

(a) *An ordinary week's work shall consist of 40 hours worked up to five of six days per week Monday to Saturday inclusive. Such 40 hours shall be organised to allow a minimum of two consecutive days off per week.*

(b) *Only workers who are required to keep machines and/or processes working continuously throughout eight hours shall be allowed 30 minutes crib time.*

(c) *No workers shall be retained on night work for more than two weeks in succession unless they and the employer agree otherwise.*

(d) *Shift allowances are incorporated in the wages schedule.*

(e) *In the event of a worker being required to work without a clear break of eight hours between the time of ceasing work and commencing the next roster, wages schedule (c) rates shall be paid until a break of eight hours has been achieved.*

(f) *Rosters shall be notified at least one week in advance of coming into effect however wherever possible workers shall receive a minimum of 24 hours notice if there is a change in rostered hours.*

(g) *If on any day a worker is asked to start work and the work done is less than four hours he shall be paid as if he had worked four hours.*

(h) *All hours including those in excess of 40 hours shall be paid at the appropriate flat rate as specified in schedule (b) except for Sundays,*

Easter Saturday and Easter Sunday where the appropriate flat rate as specified in Wages schedule (c) shall be paid and for public holidays as specified in Wages schedule (c) shall be paid at time and ½.

…

PART III

7 Day Continuous Roster Workers – Monday to Sunday inclusive

6. HOURS OF WORK

(a) An ordinary week's work shall consist of 40 hours rostered over a 7 day, 24 hour cycle at the appropriate flat rate specified in Wages schedule (c). Where not employed on a seven day rostered cycle rates specified in Wages schedule (a) or (b) (as applicable) shall apply.

[Sub clauses 6(b) to 6(g) are identical to sub clauses 4(b) to 4(g)]

(h) All hours including those in excess of 40 hours shall be paid at the appropriate flat rate as specified in Wages schedule (c) including Sundays, Easter Saturday and Easter Sunday and for Public Holidays as specified in Wages schedule (c) shall be paid at time and ½.

25. WAGES AND ALLOWANCES

(a) All workers shall be paid -

(i) For the period commencing on the first day of the pay period on or after 2nd June 2012 not less than the rates prescribed in Wages Schedule to this agreement for the work category in which they are currently employed.

….

33. VARIATION

Any clause of this contract may be varied during its term by agreement between the employer and the employees directly affected by the proposed variation.

The procedure for variation shall be:

(i) A copy of any proposed variation shall be copied to the union and the authorised on site delegate at the time the proposal is formally submitted to staff for consideration. This requirement shall not prevent the staff seeking a variation or the employer from informally exploring the possibility of a variation, prior to it becoming a formal proposal.

(ii) No vote by staff shall take place before the expiry of two weeks from the date that the proposal is copied to the union and staff, or such earlier date that advice is received, to

enable either the employees to consult the union or the union to advise the employees.

(iii) Agreement by employees shall be by 50% plus one employee of the employees directly affected by the proposed variation, voting to accept.

(iv) Any such agreement for variation shall be an agreement between the union which represents the employees directly affected and the company, and shall be attached to and form part of the original collective agreement, which has been varied.

(v) No variation agreement shall have force or effect until it is recorded in writing and signed by the union and the employer.

(vi) Such agreement may include provisions for trial periods and terms of review.

[11] There then follows the Wages Schedule which sets out the hourly rates applicable to the three categories of workers (5, 6 and 7 day roster workers) with 32 different pay rates per category depending on years of service and which of four levels a worker is deemed to be on. Under the Schedule the following clauses are set out.

Levels

1. To obtain any of the rates in (a), (b) or (c) above the employee must be ready, willing and, in the opinion of the employer, competent to carry out the full range of duties necessary to fill the different levels of positions in an efficient, effective and safe manner.

…

General

…

(ii) For a worker to maintain their level of payment they must continue to be ready, willing and competent to carry out the minimum levels of duties prescribed for that level of payment. However it shall not be permissible for any worker to refuse to carry out any duty for which, in the opinion of the employer, the worker is competent.

…

APPENDIX TWO

Terms of Reference – Roster Change

Should the occasion arise that requires manufacture employees to move from a six day roster to a seven day roster for a period of time the following procedures will apply:

1. *A clear business requirement for the need to change will be established.*

2. *The need and possible time frame of the change will be discussed with those concerned and agreement to change would not be unreasonably withheld.*

3. *Agreement reached between the employee and employer parties to change will include acceptance of a return to the six day roster (and therefore the six day roster conditions and payments) at the conclusion of the agreement.*

4. *If at some point of time the need to change rosters becomes regular (i.e. twice within a twelve month period) this arrangement will be reviewed.*

[12] Each of the first applicants produced to the Authority a copy of their respective offer letter, each of which contained the following paragraphs:

> *You will start as a [5, 6* or *7] day roster Worker. You may be required, with reasonable notice, to change your shift pattern in line with the needs of the business. If this occurs, your hourly wage will also be reviewed to ensure it is appropriate for your level of competence and hours of work/shift pattern.*
>
> *…*
>
> *Other conditions of employment are covered in the Ravensdown Employees Handbook (enclosed) and the matters contained in this letter.*
>
> [There then follow paragraphs dealing with the provision of medical insurance, car maintenance/travel allowance, and superannuation benefits under the KiwiSaver Act 2006.]
>
> *…*
>
> *You are entitled to discuss this proposal with your family, a union, a lawyer or someone else that you trust. Should you require information on your employment rights, please contact the Employment Relations Service on 0800 800 863 or www.ers.dol.govt.nz.* ***We draw your attention to the "Acknowledgement" at the end of the agreement and encourage you to seek independent advice before signing.*** *Once you are happy with it, please sign both copies of this letter and return one in the enclosed envelope. We will then retain it on your personnel file.*
>
> *…*
>
> *I,* [name of worker] *have received, read and understand the contents of this letter and terms and conditions of employment.*

[13] Each of the first applicants, apart from Mr Parker, had signed the copy of his offer letter shown to the Authority. In the absence of evidence to the contrary, I assume that Mr Parker had either done so as well, or intended to be bound by the terms of his offer letter.

[14] It was the practice of the Hornby plant to operate a closedown period twice a year, the first mid-year and the second over the Christmas and New Year period. The evidence of the first applicants was that, generally, the hours rostered to be worked during previous closedown periods had been the same or similar as the hours they generally worked in manufacturing and that they had always been paid their normal six day roster (schedule (b)) pay rate.

[15] The evidence of the first applicants was that, around mid October 2012, the workers in the manufacture department were informed that the 2012/13 Christmas and New Year closedown period would last around five weeks, that over the closedown period they would work between 6 am and 6 pm on a five day roster pattern and that, accordingly, their pay rate would reduce to the schedule (a) rate. The evidence of the applicants was that they were not consulted about this and that the union was not aware of it until the affected workers advised them.

[16] The evidence of the respondent (particularly that of Mr Cole, the Operations Manager) was that he had signalled this change in previous conversations over the preceding nine months, although this was denied by the first applicants.

[17] Insofar as there was any material conflict between the parties on this point, I accept the evidence of the first applicants that they did not become aware of the intention of the company to reduce their pay rate to the rate designated as Schedule (a) until they were told in October 2012 about the pending closedown period. I also accept that there was no consultation with the workers about this prior to the announcement. However, after the union had discovered the intention of the company, the union and management met together, including the General Manager – Manufacturing and Lime (Mr Gettins), and the General Manager – Human Resources (Ms Paterson), both of whom gave evidence to the Authority.

[18] Despite these meetings, the company went ahead and effectively changed the hours of the five applicants to those of five day roster workers during five weeks of the closedown period. The closedown period lasted a total of seven weeks, and during the final two weeks the four applicants who gave evidence were employed on six day rosters and paid at the six day roster schedule (b) pay rate. It is not clear what Mr Parker's position was during those final two weeks.

[19] The evidence of each of Messrs Kirkpatrick, Standen, Morgan and Barr was that this change in their pay rate during the first five weeks of the 2012/13 closedown period caused them financial disadvantage and that they each had to take some holiday to top up their pay. In addition, Mr Morgan said that he had wanted to save some holiday as his wife was expecting a baby in April 2013. Mr Morgan did accept in his oral evidence, however, that he did manage to take three week's holiday around the birth of his child and this had been sufficient for his purposes.

The issues

[20] The Authority must determine the following issues:

(i) Whether the terms of the collective agreement itself allow the respondent to change six day roster workers' roster pattern and pay rate to those of five day roster workers;

(ii) Whether the terms of the offer letters allow the respondent to change six day roster workers' roster pattern and pay rate to those of a five day roster worker;

(iii) Whether the first applicants have personal grievances for unjustified disadvantage in their employment;

(iv) Whether a compliance order should be made;

(v) Whether penalties should be imposed against the respondent.

Do the terms of the collective agreement itself allow the company to change six day roster workers' roster patterns and pay rate to those of five day roster workers?

[21] It is accepted by the applicants that there are two express terms in the collective agreement which allow movement of workers between rosters. The first is contained in clause 6(a), which recognises that seven day continuous roster workers can be employed on other rosters and, when they are, they will be paid in accordance with the roster in question. Whilst this clause does not expressly state that seven day roster workers can be transferred between the rosters, that is the only sensible conclusion that one can reach when considering the wording.

[22] The second term that expressly provides for the transfer of a worker, from a six day roster to a seven day roster, is contained in Appendix 2.

[23] Mr Wilson, for the respondent, accepts that neither clause 6(a) nor Appendix 2 allows the company to change the rosters of six day roster workers to five day rosters and to reduce their pay to schedule (a) rate.

[24] Mr Gettins for the respondent gave evidence that he believed that clauses 4(f) and 6(f) (which are identical) also allow the company to change the roster patterns of workers. However, Mr Cole, on behalf of the respondent, gave evidence that, when the production needs in the manufacturing department required workers to work greater hours, they dealt with it by expressly agreeing with the workers that they would work on a Sunday. Mr Cole went on to say that it was his understanding that he could use the collective agreement to effectively impose a seven day roster on these workers but he confirmed that, up until now, any work on a Sunday carried out by six day roster workers in the manufacturing department was achieved by a specific agreement with the workers in question.

[25] It is worth mentioning that the wording of Appendix 2 clearly allows the respondent to transfer a manufacture worker from a six day roster to a seven day roster, provided that certain conditions set out in Appendix 2 are satisfied. Although the wording of Appendix 2 appears to dovetail with the wording of clause 6(a), their respective origins are different, and they were introduced for different purposes at different times, although it is not necessary to examine those origins here.

[26] The evidence of Ms Patterson on behalf of the respondent was that, when workers changed from one set of rostered hours to another, then that changed their roster pattern too. Her point was, I believe, that the ability of the respondent under the collective agreement lawfully to change a worker's hours within a roster pattern gives rise to a de facto right to change a worker's roster pattern itself.

[27] Mr Wilson, counsel for the respondent, acknowledges that, with one exception (Appendix 2), the collective agreement does not expressly address the company's ability to move workers across shift patterns. He points out that there is no provision in the collective agreement that expressly enables this, nor is there any provision that expressly prohibits it.

[28] The guiding principles to be deployed in interpreting the collective agreement have been discussed in a number of high profile cases in recent years. The current leading authority on contract interpretation is the decision of the Supreme Court in *Vector Gas Ltd v. Bay of Plenty Energy Ltd* [2010] NZSC 5 (2010) 2 NZLR 444, a non-employment law case. The Court of Appeal in *Silver Fern Farms Ltd v. New Zealand Meatworkers and Related Trade Unions Inc* [2010] NZCA 317, [2010] ERNZ 317, made it clear that *Vector* had equal application to the interpretation of employment agreements. His Honour Judge Ford summarised the *Vector* principles relating to contractual interpretation in *New Zealand Professional Firefighters Union v. New Zealand Fire Service Commission* [2011] NZEmpC 149. At paragraph [17] he set out that summary as follows:

> *In summary, it would appear from* Vector *that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text (McGrath J at [80]). It is, nevertheless, a valid part of the interpretation exercise for the Court to "cross-check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. (Tipping J at [26]). If the language used is, on its face, ambiguous or flouts business common sense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties (Wilson J at [127]). Extrinsic evidence is admissible to define contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear (Tipping J at [31]). Evidence is not relevant if it does no more than tend to prove that individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time (Tipping J at [19]).*

[29] Mr Wilson, on behalf of the respondent, cites a passage from *Dwyer v. Air New Zealand Ltd (No 2)* [1996] 2 ERNZ 435 (EmpC) as follows:

> *[35] It is important to recall that, as in the case of many other employment contracts, this was a special contract written not by lawyers but by the participants in the enterprise that it was to cover and intended to be understood by them and not for later dissection by lawyers. The contract is to be interpreted in the context of the community within which it operates, that is the aviation industry. It is for that reason that the Court looks in the evidence to find what interpretation has been applied in the operation of the contract rather than what interpretation might subsequently be drawn from its words*

> *when one party is dissatisfied with the consequences of the contract in operation.*

[30] Mr Wilson refers to the need of the company for the workers to provide their labour flexibly to accommodate production requirements as they trend up and down. Mr Gettins gave evidence that there is a history of movement between the rosters in all Ravensdown plants. He gave evidence that workers moved between rosters on a seasonal basis at the Awatoto plant. However, Awatoto is in Napier and those workers are covered by a separate collective agreement known as the *Ravensdown North Island Chemical Workers Collective Agreement*. I shall examine the effects of the North Island collective agreement on the interpretation of the South Island one below. Mr Gettins also gave evidence that production workers move to the five day roster during shutdowns, and are paid at the schedule (a) rate, in the Ravensbourne plant (which is covered by the same South Island collective agreement as the first applicants).

[31] Starting with the words of clause 4(f) as I am required to, it is not my belief that the natural and ordinary meaning of the language used in that clause enables the company to change a six day roster worker to a five day roster worker, either temporarily or permanently. The wording makes reference to a change in rostered hours, not the roster pattern.

[32] The four applicants who gave evidence to the Authority all stated that the rosters they typically work in the manufacturing department are 4 x 10 hour days from Tuesday to Friday, the two rosters being either 5am to 3pm or 3pm to 1am. They each also said that they regularly worked overtime. These regular or typical six day rosters do not in any way move the workers into a five day roster pattern in my view, as was asserted by Ms Paterson. Even if this did occasionally occur, it would appear that the respondent still pays the six day workers at the schedule (b) rate in any event when this happens, and so does not seek to rely upon such a *de facto* change in roster patterns to reduce pay rates.

[33] Taking into account the specific provisions allowing the company to move workers from a seven day continuous roster to a six or five day roster (clause 6(a)), and the ability to move a six day roster worker to a seven day roster (Appendix 2), the absence of an express clause within the body of the collective agreement allowing the transfer of a six day roster worker to a five day roster, supports my view that no

express power to do so can be found within the body of the collective agreement itself.

[34] Turning now to the *cross-check* referred to by Ford J in the *Firefighters Union* case, and looking at the wider contractual context, I do not accept that practices within the North Island can be used to interpret rights and obligations of workers covered by the South Island collective agreement. Whilst the roster pattern clauses 2, 4 and 6 do not differ materially as between the two collective agreements, they are clearly different agreements and the interpretation of one cannot inform the other in my view.

[35] In respect of the practice in the Ravensbourne plant, whose workers are subject to the South Island collective agreement, no detailed evidence was put before the Authority with respect to the practices of that plant. That apart, however, I accept the submission of Ms Coulston that the fact that the respondent transfers employees at the Ravensbourne plant between the five, six and seven day rosters, and alters these workers' wage rates accordingly, does not alone in any way prove that the respondent is entitled to do so pursuant to those workers' terms and conditions of employment, including the collective agreement. It might be, for example, that the Ravensbourne workers are subject to offer letters allowing that practice (which the Authority has not seen), or that they agree specifically to such transfers and wage reductions. Without further detailed analysis of the situation at the Ravensbourne plant, little can be inferred from the assertions of the respondent in respect of these workers.

[36] In summary, I do not accept that the terms of the collective agreement alone expressly allows the respondent to transfer six day roster workers to a five day roster pattern and to reduce the worker's hours to the wage schedule (a) rate accordingly.

Do the terms of the offer letters allow the respondent to change six day roster workers' roster pattern and subsequent pay rate to those of a five day roster worker?

[37] Subsection 61(1) of the Act provides as follows:

> ***Employee bound by applicable collective agreement may agree to additional terms and conditions of employment***
>
> *(1) The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are:*

> *(a) Mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement; and*
> *(b) Not inconsistent with the terms and conditions in the collective agreement.*

[38] Subsection (2) of s.61 does not apply as the applicable collective agreement had not expired at the material time nor had any of the applicants resigned from the union that was bound by the agreement.

[39] It is immaterial when the first applicants joined the union as s.61(1)(a) makes clear that the additional terms and conditions can be agreed to before, on or after the date on which the employee became bound by the collective agreement.

[40] The key issue to consider, therefore, is whether the terms of the third paragraph set out in the offer letters signed by the first applicants are inconsistent with the terms and conditions in the collective agreement. If they are not, the second issue to consider is whether those terms allow the respondent to transfer six day roster workers to a five day roster pattern and reduce their pay to the schedule (a) rate accordingly.

[41] Both counsel for the applicants and for the respondent referred me to the case of *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v. Energex Ltd* [2006] ERNZ 749 (EmpC) in which Her Honour Judge Shaw restated the applicable principles to apply in considering whether terms set out in a collective employment agreement are consistent or inconsistent with additional terms which one of the parties seek to apply. These principles are as follows:

> - *The question of inconsistencies between the collective employment agreement and additional terms must be resolved objectively.*
> - *The relevant provisions are to be compared to determine whether they can live together as terms of the employment agreement.*
> - *The definition of inconsistent is that in the Oxford English Dictionary* [1]*:*
>
> > *Not agreeing in substance, spirit, or form; not in keeping; not consonant or in accordance; at variance, discordant, incompatible, incongruous.*

[1] (2nd ed), Oxford, Clarendon Press, 1989

- *If the additional term is more favourable to the employee than the CEA, there is usually no inconsistency.*

- *Where there is a true inconsistency and where the two provisions cannot stand together, the CEA must prevail whether the result is perceived as favourable or unfavourable to the employee.*

[42] *Energex* concerned the question of whether the company was able to enforce the terms of a bonding agreement which provided that employees who took up a certain training programme would be individually bonded to the company for two years, and would be required to repay the outstanding proportion of their training costs if they resigned, together with other reasonably onerous terms. Her Honour Judge Shaw held that the CEA contained a comprehensive clause that codified the provision of education and training by the company and she noted that, like all clauses of the Energex CEA, the training clause was governed by the general statement that the collective agreement was the entire agreement between the union and the employee.

[43] Her Honour found that the requirement to be bonded was a unilateral attempt to add to the conditions that were agreed between the parties about the way the training was undertaken. It was not a slight variation but the introduction of a new term which required the agreement of the parties to the CEA. It was:

> … a *significant change because it forces the employees to either refuse to do the training they have agreed to undergo under the term of the CEA or to sign a bond without the requirement to do so having been ratified* (paragraph [43]).

[44] Her Honour Judge Shaw went on at paragraph [44] to say:

> *…it cannot not be said that the bond condition was a term more favourable to the employee than those in the CEA, and to this extent it is inconsistent with the CEA. It places a restraint on the employees' ability to change jobs without financial penalty. While that is the outcome that Energex wants to achieve, it is an unfavourable outcome for the employees and it is therefore inconsistent in terms of the NZ Meat Processors principle.*

[45] Ms Coulston for the applicants also referred me to the Employment Court case of *Maritime Union of New Zealand Inc v. Ports of Auckland Ltd* [2010] NZEmpC 32, [2010] 7 NZELR 257. The judgment of the Employment Court in that case was upheld by the Court of Appeal in *Ports of Auckland Ltd v. Maritime Union of New Zealand* [2010] NZCA 229.

[46] In *Maritime Union of New Zealand*, Chief Judge Colgan held that fixed term individual employment agreements to which certain employees were subject were inconsistent with the applicable collective agreement and therefore unlawful. The reason for this was that the fixed term and its implications deprived the employees of a number of benefits under the collective agreement to which they would otherwise have been entitled. Chief Judge Colgan found that the additional terms and conditions contained in the fixed term agreements:

> *…both conflict with relevant provisions in the collective agreement and are less favourable than those that, but for the fixed term, they would enjoy under the collective agreement* and that there was *"a true inconsistency in the sense that the relevant provisions cannot stand together"*. The collective agreement had to prevail and that negated integrally the fixed term nature of the agreement.

[47] I do not accept, as I understood counsel for the applicants to suggest, that the Employment Court enunciated a principle in *Maritime Union of New Zealand* that, where a collective agreement is silent on a matter, an additional term dealing with that matter would be inconsistent. I believe that such a principle goes beyond those expounded in the *Energex* and *Maritime Union of New Zealand* cases.

[48] Examining the principles of the *Energex* case in particular, I believe that it is necessary to explore two sub questions in exploring the issue of consistency:

a. can the terms of the offer letter stand together with the terms of the collective agreement?

b. Even if they can stand together, are the terms of the offer letter less favourable to the six day roster workers, and if so, does that fact cause the terms of the offer letter and the collective agreement to be inconsistent?

Can the terms of the offer letter stand together with those of the collective agreement?

[49] Ms Coulston submits on behalf of the first applicants that, when viewed objectively, the relevant clause of the offers of employment is inconsistent with the collective agreement, and clause 4 in particular. Ms Coulston submits that the collective agreement is silent as to the ability to transfer the six day roster workers to

a five day roster pattern and reduce their pay accordingly and that there is a true inconsistency here.

[50] Ms Coulston argues that the individual terms and conditions of employment set out in the offer of employment provide less benefit to the applicants and are extremely disadvantageous to them.

[51] Ms Coulston also argues that, in the 25 years that Mr Langham (one of the witnesses for the applicants) has been employed by the respondent, six day roster workers who have agreed to work in the closedown period have retained their six day roster wage rates. She argues, therefore, that there is an extremely longstanding and recognised custom and practice which implies a term accepted by both respondent and the union that the six day roster workers who work a five day roster pattern must retain their six day roster pay rate.

[52] The principal exercise to be undertaken by the Authority is to consider whether the relevant clause in the offer of employment can stand together with the terms of the collective agreement. In my view, they can stand together. My reason for concluding this is as follows. Parts I, II and III of the South Island Collective Agreement respectively set out the rights and obligations of five day roster, six day roster and seven day roster workers. They do not explain how workers might be designated as five, six or seven day roster workers, nor do they stipulate that, once so designated, a worker cannot transfer between one category of roster pattern to another. As Mr Wilson has stated, with the exception of Appendix 2, the collective agreement neither expressly provides for transfers between roster patterns nor prohibits it.

[53] It is for the company to decide, when recruiting an employee, whether he or she is to be recruited as a five day, six day or seven day roster worker. The union has not argued that such a decision must be the subject of consultation with the union. The company decides where the proposed employee will work and under which shift pattern he/she is to commence. That decision is reflected in the letter of offer, which the respective employee can accept or reject. Each of the four applicants who gave evidence accepted the designations they were given. That is to say, Mr Kirkpatrick commenced as a six day roster worker working mainly in the dispatch department; Mr Standen and Mr Morgan commenced as a five day roster workers working in the dispatch department and Mr Barr commenced as a six day roster worker and was

offered the position of *Plant Operator (Manufacture/Dispatch)*. Messrs Standen and Morgan both became six day roster workers where their competency levels allowed them to work in the manufacturing department. They both agreed to become six day roster workers.

[54] Mr Wilson has submitted that, not only is the relevant clause in the letters of offer consistent with the terms of the collective agreement but they actually dovetail with them. I believe this is correct. First, I note that the collective agreement does not have an *entire agreement* clause. Therefore, the collective agreement does not expressly exclude the possibility of additional terms and conditions being agreed to (and arguably s. 61 would render such a clause ineffective in any event, subject to the inconsistency test).

[55] Second, the collective agreement does not state, for example, that all workers based in the manufacturing department, or that certain named workers such as the first applicants, are to be six day roster workers. If it did, then I believe that the company would not be able to rely on the clause in the offer letter to transfer manufacturing employees (such as the applicants) to work in accordance with the five day roster during temporary closedown periods, as the two clauses would not stand together. However, there is no mechanism within the collective agreement which describes which workers will be designated as six day roster workers. That designation occurs outside of the collective agreement, and Part II kicks in once that designation exercise has occurred to allocate a worker to the category of a six day worker (whether that happens upon recruitment or subsequent transfer).

[56] Furthermore, there is nothing in the collective agreement that expressly prevents the company from agreeing with six day roster workers (or other workers), either upon recruitment, or at a later date, that the company may move the worker from one roster pattern to another as the company's needs dictate.

Are the terms of the offer letter less favourable than those of the collective agreement and, if so, does that fact cause the terms of the offer letter and the collective agreement to be inconsistent?

[57] Reading carefully the judgement of Shaw J in *Energex*, it is my view that Her Honour intended to promulgate a principle that, even if the additional terms under examination can stand together with the terms of an applicable collective agreement,

where those additional terms are less favourable to the employee than the collective agreement provides, then those additional terms are inconsistent under s. 61 of the Act.

[58] At first sight, *Energex* simply states the principle that there is usually no inconsistency where the additional term is more favourable to the employee than the collective agreement. It does not state, as a principle at paragraph [30], the converse, that there usually is an inconsistency where the additional term is less favourable than the collective agreement. However, when one also takes into consideration the final bullet point of paragraph [30] in *Energex*, the following principles emerge:

a. Additional terms that can stand together with the collective, and which are more favourable than the collective, are consistent;

b. Additional terms that cannot stand together with the collective, and which are more favourable than the collective, are inconsistent;

c. Additional terms that cannot stand together with the collective, and which are less favourable than the collective, are inconsistent.

[59] Given that, when additional terms which cannot stand together with the collective agreement are always inconsistent, it would not be necessary to say that an additional term is not inconsistent if it was more favourable if it were the case that terms that can stand together with the collective agreement were always consistent. Therefore, it can be inferred, as a matter of logic, that an additional term that can stand together with the collective agreement is inconsistent if it is less favourable than that provided in the collective agreement.

[60] This analysis is supported by the judgement of Shaw J in *Energex*, where she states at [44]:

> *it cannot not be said that the bond condition was a term more favourable to the employee than those in the CEA, and to this extent it is inconsistent with the CEA. While that is the outcome that Energex wants to achieve, it is an unfavourable outcome for the employees and it is therefore inconsistent in terms of the NZ Meat Processors principle.* [Emphases added].

Whilst *Energex* does contemplate at [43] that there is a conflict between the bonding agreement and the terms of the CEA (the employees being forced to either refuse to

do the training they have agreed to undergo under the terms of the CEA or to sign a bond without the requirement to do so being ratified), the words in which Shaw J expresses herself at [44] seem unequivocally to say that an unfavourable term compared to the collective agreement makes it inconsistent *per se*.

[61] This interpretation also seems to be supported by the learned authors of Brookers Online Employment Law (current edition), when they state at ER61.02(1):

> *Terms and conditions negotiated on an individual basis will only be "not inconsistent" with the collective agreement if they deal with a matter that the collective agreement does not deal with, or if they are superior to terms and conditions that are minimum rather than fixed.*

[62] When examining whether the relevant clause in the offer letter provides less favourable terms to the first applicants than the collective does, my conclusion is that it does not. The four first applicants who gave evidence all effectively stated that they were willing to reduce their hours to a five day roster over a closedown period, but not at the expense of their schedule (b) rate. This was echoed by a letter from Ms Coulston to the respondent dated 30 November 2012. However, the terms of the collective agreement make clear that a five day roster worker will be paid at wage schedule (a) rate.

[63] It must be the case that a five day roster pattern is generally less onerous to work than a six day roster pattern. This is why it is remunerated at a lower pay rate. Therefore, the first applicants being willing to work a less onerous roster pattern should expect, under the terms of the collective agreement, to be paid at the appropriate rate. So long as the respondent may require a six day roster worker to work a five day roster pattern (and I find it can under the terms of the offer letter, which were agreed by the first applicants, and which can stand alongside the terms of the collective) the respondent's ability to pay the workers at the five day roster pay rate is expressly allowed for under the terms of the collective. Accordingly, that pay rate cannot be less favourable than the term in the collective agreement, as it derives from the collective agreement.

Other arguments deployed by the applicants

[64] The applicants say that there was no consultation with the union regarding the introduction by the company into the offer letters of the relevant clause. This is admitted by the respondent, although it says the union was informed of the intention

to do so in around 2006, which the union does not admit, but cannot refute as the relevant union official at the time did not give evidence. I do not accept that such consultation was necessary in the absence of an express agreement that such consultation was to occur, or where the clause to be inserted into offer letters was inconsistent with the terms of the collective agreement.

[65] With respect to the applicants' argument that there is an implied term preventing the respondent from reducing the pay of the six day roster workers even if they work a five day roster pattern, I must reject this. As I understand it, Ms Coulston's argument was that, by the mechanism of long established custom and practice, a term is implied into the agreement between the parties that the six day roster workers' pay rates will be preserved even if they work a five day roster pattern. However, clause 2(d) of the collective agreement makes clear that a worker working a five day roster pattern will be paid in accordance with Wages Schedule (a). That is an express term that directly contradicts the implied term that Ms Coulston argues for. In such a case, the express term must prevail.

[66] I also do not accept that the relevant clause in the offer letters constitute an unlawful variation of the collective agreement, contrary to clause 33. As the relevant clause sits with the terms of the collective agreement, and is not inconsistent with it, it cannot be said to have varied the collective agreement.

Consistency aside, are the words of the offer letter sufficiently clear to enable the company to change a worker from one roster pattern to another, and to change their hourly rate of pay?

[67] The relevant wording states:

> *You may be required, with reasonable notice, to change your shift pattern in line with the needs of the business. If this occurs, your hourly wage will also be reviewed to ensure it is appropriate for your level of competence and hours of work/shift pattern.*

[68] First, I am satisfied that the needs of the business during the 2012/13 closedown period justified the company changing the first applicants' shift pattern to that of a five day roster worker. I am also satisfied that reasonable notice (around two months') was given.

[69] The second sentence of the relevant clause makes reference to the workers' *level of competence*, as well as their hours of work/shift pattern, having to be taken

into account to ensure that the hourly wage is appropriate. However, this reference to *levels of competence* clearly refers to the four levels which provide one of the parameters (alongside the roster pattern and years of service) in accordance with which the hourly rate is fixed. Level 1 is defined in the collective agreement as a *process operator*, level 2 as a *departmental operator*, level 3 as a *senior departmental operator* and level 4 as a *senior works operator*. The higher the level of a worker within each roster pattern the greater the hourly rate.

[70] None of the first applicants complained that he had not been paid at the appropriate level during the 2012/13 closedown period.

[71] Furthermore, my reading of the second sentence of the relevant clause in the offer letter requires both the level of competence of a worker and their work/shift pattern to be taken into account during the review of their hourly rate following a change in shift pattern. Therefore, even if a worker's level of competence has not changed, if their hours of work/shift pattern have, then the company may review the hourly wage.

[72] Finally, I am satisfied that the term *review* in the second sentence includes the concept of *change*, as otherwise the clause would have a nugatory effect.

[73] Therefore, the issue of consistency aside, I am satisfied that the wording of the relevant clause in the offer letter is sufficiently clear to enable the company to change a worker from one roster pattern to another and, as a consequence, to review (and by implication change) the hourly rate of pay.

Conclusion

[74] In the absence of a term in the collective agreement that designates specific workers as six day workers, or a term that expressly prevents transfers from six day to five day roster patterns, I do not agree that the relevant clause in the offer letter is inconsistent with the terms of the collective agreement and I therefore accept the respondent's defence that it may rely upon the relevant clause in the offer letters to switch a six day roster worker to a five day roster pattern.

[75] It follows from this that, by dint of clause 2(d) of the collective agreement, the company has the right to pay a worker in accordance with Wages Schedule (a) when that worker is working a five day roster pattern.

[76] In light of the above, I dismiss the application of Mr Parker as he was either a seven day roster worker who could be required to work under a six or five day roster, and be paid in accordance with the applicable wages schedules, (b) or (a), as applicable, by virtue of clause 6(a) of the collective agreement, or else he was a six day roster worker whose offer letter allowed the company to reduce his pay to wage schedule (a) when he worked a five day roster pattern.

[77] I also dismiss the claims of Messrs Kirkpatrick, Barr, Standen and Morgan and of the second applicant that the respondent has breached the terms of the collective agreement by changing the roster pattern of the six day roster workers to a five day roster during the 2012/13 closedown, and by reducing their pay in accordance with Wages Schedule (a).

[78] Accordingly, I also decline to order compliance as requested by the applicants. I also decline to impose penalties against the respondent company. I also dismiss the personal grievances of the first applicants.

Costs

[79] The parties are invited to agree amongst themselves how the issue of costs is to be dealt with between them. In the absence of any such agreement within 21 days of the date of this determination, any party seeking costs may apply to the Authority within a further seven days by way of memorandum of counsel and any memorandum in response must be served and lodged within a further 14 days.

David Appleton
Member of the Employment Relations Authority