



[4] Tenix wishes to have a greater degree of flexibility in its workforce for financial and competitiveness reasons, and claims that Mr Simpson working as part of the Line Mechanics team will achieve flexibility.

[5] Tenix does not agree that requiring Mr Simpson to undertake duties within his capabilities and within the expectations of a Line Mechanic under the Collective Agreement breaches his terms and conditions of employment.

### **Issues**

[6] The issue for determination is whether it is a breach of Mr Simpson's employment agreement for Tenix to require Mr Simpson to undertake the work of a Line Mechanic when he currently performs the work of a Faultman.

### **Background Facts**

[7] Mr Simpson commenced employment as an apprentice with Thames Valley Electric Power Board in 1982. After completing a 4 year apprenticeship he became qualified as a Line Mechanic.

[8] In 1988 Mr Simpson applied for, and was appointed to, the position of Faultman. Following his appointment, Mr Simpson was required to undertake further training and obtain a Limited Registration qualification. Mr Simpson has been continuously employed as a Faultman since that time.

[9] The entity employing Mr Simpson has undergone several changes during the period of Mr Simpson's employment. Siemens Energy Services Limited ("Siemens") was the employer from 2001 until 2004. In September 2004 the employer changed to Power Co, and in 2005 the employer became Tenix.

[10] Tenix employs approximately 300 employees and provides design, construction, operations, and maintenance in addition to programme, project and asset management services in New Zealand to the water, power, gas, industrial and transport sectors.

[11] Tenix has a contract with Powerco to provide line maintenance and associated services within the Coromandel area for which Mr Mark Miller, Field Services Manager, is responsible. The 15 employees covering this area, including Mr Simpson, are based at the Kopu depot.

### *The PTH Letter*

[12] In 2005 Siemens issued Mr Simpson with a PTH letter which stated that it: “*sets out the terms of your employment which are personal to you and which prevail over the terms of the CA that is binding on you and the Company.*”

[13] The initial part of the letter set out Mr Simpson’s date of commencement as being 22<sup>nd</sup> February 1982, his mode of payment as being weekly, and stated that: “*Siemens Energy Services Limited employs you in the position of Faultman*”. Also set out in the PTH letter were various benefits personal to Mr Simpson including health insurance, redundancy rights and retiring gratuity.

[14] The letter concluded by asking Mr Simpson to acknowledge his acceptance of the points described in the letter by signing and returning the letter. Mr Simpson signed the letter on 18 October 2002.

### *Collective Agreement*

[15] The relevant clauses of the Collective Agreement are clause 2.5 and clause 4.1 which state:

#### **2.5 Completeness/savings**

...

*Those employees who, at the date of execution of this CA had conditions in excess of those provided for in this CA in respect of all terms and conditions contained in their personal to holder agreements pursuant to previously applicable awards or collective employment contracts, will continue to receive such provisions, provided that the employer and employee may agree to alternative arrangements.*

#### **4.1 Duties**

*There may be times when the company requires the content of your job to vary in order for the Company to meet its business and customer service requirements. The content of your job may be varied from time to time after consultation with you but not so as to substantially alter the nature of your position. You may be required to perform other duties for which you are trained, skilled or experienced.*

*Faultman and Line Mechanic duties*

[16] Mr Simpson explained that as a Faultman he is the first response for faults and call outs during the day and is responsible for switching off the Network for shut downs, substation switching, voltage complaints, cable locations, and close approach permits.

[17] Mr Simpson explained that to carry out his duties he required a higher level of understanding of electrical theory and systems than was required to carry out the role of Line Mechanic, and this was recognised in the Limited Registration qualification.

[18] Mr Simpson said that he worked autonomously during his working day, being contacted directly on his cell phone by the customers and advised of faults. In order to carry out his duties during his working day Mr Simpson explained that he had sole use of a company vehicle (“the Ute”), and primarily worked alone on the faults, unless he required a Line Mechanic to assist him, or had taken a Line Mechanic with him for training purposes.

[19] During any period of down time from fault work, Mr Simpson said he would carry out scheduled maintenance or other tasks in accordance with clause 4.1 of the Collective Agreement.

[20] Mr Simpson said he was paid in accordance with the base rate for a Line Mechanic as set out in Schedule 1 of the Collective Agreement, and also received the Faults allowance and the Limited Registration payment.

[21] In contrast to his role as a Faultman, Mr Simpson explained that a Line Mechanic worked as part of a team in a line truck with other Line Mechanics and primarily carried out construction and maintenance work under the direction of a Foreman, although he agreed that a number of Line Mechanics also had the Limited Registration qualification and could work on faults.

[22] Mr Simpson further explained that there was an after hours standby roster system to deal with faults. Mr Simpson said that together with those Line Mechanics qualified to work on faults, he was rostered on the after hours standby roster one week in four. At the close of his working day, Mr Simpson explained that the Ute would be used by the person rostered on the after hours standby roster and the following day it would again be available for his sole usage.

### *Events in Early 2012*

[23] Mr Simpson said that in early 2012 Mr Miller had instructed him to perform the duties and functions of a Line Mechanic as he wished a Line Mechanic to replace him on the day time faults for reasons of flexibility and training. Mr Simpson said he had objected to this and made reference to his PTH letter. Mr Simpson said Mr Miller's response been to contact his own manager and then inform him that the PTH letter was not legal.

[24] Mr Simpson said he had contacted Mr Myles Leeson, EPMU Organiser, who had written to Tenix on his behalf advising that the PTH letter made it a term of employment that he was employed as a Faultman, and secondly that clause 4.1 of the Collective Agreement did not allow Tenix to substantially alter the nature of Mr Simpson's employment.

[25] Mr Simpson said that throughout the 20 years of his employment as a Faultman, he had been the only employee who attended to all faults which were received throughout the day, unless he was absent. As such, he had worked autonomously and alone, assessing situations as they arose and deciding on a plan of action.

[26] As a result, Mr Simpson said he considered that changing his employment to operate as a Line Mechanic rather than a Faultman would substantially alter his employment in that he would be carrying out a completely different type of work, would be working as part of a team under the supervision of a foreman, and he would lose status and independence in the way he worked.

### **Determination**

[27] The starting point for determination of this dispute is section 61 of the Employment Relations Act 2000 ("the Act") which provides that employees bound by the terms of an applicable collective agreement may agree to additional terms and conditions of employment which are mutually agreed and provided these are, pursuant to s 61 (b): "*not inconsistent with the terms and conditions in the collective agreement*".

[28] The additional terms and conditions of employment in this case are those contained in Mr Simpson's PTH letter, which has to be considered in the context of the Collective Agreement terms

## The Law

[29] Ms McNally referenced the Supreme Court case of *Vector Gas Ltd v Bay of Plenty Energy Ltd*<sup>1</sup> as providing the relevant legal principles of contractual interpretation. In that case Tipping J stated<sup>2</sup>

*..the ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. .. The language used by the parties, appropriately interpreted, is the only source of their intended meaning.*

*... The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean.*

[30] Ms McNally submitted that the Supreme Court's approach accorded with that of the Appeal Court as set out in *Lowe Walker Paeroa Ltd v Bennett*<sup>3</sup> in which it was observed that: "Where contractual intention is clear from the words used, the court must give effect to it..", and that of the Employment Court in *Chief Executive Officer of the Department of Corrections v Corrections Association of NZ Inc*<sup>4</sup>. In that case Colgan J as he then was, noted that the Employment Court had set out the principles of interpretation as applied to employment agreements under the Act on many occasions and at para [15] cited the following principles as being relevant:

- *Agreements are interpreted with reference to their factual matrix or surrounding circumstances. This includes matters such as the background to the transaction and the practice of the industry or sector in question.*
- *One considers first, the words used – they must obviously be a starting point – and then the surrounding circumstances to make sure that the first impression of the meaning is correct and nothing in the circumstances requires modification of that most natural meaning of the words.*
- *The Court is required to adopt an objective approach to interpretation: what matters is not what the parties say they intended the words to mean but what a reasonable person in the field, knowing all the background, would take them to mean.*
- *Interpretation of an employment agreement should not be narrowly literal but should accord with business common sense ... The interpretation should fulfil the purpose of the agreement and be based not simply on dictionary meanings or grammar. Even if the Drafting*

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<sup>1</sup> [2010] NZSC 5, [2010] 2 NZLR 444

<sup>2</sup> Ibid at para [19]

<sup>3</sup> [1988] 2 ERNZ 558 (CA)

<sup>4</sup> [2005] ERNZ 984

*is inept, the Court should attempt to give effect to the underlying intent. If a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find an interpretation that satisfied business common sense and fulfils the parties' purpose.*

- *Nevertheless, if the words are clear and can have only one possible meaning, that should generally determine the matter. The Court will need to be very sure of what business common sense requires when interpreting a contract if that does not accord with the clear words.*

*PTH Letter and the Collective Agreement provisions*

[31] The PTH letter states that Mr Simpson's job title is that of a Faultman. Ms Sam Dyer, Senior Human Resources Advisor, pointed out that of the 300 Tenix employees Mr Simpson was the only employee with the job title of Faultman. Although there were a few other employees with PTH letters who had the word 'Faultman' included in the job title, the full job title was in fact Line Mechanic/Faultman.

[32] Ms Denz further stated that the term Faultman was not used by Tenix, nor did the term exist in the Collective Agreement.

[33] However Ms Denz did accept when questioned at the Investigation Meeting that Mr Simpson's duties as a Faultman are distinct from that of a Line Mechanic; he works alone and autonomously on all day time faults, and not as part of a team working predominantly on maintenance and construction. Mr Miller also agreed that this was the case.

[34] I find that the uniqueness of this job title supports the view that the reasonable person in the industry, knowing all the background, would understand the words relating to the job title as stated in the PTH letter to mean that Mr Simpson was employed as a Faultman and not as a Line Mechanic/Faultman or as just a Line Mechanic.

[35] I consequently agree with Ms McNally's submission that the context in which the words in the PTH letter were created does not give rise to any ambiguity.

[36] I do not accept that the preliminary section of the PTH letter can be severed from the benefits section as has been submitted by Mr Harrison on behalf of Tenix, such that the introduction, and also the conclusion, section of the letter are not conditions captured by the savings provision contained in clause 2.5 of the Collective Agreement. If this were the case, I find it would have needed to be clearly indicated in the PTH letter that that was the intention. In fact the opening paragraph of the PTH letter defines the scope of the letter, the commencement date of employment, the job title and the method of payment.

[37] Tenix became the employing entity in 2005; however there is no evidence to support Mr Simpson's terms of employment being altered at that time such that his job title as stated in the PTH letter changed to Line Mechanic. It was also accepted by Ms Denz and Mr Miller that Mr Simpson's duties did not change after 2005,

[38] Whilst there is no reference to a Faultman position in the Collective Agreement; I find it significant that when Tenix became the employer, the PTH letters were accepted and acknowledged by Tenix, as indicated by the inclusion of the savings provision in relation to the PTH letters in clause 2.5 of the Collective Agreement.

[39] Clause 2.5 confirms that employees holding PTH letters may have terms and conditions which are different to those contained in the Collective Agreement. Further that such terms and conditions of employment will continue to be received by these employees, unless the employer and employee agree to alternative arrangements.

[40] I do not consider the fact that the position of Faultman is not included within the job classification in Schedule 1 of the Collective Agreement, or that Mr Simpson is paid in accordance with the Line Mechanic rate, infers that Mr Simpson is thereby a Line Mechanic or undermines the clear meaning of clause 2.5 as is contended by Tenix.

[41] Further, as both Ms Denz and Mr Miller acknowledge, Mr Simpson's duties did not change after Tenix became the employer in 2005, thus that Mr Simpson has been employed carrying out the duties of Faultman rather than Line Mechanic for approximately 7 years despite the job of Faultman not appearing in the job classification in Schedule 1 of the Collective Agreement.

[42] Ms Denz stated that the classifications of employees within the Collective Agreement reflected the positions which currently exist within Tenix and the training pathway, this latter being structured around the units standards framework set by ESITO (the electrical supply training organisation).

[43] Ms Denz and Mr Miller's evidence supported Mr Simpson's explanation of the role he fulfilled with Tenix. I find this explanation of the role Mr Simpson fulfilled as Faultman to be supported by the description of the position as noted in the National Certificate in Electricity Supply (Distribution Faultman) (Level 4) NZQF NQ Ref 1624 ESITO description, the training pathway followed by Tenix.

[44] The ESITO description of the position of Faultman states: “*Faultman is a recognised role within the electricity supply industry into which experienced line mechanics and electricians make a career progression. Faultmen are responsible for identifying faults on electricity supply lines, analysing the cause of those faults and recommending remedial work to fix them, and undertaking that work if qualified and competent to do so. The nature of the job means faultmen are often working alone so the role demands strong analytical skills, responsibility, and an ability to work and make decisions alone... faultmen must also be able to take responsibility for their decisions*”

[45] I further consider that the validity of the Schedule 1 argument needs to be considered within the context of Schedule 2 of the Collective Agreement which defines the principle purpose of the Line Mechanic role as being “*to provide industry best practise network line construction and maintenance services.*” There is no reference to fault repair in this definition, although I accept that Line Mechanics may become skilled at repairing faults in accordance with the ESITO training pathway.

[46] I conclude that these Schedules in the Collective Agreement are not conclusive in themselves and have to be considered in conjunction with clauses 2.5 and 4.1.

[47] I find that Mr Simpson’s PTH letter provides terms and conditions which are in excess of those set out in the Collective Agreement, and as such, in accordance with clause 2.5, they prevail over those terms and conditions set out in the Collective Agreement

*Substantial alteration of the nature of the position*

[48] I accept that clause 4.1 allows Tenix to vary Mr Simpson’s job content and require him to perform other duties for which he is trained, skilled or experienced. Requiring Mr Simpson to carry out the duties of a Line Mechanic on occasion clearly falls within this category in that Mr Simpson is trained, skilled and experienced in Line Mechanic duties.

[49] However there is a limitation on this general management prerogative contained within the clause, this being that the variation may not: “*substantially alter the nature of your position.*”

[50] Ms McNally cited the Employment Court case of *Holloway v Waikato and King Country Press Ltd*<sup>5</sup> which involved consideration of a collective agreement which allowed an

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<sup>5</sup> [2000] 2 ERNZ 86

editor to allot duties to reporters at the editor's discretion in the context of a letter appointing Mr Holloway to the role of sports reporter. In that case Judge Travis stated:

*... The respondent could have expressly reserved to itself in the appointment letter the right to remove the appellant from the position of sports reporter to a general reporting position. It did not do so. The appointment process in this particular case has had the effect of constraining the wide powers reserved to the editor by cl 13.2.1 of the correct CEC.*

[51] I find that the PTH letter similarly contains no right to alter Mr Simpson's role from Faultman to Line Mechanic. Tenix did not insert such a provision in 2005, rather as previously observed, the PTH letters were given recognition in the Collective Agreement.

[52] I accept that Tenix had genuine commercial and business reasons for the proposed change to Mr Simpson's position.

[53] I also accept that Mr Simpson carried out duties to be found within a Line Mechanic role from time to time. However, although Ms Denz argued that the title of Faultman was merely a title and not an indicative term of employment, both she and Mr Miller confirmed in their evidence that in accordance with this title, Mr Simpson employment duties were as the employee who attended to the day time faults. As such Mr Simpson worked autonomously and alone during the 7 years Tenix had been the employer, and had done so in his total employment for approximately 20 years.

[54] While Mr Simpson accepted that there would be no change to his rate of remuneration, he did consider that the proposed change would have a significant impact on his mode of working and on his status. Ms Denz agreed that Mr Simpson's working day would be different, although she did not agree that change was significant, and Mr Miller conceded that some employees might consider that Mr Simpson had been demoted should the proposed change of duties take place.

[55] I find that the proposed change would be significant; affecting Mr Simpson's daily duties and mode of working, there would also be a change in his perceived status as a Faultman. I find that the proposed change would be a substantial alteration in the nature of Mr Simpson's employment in contravention of clause 4.1 of the Collective Agreement.

[56] I determine that it is a breach of Mr Simpson's employment agreement for Tenix to require Mr Simpson to undertake the work of a Line Mechanic when he currently performs the work of a Faultman.

## **Costs**

[57] Ms McNally is seeking a contribution towards costs based on the usual tariff approach as applied within the Authority. Mr Harrison submits that this is a genuine dispute, and as such costs should lie where they fall.

[58] I accept that this was a genuine dispute about the interpretation, application or operation of the provisions of the Collective Agreement in light of Mr Simpson's PTH letter, and I am not persuaded that this is a matter in which costs should be awarded.

[59] I order that costs are to lie where they fall.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**