IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 74/07
CEA 380/05

	BETWEEN	BEST, HORRELL, NEES AND SATHERLY Applicants
	AND	TNL GROUP LIMITED Respondent

Member of Authority:	Paul Montgomery
Representatives:	Andrew McKenzie, Counsel for Applicant Kit Toogood QC and Craig Stevenson, Counsel for Respondent
Investigation Meeting:	1 March 2007 at Nelson
Determination:	4 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The four applicants, Brad Best, Grant Horrell, Paul Nees and Neville Satherly are employed by the respondent company.

[2] A dispute has arisen in respect of their entitlement, under the Collective Agreement, to shift allowances. They seek a determination as to their eligibility for such allowances, and if found to be eligible, recovery of unpaid allowances with interest over the relevant period.

[3] The respondent resists the applicants' claims saying that none of the applicants is a "shift worker" and hence none is eligible for shift allowances. That is because each works the same hours week by week and are not rostered to work some days and some nights.

The relevant facts

[4] The Authority was provided with copies of the 1992-1993 and the 1998 to 1999 Collective Employment Contracts, the relevant sections of the 2002 to 2004 Collective Employment Agreement and the 2004 to 2006 Collective Employment Agreement between the parties. The relevant definitions set out in the documents are:

> ***DEFINITIONS***
>
> ***A shift*** *shall mean a rostered span of working hours comprising part of a shift operation.*
>
> ***A shift employee*** *shall mean an employee who is rostered to work a shift operation over consecutive days within the definitions as outlined in clause 13.*
>
> ***Day shift*** *shall mean where the substantial number of hours worked shall fall inside the hours of 6.00am to 6.00pm.*
>
> ***Night shift*** *shall mean where the substantial number of hours worked fall inside the hours of 6.00pm to 6.00am.*
>
> ***A roster*** *shall mean a schedule of duties showing in advance the days of the week and shifts when an employee is due to commence work and be off work.*

[5] Further on into the document there is another section which reads:

> ***10. SHIFTS***
>
> *10.1 A shift operation shall mean an arrangement to carry out specified tasks using relays of employees operating a vehicle or vehicles on two shifts per day constituting a "day" and a "night" shift.*
>
> *10.3 A shift shall commence at a time set by the shift roster and shall not be changed except by re-rostering or by consultation with the employee and the work place representative. The employer acknowledges the necessity for a roster to be posted.*
>
> *10.4 For a "shift operation" in excess of one week a shift roster outlining names of drivers and time of commencement of shift duties shall be posted one week before the commencement of the shift.*

The Issues

[6] At issue here is whether an employee, driving a tractor unit which is deployed on different tasks during the day from that on which it is employed during the night, is entitled to be paid a shift allowance regardless of whether the tractor unit is driven at night or during the day.

[7] The question is whether it is the driver of the tractor unit who works shifts or whether the tractor unit works shifts when deployed on different tasks during night or day hours.

[8] Further, it is relevant to ask whether employees using the tractor units in question work the same hours week by week, be they day hours or night hours, or whether they change their hours from day to night hours as set out on a roster. In other words, do some employees regularly maintain their day or night hours or do they alternate between day and nights hours as set out on a rotating roster which provides for some employees to work day hours at times and night hours at times on an organised, prearranged basis.

[9] The applicants maintain that, consistent with practice prior to 1999, a shift allowance was/is payable where employees work on the same vehicle that works both day and night.

[10] The respondent company maintains that the applicants are not entitled to a shift allowance unless employees work rotating rosters and where the work is the same for both day and night.

The investigation meeting

[11] At the investigation meeting I was assisted by the four applicants, each of whom gave evidence before the Authority, and for the respondent Mr Craig Peattie, the respondent's Chief Executive Officer, and Mr Mark Holland, the Nelson Area Manager of the respondent company, gave evidence.

[12] In essence, the witnesses gave their views on the practices adopted by the company under the CEA from their particular points of view. Counsel for the parties focused their attention in their respective submissions on the interpretation of the clauses cited above.

Discussion and analysis

[13] Significantly, Mr Toogood pointed out that the Authority had no evidence before it other than the documents referred to above and the exhibits tabled. There being no evidence adduced regarding the intentions of the parties involved in settling the collective contract or agreements, the appropriate method to be adopted in

determining the issue was the plain meaning of the words used. As I understood it, Mr McKenzie did not disagree with this view. However, he placed a different interpretation on the words in the documents.

[14] While it is trite to observe that agreements or contracts are made between employers and employees, not between employers and tractor units, I think it germane to this particular issue to accept that the employees (and perhaps the employer) have coined the phrase "shift trucks" to describe tractor units which work both day and night hours.

[15] Clearly a business needs to secure work to keep the wheels of its tractor units turning for as many hours as possible to defray its cost and generate income from its investment in the unit. To dub that tractor unit as a "shift truck" in colloquial terms is thoroughly understandable. However, to import from that colloquially descriptive term an obligation on the owner/employer to pay whoever drives that unit, whether by day or night when it is deployed on different tasks during the day from that on which it is deployed by night, is a totally different matter.

[16] It is also clear from the evidence put before the Authority that, at times, the employer has paid an additional allowance to drivers who, on the face of it, do not appear entitled to these payments. In June 1999, the company wrote to two of its drivers, Mr Horrell and Mr Satherly, the relevant section of the letter reading:

> *Within your employment contract document there are provisions for both flexible ordinary hours and for shift work. While the company believes that your ordinary hours, which will be regularly worked at night, could be interpreted as flexible ordinary hours, there should be recognition for regularly working unsociable night hours. The company proposes to pay you $1 per hour for the regular night hours while you are working this arrangement.*

[17] For the applicants, Mr McKenzie urged me to consider this a concession which assisted his clients.

[18] On reviewing the documents put before the Authority, I observe that the 1992 contract sets the shift allowance at $18.70 per shift, the 2002 agreement the sum of $20.08 per shift and the 2004 agreement a shift allowance of $20.99 rising in steps to $21.83 on 1 February 2006. Having considered the matter as carefully as I am able, it is clear to me that the increased payment to these two applicants in 1999 represents an adjustment to their hourly rate based on unsociable night hours of regular work. It is

clear to me that the author of the letters, Mr Mike Aberhart, was clearly trying to avoid the word "allowance" in the correspondence and to distinguish the additional payment from a shift related entitlement.

[19] It is also suggested that at times shift allowances were paid to relief drivers working at night. For the respondent, Mr Holland told the Authority that as far as he knew, this had not occurred although he accepted he could not rule out the possibility. Mr Holland told the Authority that if such payments had occurred occasionally then it would have been most likely due to an administrative error in Payroll as it was certainly not in line with the company's policy.

[20] Mr McKenzie urged me to consider a judgment of Jamieson J in which he wrote:

> *Similarly the term 'shift' does not today denote, 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 clock hours.* [Inspector of Awards v. Caxton Printing Works Ltd [1975] B.A. 6445]

[21] I have considered this and in the context of Mr Toogood's submission referring the Authority to the decision of Horn CJ in *NZ (Except Northern etc) Food Processing etc IUW v. Skeggs Foods Ltd* [1984] ACJ 85. After quoting the passage from Jamieson J, the learned Chief Judge goes on to say:

> *That was a decision on the facts of a particular award. Each award must be considered in its own context and with regard to the terms used. In Road Transport Drivers' Union v. New Zealand Motor Omnibus Union of Employers 79 ACJ 127, we refer to the occasionally loose use of the word shift in common parlance. We pointed out that it is open to parties to any document to create, in effect, their own dictionary. The question to which we address ourselves is whether the parties have done so in this case.*

[22] Upon close reading of the documents it is clear in this particular case that a critical component is the rotation established by the roster. Only those employees working rotating hours rather than those employees working regular night or regular day hours are eligible for shift allowance. Clause 12.3 of the CEC and clause 13.3 of the CEA provide that:

> *A shift shall commence at a time set by the shift roster and shall not be changed except by re-rostering or by consultation with the employee and the employer acknowledges the necessity for a roster to be posted.*

[23] Further, the definition of a shift employee is set out in the document as *an employee who is rostered to work a shift operation over consecutive days*. The document defines a roster as *a schedule of duties showing in advance the days of the week and the shifts when an employee is due to commence work and be off work.*

[24] The copy of an actual roster provided by the respondent was helpful in that it clearly distinguishes the difference in the actual hours worked by regular hour employees and shift employees.

[25] The applicants submitted to the Authority a copy of a document headed "Shift Agreement between the TNL Group Limited group of companies and the Nelson and Marlborough Drivers' Union" dated 27 January 1980. The document is useful in that, at clause 4, it states:

> *Shift work means work which is carried out by two or more successive relays or spells of workmen. Where shifts are worked the employer shall as far as possible taking into consideration the requirements of the business arrange the shift roster by mutual agreement with men concerned.*

[26] At clause 5, the document goes on:

> *It is recognised that shift payments are compensation for working rostered hours outside those normally worked by the company or for reduced working hours due to better utilisation of vehicles.*

[27] In clause 8, the document states:

> *The shift payment will be $10.38 per day per vehicle and will be divided between the early shift and late shift in such proportions as may be agreed upon from time to time between the company and the Union.*

[28] It is significant that in this agreement the shift allowance is allocated on a per vehicle per day basis. In the 1992 CEC (and possibly earlier collective arrangements not before the Authority), shift allowances are allocated at a stated rate to the employee not to the vehicle. This change is important as it clearly indicates that both parties agreed, at least in 1992, to that very specific change in their collective arrangements. It is also significant that the definitions of shift and the need for rostered hours have not changed materially since 1980. The only material change is in respect to how shift payments are allocated.

[29] I think it possible that the term "shift truck" had its genesis in documents such as the 1980 agreement where the parties agreed to allocate shift payments on the basis of the hours worked by the vehicle as opposed to rostered hours worked by the employees.

Determination

[30] On the basis of the evidence before the Authority, I find that the parties agreed that two essential components are required to establish entitlement to a shift allowance. They are:

- That the employee must work in a relay with others doing the same task as those they replaced on those tasks and those who replace them on those same tasks; and

- The employee must be engaged in rostered duties with other employees to work in rotation with them at different hours as set out in the weekly roster.

[31] I find that with the exception of the method of allocation of shift payments, which I find has been agreed between the parties, there has been no significant movement in the subsequent conduct of the parties after these contracts/agreements came into existence.

[32] Each of the four applicants works set, regular hours, not hours dictated by a rotating roster.

[33] The application is dismissed. The applicants are not entitled to shift allowances.

Costs

[34] The parties are to attempt to resolve this issue between themselves. If that cannot be achieved, Mr Toogood is to lodge and serve a memorandum. Mr McKenzie will have a further 14 days within which to file his response.

Paul Montgomery
Member of Employment Relations Authority