



[2] The Melter Plant is part of the production process for the manufacture of steel. Its environment is unique and has been described as unforgiving. The Melter Plant contains two furnaces, referred to as melters, which produce molten steel to be used further on in the manufacturing plant.

[3] The melters are each divided into an “iron side” and a “slag side”.

[4] Each melter has two tap holes on the iron side feeding two launders, which feeds molten metal from the melter into a ladle. On the slag side of each melter the tap holes have a launder which feeds molten slag into a bowl.

[5] Bob cats operated by contractors are used to clear out the launders and undertake a significant element of launder re-sanding.

[6] When the manning levels were agreed in 1996 the work in the Melter Plant was largely manual labour which was physically demanding with exposure to extreme conditions. In present day 2017 the need to undertake manual tasks has been significantly reduced through mechanisation.

[7] The 2011 12-Hour Variation, consistently with the wording in the collective agreement, requires any changes to manning levels to be by agreement which will not be unreasonably withheld.

[8] In 2015 NZ Steel proposed to reduce manning levels from 44 to 34. This was to be achieved by reducing the number of Tappers per shift from six to four and the number of relief workers per shift from two to one. In addition NZ Steel proposed having two additional relief workers who would “float” between shifts. The Union did not consent to the proposed changes.

[9] NZ Steel considered the Union had unreasonably withheld its agreement, in breach of the collective agreement and the 12-Hour Variation. It lodged an application in the Authority seeking a declaration that the Union had unreasonably withheld its agreement. An investigation meeting in 2016 was adjourned to allow the parties to enter into settlement discussions.

[10] On 26 July 2016 the parties entered into an agreement allowing monitored trials with reduced manning to be undertaken. During the first trial the manning levels would be reduced to 40 Operators (5 tappers on each shift instead of 6). If that trial was successful NZ Steel could propose to permanently reduce the manning level to 40 Operators and the Union agreed its consent would not be unreasonably withheld.

[11] If the first trial was successful the parties also agreed a second monitored trial would occur where manning levels would be reduced to 36 (4 tappers instead of 5). If the second trial was successful NZ Steel could propose to permanently reduce manning to 36 Operators and the Union agreed its consent would not be unreasonably withheld.

[12] The Union have agreed to reduce manning levels to 40 following the first trial but has not consented to a further reduction to 36 because of concerns its members hold about their health and safety with reduced numbers.

### **Issue**

[13] In order to resolve this employment relationship problem the issues I must determine are:

- a) Was the review of the manning levels necessary?
- b) Was the Union's refusal to consent to the reduction from 40 to 36 unreasonable?

[14] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from NZ Steel and the Union but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

### **Was the review of manning levels necessary?**

[15] Clause 13.7 of the collective agreement provides for a review of manning levels in an area "Where it becomes necessary...".

[16] The Union has questioned whether NZ Steel has shown that the review of the manning levels of the Melter Plant were “necessary” as required by the collective agreement.

[17] The starting point when interpreting a clause in a collective agreement is to consider the natural and ordinary meaning of the language used by the parties. Even if the words are plain and unambiguous, this does not preclude a consideration of the surrounding circumstances<sup>1</sup>. This acts as a cross-check as to whether some other or modified meaning was intended.

[18] There is no dispute that the clause 13.7 of the collective agreement is triggered when one party considers it to be necessary to review manning levels.

[19] Consultation between the parties over a possible reduction to manning levels started in 2013. The Union have participated in the consultation process without objection. I agree with Mr Skelton’s submissions that by entering into the 26 July agreement the parties have impliedly accepted the need to review manning and to trial and monitor NZ Steel’s proposal.

[20] The reasons for the trial include the investment of \$17m in mechanisation of the Melter. The investment was made to improve the safety within the Melter and to increase efficiency, productivity and competitiveness. Mr Palmer accepted in his oral evidence that if manning levels at the plant can be reduced safely, it would increase productivity and efficiency, and that would be a “...worthy goal.”

[21] In the absence of any objections prior to the 26 July agreement, I am satisfied the parties accepted the consultation process had been initiated due to it being necessary to review the manning level of the Melter Plant.

**Was the refusal to consent to the reduction unreasonable?**

[22] Once the necessity for a review has been established clause 13.7 requires agreement to alter manning levels and states:

Agreement shall not be unreasonably withheld. The basis for agreement shall be:

- Safe working practices

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<sup>1</sup> *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789; *Tertiary Education Union v Vice-Chancellor, University of Auckland* [2015] NZEmpC 169

- Training and competence
- Business impact;
- The relationship between manning levels, revised work practices and the impact on banked hours.  
[my emphasis]

[23] The agreement that the alteration of manning levels will not be unreasonably withheld has been consistently applied by the parties through the collective agreement, the 12-Hour Variation and the 26 July agreement relating to the two trials.

[24] The wording in the collective agreement originated in Industrial Awards pre-1990. The parties have agreed to continue with the wording which has been specifically replicated in the 12-Hour Variation and the 26 July agreement.

[25] The parties have established when agreement can be withheld. I conclude they intended the words to mean what they say. That is, if consent is withheld, the withholding of the consent must be reasonable.

[26] Surprisingly there is very little judicial authority dealing with the term “unreasonably withholding consent” in the employment sphere. I have been assisted by decisions in other jurisdictions to guide me in my investigation of this matter.

[27] The Supreme Court has considered the judicial approach to “consent not to be withheld unreasonably” in the context of assignment clauses in leases. The Supreme Court said it required a two stage inquiry, first into the actual basis for withholding consent and secondly as to whether that basis provides reasonable grounds for withholding consent.<sup>2</sup>

[28] There is no dispute that if the Union’s consent was withheld in bad faith it would be unreasonable. I am satisfied the parties have at all times acted in good faith towards each other. The parties have a long standing collaborative relationship. During the investigation meeting I heard many examples of where the Union and NZ Steel have worked together to resolve issues which at times has been directly beneficial to NZ Steel.

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<sup>2</sup> *Greymouth Gas Kaimiro Ltd v GXL Royalties Ltd* [2011] 1 NZLR 289 at [10].

[29] However, good faith is not sufficient to demonstrate that the consent was withheld on a reasonable basis.<sup>3</sup> The reasons for withholding consent must be rational and not at odds with an objective assessment of the Union's conduct.<sup>4</sup>

[30] The Union says its members did not consent to the further reduction in manning because of strongly held concerns about fatigue, health and safety, the spread of training and competence within shift crews, and concerns about overtime.

### ***Fatigue and tiredness***

[31] At a meeting held on 9 June 2017 Mr Ian Bartlett and Mr Derek Miller, the two experts monitoring both trials, were invited to answer questions from members of the Union relating to the trials. At this meeting the members raised concerns about feeling exhausted at the end of their shifts. Examples given during the meeting included an operator relating his experience of nearly falling asleep while driving home. The operator had lodged an audit form about this incident into NZ Steel's health and safety system. Other examples included being too tired to properly interact with children and partners when at home which was having an impact on home life.

[32] Fatigue and hydration were two areas being closely monitored during the second trial. It was noted that during the first trial employees were not rehydrating effectively and were waiting until breaks to drink water. This led to inadequate ingestion of fluids and a state of dehydration was possible. Poor hydration is linked to fatigue.

[33] The Melter operators work on rotating shifts of 12 hours, four days on and four days off. The first two shifts are night shifts and the last two are day shifts.

[34] Partway through the second trial, at the request of the Union and NZ Steel one on one coaching sessions on hydration were delivered to the majority of the melter employees. The results of testing during the second trial indicated improvements were still needed to ensure good hydration.

[35] The issue of managing tiredness and fatigue was only addressed informally when the opportunity arose during the trial and when the employees were being

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<sup>3</sup> *Caritas Health Group v United Nurses of Alberta* 2007 ABQC 388 at [32].

<sup>4</sup> *P & O Cold Logistics New Zealand Limited v The National Distribution Union*, AA 305/03, Member Urlich, Auckland Employment Relations Authority, 13 October 2003.

monitored. Information relating to fatigue was undertaken through self-reporting by employees at the beginning and end of each shift. During the shift where tappers were being monitored the observers had a cheat sheet listing symptoms to check for. Any concerns were noted.

[36] It is not disputed that fatigue is difficult to measure. During the trial the experts relied on self-reporting. This means if tiredness or other concerns around fatigue were not reported at the beginning or end of a shift the experts had no evidence to support any finding that the reduction to 4 tappers would have any adverse impact on their health.

[37] At the investigation meeting Mr Gallagher told me employees were not prepared to comment on how they felt at the end of a shift in case there were adverse repercussions. Mr Bartlett told me Ms McNally, a lawyer working for the Union, made it clear at the 9 June meeting that fatigue issues had to be reported and if there were concerns about repercussions employees could advise the Union who would then relay the information. By that time of course, the trial had ended and the information had not been made available.

[38] I find it is more likely than not that employees were not reporting accurately at the end of a shift on issues relating to tiredness or fatigue. There was also a lack of information available to the employees generally as only a few had received one on one coaching about how to manage fatigue and tiredness.

[39] I am satisfied the employees held genuine concerns about the impact the reduction to four tappers would have on fatigue. The strong feeling relayed by Mr Gallagher and Mr Palmer was that employees felt they may be able to cope with the reduction in the short term but not in the long term.

[40] During the second trial two different options around shift tasks were used by the tappers. I will refer to them as Option A and Option B. The experts noted that employees reported during the trial of Option A that work patterns, particularly shift work, and a lack of rest breaks were emerging as pre-disposing to feelings of fatigue. During the trial of Option B no similar reports were made.

[41] Under Option A the experts reported that the tappers had little or no control over their work schedule and during some aspects of their shifts only one scheduled rest break was provided.

[42] Under Option B the tappers appeared to have more control over their schedule resulting in the tappers taking their scheduled rest breaks. The production output was the same as for Option A. The experts opinion was that Option B was more conducive to alleviating feelings of tiredness.

[43] Mr Palmer told me that while the workers reported lower fatigue they perceived there was a higher risk. NZ Steel submitted that the Union was relying on a “perceived” increase in fatigue rather than the objective measurements of the experts which show that indicators of fatigue actually improved under the 4 tapper trial possibly due to better hydration and sleep education.

[44] The tapper’s perceptions about the risk of fatigue are important, however the reality is, based on the objective findings from the second trial, reported and observed fatigue was reducing. Whether that finding would have changed if employees had accurately reported symptoms at the beginning or end of their shifts cannot now be established.

[45] After the meeting on 9 June, the Union wrote to Mr Bartlett seeking clarification on aspects of the report (10 June email). Mr Bartlett and Mr Miller discussed the questions raised by the Union and answered each issue on 12 June. In relation to fatigue the experts advised the Union that the data indicated there was an improvement in sleep patterns during the four person tapping compared with the five person tapping. The experts noted that the current scientific thinking is that fatigue and sleep are linked and as fatigue worsens sleep becomes worse.

### ***Health and safety concerns***

[46] The Union is concerned about general health and safety issues. Mr Gallagher told me that these issues were general such as working long shifts in a hot and dangerous environment. Mr Gallagher said that with only 4 tappers working on each shift they will be exposed to the environment more often during the shift and will have to undertake more tasks.

[47] NZ Steel acknowledges that the four tapper crew will result in each tapper spending more time on the melter floor, this is in the context that technology has significantly reduced operator's exposure to heat, fumes and other dangers since manning levels were agreed in 1996.

[48] NZ Steel has continued to improve the working environment through innovation throughout both trials. For example during the second trial NZ Steel implemented load cells on the ladles which reduced the number of visual checks carried out by the tappers. In discussion with the tappers the amount of deskulling and sanding carried out manually on the launders was reduced with more of that work being undertaken by the bob cat crews.

[49] Since the second trial ended a pulpit has been installed on the slag side which now provides an air conditioned space from which tappers can work with mechanised equipment.

[50] The reduction in exposure on the melter floor since the commencement of the first trial led to a corresponding reduction of exposure to heat stressors which lowers the risk of heat strain. This is consistent with the experts' conclusion that there was no appreciable increase in risk of adverse health effects compared to a 5 tapper system.

[51] In the 10 June email the Union raised a concern about tappers working by themselves without a "buddy" to assist if something went wrong. The Union asked the experts to comment on any significant differences between having five tappers versus four tappers. The experts responded that the issue was about safety and not health related. It was therefore outside the scope of the report which was focussed on physiological health risks and not safety risks. The experts view was that this type of issue was better addressed by the tappers, supervisors, managers and NZ Steel safety advisors.

[52] At the investigation meeting the experts told me that during the trial they observed a number of incidents where tasks were not straightforward and small things went wrong. They also observed a tapper undertaking lancing without another person being present which NZ Steel told me was a breach of its standard operating procedure.

[53] The experts' role was not to assess safety, but was to assess the risk of adverse health effects. The incidents outlined by the Union and observed by the experts were related to safety and did not relate to the physiological health of the tappers.

[54] I agree with the comments from the experts in answer to the 10 June email that the advisability of having four tappers instead of five will depend on variables and practicalities beyond their control or understanding and is best left to NZ Steel to be addressed internally.

### ***Training and competence***

[55] The Union is concerned that the level of experience of the tappers in a four man shift will lead to an increased risk to safety.

[56] Mr Weaver set out in his written evidence the process used by NZ Steel to train new operators. He told me that in 2016 a number of new operators were employed and underwent a strict training regime which lasted between 6 and 12 weeks depending on their level of confidence and the trainer's level of confidence in them.

[57] It was common ground that during the second trial there was a mix of experience used in each shift. Mr Weaver said this was to balance the skills and experience across the shifts and to ensure the new employees were able to work alongside more experienced staff.

[58] Based on the evidence I have seen and heard at the investigation meeting I have concluded that the key area of concern relates not to training specifically but to the ability of a new operator to inherently know if there is a problem brewing. This is knowledge only experience in the job over a period of time will provide.

### ***Overtime***

[59] Overtime is worked by employees through two mechanisms. First, each operator has agreed through the terms of the collective agreement to work eight shifts of overtime per year for anticipated absences. Compensation for these shifts is built into the employee's normal salary package. These overtime shifts are known as "prepaid" or "pre-arranged overtime". Prepaid overtime is compulsory.

[60] Prepaid overtime shifts are allocated to employees through arrangements made by the individual shift crews as a team and these are then presented to the supervisors for confirmation.

[61] The second mechanism for allocating overtime is through a “call-out” system. These are overtime shifts that have not been pre-arranged and may be used to fill unanticipated absences that cannot be covered by a relief operator.

[62] Call-out overtime is managed by a system whereby the employees are ranked in order of those who have worked the least amount of overtime through to those who have worked the most. When an operator is required at short notice a supervisor will call operators according to their ranking order. This is to ensure there is an equitable spread of overtime across all operators.

[63] The experts reported that during the trial some operators carried out relief/overtime during their rest days. This led to a conclusion that these operators did not have sufficient recovery time between shifts. This resulted in the risk of increased fatigue. The experts recommended that overtime was managed evenly amongst all workers so that it did not impinge on sleep debt and allowed all workers to get an adequate break. This was considered more important in moving to a 4 man tap where less manpower may be available to call upon for overtime.

[64] Mr Palmer told me members reported concerns that because the prepaid overtime was compulsory there would be times when they were obliged to come to work on their days off while they were still recovering from the effects of their normal roster.

[65] Mr Palmer was asked to broach this with management and request the number of prepaid shifts be reduced from eight to four. Mr Palmer said that when he approached Mr Weaver about this he was dismissive and was not prepared to enter into any discussions on the matter.

[66] Mr Palmer told me some operators were reporting being physically exhausted during their days off and were concerned about the prospect of being called back to

work. Mr Palmer advised the members of several ways they could spread their overtime to alleviate fatigue and ensure they had proper days off.

[67] At the investigation meeting the experts told me that the reality was that some crew members were working more overtime than others because they wanted to increase their income.

[68] NZ Steel maintains that the two mechanisms by which overtime is allocated ensures an even spread of overtime between the shift crew. Further, the first port of call for overtime is the two relief operators who work each shift. On that basis, and with less tappers to provide relief for, the number of overtime shifts the tappers will work should reduce.

### ***Conclusion***

[69] I must consider whether the grounds set out above provide a reasonable basis to withhold consent. For the following reasons I find the Union withheld its consent to the reduction to four tappers on each shift on a reasonable basis.

[70] The issue of fatigue and tiredness is a genuine concern held by the members of the Union working in the Melter Plant. It is unfortunate that when they held concerns during the trial the operators did not raise them to enable their concerns to be properly assessed and addressed. That means the results of the measurement of fatigue as set out in the report are questionable. Not because of anything the experts have done, but as a result of a lack of information which should have been provided, but was not.

[71] On balance I have concluded the general health and safety concerns raised by the Union largely relate to safety and not the tappers physiological health. Questions about safety when working with a reduced number of operators remains untested, particularly for unplanned events. Examples of outstanding safety issues includes evidence that the overtime mechanisms may not be working to provide as even a spread of overtime shifts as anticipated by NZ Steel. This was noted by the experts as potentially affecting fatigue and tiredness levels.

[72] When NZ Steel formulated its proposal to reduce the manning levels to four tappers it did not address which of the options out of Option A or Option B it proposed implementing. The experts recommended Option B because it provides a

better template for work rest regimes and control of core temperature because of its enhanced self-pacing characteristics.

[73] The collective agreement sets out the basis on which agreement to a reduction in manning levels will be reached. This includes safe work practices. While there is no appreciable increased risk to health there are clearly still genuinely held concerns about safety. These issues will need to be addressed by NZ Steel if it is to persuade its employees to consent to the reduction in manning from five tappers to four.

### **General comments**

[74] The employees agreed unanimously for both trials to proceed. In that event it was incumbent on them to participate fully in the trials including providing information and adhering to all methods used for capturing data. The evidence I heard shows that there was a reluctance to participate fully and in particular the fatigue results are questionable due to employees not providing the necessary accurate feedback.

[75] Further the evidence indicated that it is possible tappers were not strictly adhering to standard operating procedures during the second trial.

[76] While no allegations of bad faith have been made, good faith is a mutual obligation.

### **Section 163**

[77] For the sake of completeness I record here that even if I had found that the Union had unreasonably withheld its consent, section 163 prohibits the Authority from making any order cancelling or varying any term of a collective agreement. This means I do not have the power to direct the Union to accept a variation to the collective agreement to reduce the number of tappers on a shift from five to four. That is a matter for negotiation and agreement between the parties.

### **Costs**

[78] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so the Union will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. NZ Steel will have a further 14 days in which to file and serve a memorandum in reply. All submissions must

include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[79] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority