Determination Number: WA 104/05
File Number: WEA 467/04

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON OFFICE**

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| **BETWEEN** | Service & Food Workers Union Inc., Applicant |
| **AND** | Ngai Tahu Seafood Products Limited, First Respondent<br>Ngai Tahu Seafood Distributors Limited, Second Respondent |
| **REPRESENTATIVES** | P Cranney for Applicant<br>L Penno for Respondent |
| **MEMBER OF AUTHORITY** | G J Wood |
| **INVESTIGATION MEETING** | 15 June 2005 |
| **DATE OF DETERMINATION** | 24 June 2005 |

## DETERMINATION OF THE AUTHORITY

### The Facts

1. The set of agreed facts below clearly sets out the dispute between the parties (referred to as the union and Ngai Tahu) for determination.

***"THE PARTIES***

*1. The applicant party to this employment relationship problem is a trade union in terms of part 4 Employment Relations Act 2000.*

*2. The respondents own and operate a fish processing plant in Wellington.*

***THE COLLECTIVE EMPLOYMENT AGREEMENT***

*3. On 2 June 2004 a collective employment agreement was executed between the parties – the "Ngai Tahu Seafood Products Limited Wellington Region Processing Plants Collective Employment Agreement" (14 April 2004 – 30 September 2006) ("the CEA").*

***SCOPE OF THE EMPLOYMENT RELATIONSHIP PROBLEM***

*4. The union represents 27 employees employed by the first respondent at the Wellington site, 22 employees employed by the first respondent at the Petone site, and 2 employees employed by the second respondent.*

5. *However, this employment relationship problem only concerns those employees employed at the Petone site who worked during the 2004 hoki season.*

6. *The respondent accepts that other than for the duration of the hoki season, all employees are entitled to be (and are) paid overtime rates for all work performed either –*

   *(a) outside of the hours of 3am to 6pm between Monday-Friday; or*

   *(b) outside the hours of 3am to midday on Saturday; or*

   *(c) any hours worked on a Sunday.*

7. *The duration of the hoki season was from the week ending 27 July 2004 until the week ending 14 September 2004.*

***HOURS WORKED BY EMPLOYEES & QUANTUM OF CLAIM***

6. *Between the week ending 27 July 2004 and the week ending 14 September 2004, at the respondent's request, the employees worked outside of the hours of 3.00am-6.00pm.*

7. *The applicant claims that the respondent was required to pay these hours at the overtime rate of T1¼, which for each person has been quantified and set out in* ***Document "J".***

8. *The respondent denies any liability to pay overtime as set out in that document."*

2. In issue are the following clauses of the Collective Agreement:

*"4. HOURS OF WORK*

*(a) The ordinary hours of work shall not exceed 40 per week and shall be worked between the hours of 3.00am and 6.00pm on the six days of the week, Monday to Friday and Saturday 3.00am to 12.00 noon.*

*(b) Notwithstanding any other provision in this clause hours of work may be varied for such occasions that may arise where there is a need to change hours/days to process product. Any such change would be by mutual agreement between the worker and the employer.*

*5. SHIFT WORK*

*Shifts, where required due to seasonal or peak period requirements (eg hoki season) shall be worked as required by the employer. The normal split shift hours will be:*

*1. 3.00am to 2.00pm*

*2. 3.00pm to 2.00am*

*If it is required by operational requirements these hours may be varied on terms that will be agreed between the employer and employees concerned.*

*9. OVERTIME*

*a. (i) All time worked in excess of the ordinary hours prescribed in clause 4a of this CEA shall be considered overtime and shall be paid for at the rate of time and one quarter until the 1st of August 2005 when the rate will increase to time and one half."*

3. The negotiations resulting in the CEA took place following the purchase of what was previously the business of Cook Strait Fisheries by Ngai Tahu in 2003. It was the first collective employment agreement for fish processing workers in the Wellington region. The only relevant background factors to the bargaining were that both parties wanted to reduce long and anti-social hours previously worked by the workers and that Ngai Tahu required shifts at certain times of the year to process product such as hoki in a cost-effective way.

**The Law**

4. It is important in this case to note that the Authority cannot consider the accounts of parties or their negotiators as to what they now say they intended to mean by relevant clauses in their employment agreement. Thus while I have sympathy for Ngai Tahu's view that it made it clear to the union that overtime would not be payable for shifts, I can not take that disputed subjective view into account.

5. For the principles in determining such disputes I rely on *ASTE Te Hau Takitini O Aotearoa Inc v. Hampton, Chief Executive of the Bay of Plenty Polytechnic* [2002] 1 ERNZ 491. In that case it was stated at para.20:

*"The Court is required to adopt an objective approach to interpretation and this has always been so. What matters is not what the parties say they actually intended the words to mean, but what a reasonable person in the field, knowing all the background, would take them to mean. So evidence is not admissible of what one party thought the words meant or of preliminary negotiations or earlier drafts. That is because if such evidence was admissible, it would often, perhaps inevitably, be concluded that the parties disagreed. Second, the whole point is that a final written agreement supersedes the negotiations; positions may have changed in the course of negotiations and the final document is the agreed version which might involve a compromise of the respective parties' positions. Third, there is a sense in which an agreement takes on a life of its own, liable to be used and relied on by third persons who are not privy to the negotiations …"*

6. The Court went on to hold at para.24 that:

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

*necessary to be careful not to treat as the commercial purpose of the agreement what seems to the Court to be the decent thing to do. It is not the Court's task to re-write an agreement."*

7. Otherwise the logical extension of admitting evidence not necessary to interpret the agreement would be to conclude that the parties had not in fact agreed and that is clearly not the case here. There is a written agreement in place. It is simply a matter of interpreting what the parties have meant by that agreement. In the sense that there is still disagreement between the parties they will be able to address the matter again in negotiations for a new collective employment agreement, once the current one expires on 30 September 2006.

**Determination**

8. This agreement is clear on its face, I find. The hours of work clause 4(a) sets out the ordinary hours of work. They are not to exceed 40 and shall be worked between certain hours over six days of the week. Ordinary hours of work in this clause can only be varied by agreement.

9. Clause 5 - relating to shift work, however, allows the employer to require shifts during the hoki season. Normally these will be by way of two split shifts, with one shift between 3.00am and 2.00pm and the other shift between 3.00pm and 2.00am. These hours may also be varied, but only if required by operational requirements and by agreement.

10. Neither clause sets out what workers are to be paid for these hours. Wage rates are set out in clause 6. Clause 9 deals with overtime specifically. It states that all time worked in excess of the ordinary hours prescribed in clause 4(a) shall be considered overtime. It is clear that the words "in excess" mean outside of, particularly as clause 4(a) sets two constraints on the ordinary hours of work, one being 40 hours, with the other being the span of hours set out thereafter. That neither constraint can be breached before overtime is payable is clear from the wording of clause 9 where it provides for time worked in excess of the ordinary hours prescribed in clause 4a being "considered" overtime, rather than comprising overtime.

11. Clause 9a(i) contains the words "prescribed in clause 4(a)". To take the meaning sought by Ngai Tahu that clause 5 operates separately to clause 9 would be to give the words "prescribed in clause 4(a)" in clause 9 no meaning.

12. I therefore conclude, on the clear, plain meaning of the words that 40 hours of work and the span of hours of work contained in clause 4(a) must both be assessed in all cases to determine whether hours worked by workers are in fact deemed to be and thus paid as overtime. As the workers have not agreed to any changed hours of work under clause 4(b) or 5, the union's claim must succeed, I hold.

13. I note that to determine otherwise would be to find that Ngai Tahu has the power (which I am sure it would never actually utilise) during the hoki season to make workers work not only more than 40 hours, but also up to 11 hours per day over 7 days of the week, without overtime.

14. That does not mean that clause 5 is of no effect, because it allows Ngai Tahu to require the workers to work split shifts of 11 hours over 7 days of the week, when otherwise it could only require 40 hours over 6 days of the week and over a narrower span of hours. In this sense it is noteworthy that there is no requirement in the CEA for workers to work overtime. Thus the background issue of how additional processing demands during the hoki season can be met has been addressed.

15. I therefore reject Ngai Tahu's claim that the effect of clause 5 is to set up a completely separate payment arrangement, particularly as the clause does not say so. While I accept the thrust of *Carter Holt Harvey Ltd v. Parkes & Ors* (unreported, Goddard C J, 23 July 2004, WC11/04) that overtime is overtime and shift work is shift work, that case is clearly distinguishable from this one. In particular the shift clause in *Parkes* clearly sets out when overtime will be paid for shift workers and has a sub-clause which clearly overrides the ordinary time and overtime provisions in the rest of the agreement. Thus, unlike in *Parkes*, here clause 5 makes no attempt to change the ordinary hours of work. Furthermore, in *Parkes* the shift allowance was expressed as being in addition to the ordinary rate of pay, which is not an issue here.

16. Therefore I declare that the Collective Employment Agreement requires Ngai Tahu to pay overtime rates for work outside of the ordinary hours of work referred to at clause

4(a) of the Agreement when shifts are worked during the hoki season. Leave is reserved for the parties to revert to the Authority in the unlikely event that agreement can not be reached over the sums owing to the workers.

**Costs**

17. Costs are reserved.

**G J Wood**
**Member of Employment Relations Authority**