

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Asure New Zealand Limited (Applicant)
AND NZ Public Service Association Inc (Respondent)
REPRESENTATIVES Victoria Donaghy and Jane Pearson, counsel for the applicant
Greg Lloyd, counsel for the respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING Christchurch 6 November 2006
DATE OF DETERMINATION 26 January 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Asure NZ Limited is a State-owned enterprise and provides regulatory meat inspection services under the Animal Products Act 1999 to the New Zealand meat industry. These services are provided at more than 70 meat plants around New Zealand and Asure employs about 880 employees for this purpose. NZ PSA is a union which represents about 780 of Asure's employees.

[2] Asure and PSA are bound by a collective employment agreement currently applicable from 16 March 2006 until 31 May 2008. There have been three previous collective agreements between Asure and PSA.

[3] There is a dispute between the parties about clause 10.4(c) of the 2006 collective agreement. Clause 10.4(c) deals with penal rates. It reads:

10.4 PENAL RATES

The following penal rates will apply for permanent full time and permanent seasonal meat inspector employees:

- (a) ...*
- (b) ...*
- (c) From 1 October 2006, all hours worked each day by an employee undertaking meat inspection duties, whether notified under clause 8.3 or agreed on the day, at a plant over the current daily hours of work (e.g. as reflected in that plant's HOW Agreement) will be paid at T1.5. To receive T1.5 the employee must work greater than their own total applicable weekly hours of work derived from that plant's current weekly hours of work (e.g. as reflected in that plant's HOW Agreement), except during periods of extended/high kill specified in a plant HOW Agreement. The following do not count towards hours worked or plant daily/weekly hours for the purposes of this clause:*

...

[4] The CMP Canterbury plant near Ashburton operates sheep and beef chains. It runs both day and night shifts. Sometimes Asure staff work extra hours at the plant to service overtime worked on one or more shifts and one or more chains. The issue for resolution is whether the collective agreement requires the extra work to be paid for at penal rates under clause 10.4. To determine this point, it is necessary first to set out the correct approach to interpreting a collective employment agreement and then to apply that law to the present circumstances.

Principles of interpretation

[5] Counsel referred me to *ASTE v. Hampton* [2002] 1 ERNZ 491. The head note provides a useful summary of the relevant principles:

The law of interpretation of employment agreements remained unchanged by the Employment Relations Act 2000. Agreements were to be interpreted with reference to their factual matrix. This included matters such as the background to the transaction and to industry practice. The law had moved on so that such reference was possible and even desirable. The Court was also required to adopt an objective approach to interpretation, so that evidence of what either party thought the words meant was inadmissible. The interpretation of an agreement was not to be narrowly literal, but in accord with business common sense. Nevertheless, if the words were clear and could only have one possible meaning that would generally determine the matter.

[6] Counsel also referred to a number of relevant principles. The *golden rule* is that a Court must give effect to the plain and ordinary meaning of a clause unless to do so would result in an absurd result which was unlikely to have been the intention of the parties. Ambiguities may be avoided by interpreting the document in light of its purpose and by reference to surrounding circumstances. When considering the meaning of words used, the document shall be viewed as a whole. If parties use the same wording in prior documents, it can be presumed that they intended the same interpretation to apply.

[7] There is no dispute over the relevant principles. What is in contention is the correct outcome from the application of those principles.

The document as a whole

[8] The collective agreement is a comprehensive document. It includes a definition section. Clause 6 defines *HOW Agreements* as *A plant agreement identifying the true actual days and hours of normal production, and any agreed plant variations to the CA*. It also defines *Normal patterns of work* as *An employee's normal pattern of work and/or hours contained in a plant hours of work agreement*.

[9] Chapter 2 of the agreement is headed *General Terms of Employment*. It first specifies categories of employment then clause 8 deals with *Hours of Work (HOW)*. Clause 8.1 says that each plant has its own *HOW agreement* which identifies the true/actual hours of work at the plant to meet Asure's clients' needs. Clause 8.2 provides the process for agreeing and documenting *HOW Agreements*. For present purposes, I note that *HOW Agreements* in place at the commencement of the collective agreement are varied automatically to include new conditions from the agreement except where the *HOW Agreement* is more beneficial. Clause 8.3 deals with short notice changes to hours of work. It includes an exhaustive definition of what constitutes such a change. Clause 8.4 provides for working longer in the event of an emergency. It overrides hours of work provisions in *HOW Agreements*. Clause 8.5 limits the number of days in a row, hours in a shift and hours without a meal break that an employee can be required to work. Other clauses provide for rest breaks, breaks between shifts and payment for hours of work.

[10] Chapter 3 is headed *Remuneration*. Clause 10.1 sets out salaries for permanent employees while clause 10.2 does the same for other categories of employees. Clause 10.3 is headed *Unsociable Hours Payments* and provides an alternative of extra payment or time in lieu for work at particular hours or on particular days. Clause 10.4 is headed *Penal Rates*. The first subpart provides T1.5 for work performed under clause 8.3 and in other specified circumstances. The second subpart provides T1.5 for weekend work at Monday to Friday plants. The third subpart contains the disputed provision. The fourth subpart provides T2 for work on statutory holidays. Other subparts exclude some categories of employees from the benefits of clause 10.4 and also exclude those receiving T1.5 or T2 from an entitlement to the unsociable hours payment in clause 10.3 for those same hours. The remainder of chapter 3 deals with pay fixing principles and processes.

[11] There are other chapters dealing comprehensively with *Allowances and Expenses, Holidays and Leave, Employee Wellbeing, Management of Change, Consultation and Union facilities, Workplace Standards and Resolving Disputes, Ceasing employment with Asure, Savings and Miscellaneous*. There are also 16 schedules.

Hours of work (HOW) Agreement

[12] There is a *HOW Agreement* dated 14 March 2005 applicable to CMP Canterbury. The relevant sections are clauses 3 and 4.

[13] There is also an appendix which is relevant.

[14] Clause 4 of the *HOW Agreement* refers to Appendix 1 for any changes to clause 4. Clauses *B (i)* and *B (iii)* in the appendix simply describe the duration of the normal day's shift including meal breaks for the lamb and beef day and night shifts based on the hours set out at clause 4 of the *HOW Agreement*. The reference to OT in clauses *B (ii)* and *B (iv)* the second and fourth subparts to clause B can be explained by reference to plant practice, a point to which I will return.

[15] There is a dispute about the effect of some words in the eighth subpart of clause B of the appendix. I have not set out the words in the extract above but in part it reads:

Expiry Clause: To allow above clause to revert to the collective on the expiry date of the collective.

[16] It is argued for PSA that the effect of this part of clause *B (viii)* is that the whole of the appendix expired at the date the new collective agreement came into force. If that is correct, there being no other reference to *OT* in the *HOW Agreement*, the penal rate provision of clause 10.4 (c) would dictate the rate payable for *OT*. I do not accept the expiry argument. It is clear from the subject matter of clause B (viii) and its layout that the expiry clause relates only to the provisions dealt with in the first two paragraphs of clause B (viii). The evidence indicates that the employees have not exercised the option available to them under the expiry clause to revert to the collective agreement but it is not necessary to say anything further on the point or make any findings other than the finding that the expiry clause is not relevant to resolution of the current dispute.

Plant practice

[17] As mentioned above, Appendix 1 of the *HOW Agreement* describes the duration of the normal day and the *OT* day on the lamb and beef chains. Both Asure and PSA devoted considerable effort to explaining the production patterns at the plants. The chains, either beef or lamb or both, are often operated longer than the normal day referred to in the *HOW Agreement*. Staff are generally given some advance notice of the extra production by memo from the CMP Canterbury Plant Production Manager with that information then transferred onto a whiteboard displaying rosters for Asure staff. The memos refer to the extra production as

overtime. It is abbreviated to *OT* on the whiteboard. The same abbreviation is used in the appendix to the *HOW Agreement*. As part of its argument, Asure says that the *OT* or overtime worked at the plant falls within the words *periods of extended/high kill specified in a plant HOW Agreement* in clause 10.4. However, I accept the evidence that the extra production at CMP Canterbury has never been described as *extended/high kill*. *Extended/high kill* is a production pattern at some plants where there is a historical and distinct seasonal pattern of additional production within a defined period of time. That production pattern is quite distinct from the frequent but irregular additional production worked at CMP Canterbury.

[18] Looking at the memos, sometimes they stipulate that overtime will be worked on a particular day or days and sometimes they stipulate that overtime may be required during or for a specified period of time, usually less than a week.

[19] Asure provided a bar chart that shows that there was extra production worked nearly every month from August 2004 until July 2006. In the months when there was extra production, that ranged between four and 20 days on which one or more shifts worked extra production. Half the months had nine or more days when extra production was worked. I take from this that extra production, called overtime or *OT*, at the plant is quite common. That brings us back to the correct rate of pay for that work.

Interpreting the collective agreement

[20] Subclause (c) of clause 10.4 in the 2006 collective agreement has no counterpart in the previous agreement. I infer that the parties intended to provide for payment of a penal rate of T1.5 in certain defined circumstances from 1 October 2006. The circumstances are described in the disputed clause but reference is also required to the *HOW Agreement*. However, I should note that the CMP Canterbury *HOW Agreement* is varied to include new conditions in the collective agreement such as clause 10.4 (c) to the extent they are more beneficial.

[21] The words used in the disputed clause create some ambiguity. *Current daily hours* and *current weekly hours* could mean whatever hours are being worked at present. If that is the meaning, there would never be any entitlement to a penal rate. Extra hours worked today become part of rather than *over* or in excess of *current daily hours* and *current weekly hours*. That result would be inconsistent with the plain intention to entitle employees to a penal rate in defined circumstances.

[22] The word *current* is informed by the bracketed reference to the plant *HOW Agreement*. *HOW Agreements* may set different hours of work depending on the time of year and client requirements. Extra production worked at a time of the year might be in excess of or within the hours set out in the *HOW Agreement* relating to that time of the year. In light of that, *current* simply requires one to assess the extra hours against what is required currently by the *HOW Agreement* to determine whether extra hours are *over* or within what is required. Looked at that way, *eg* should properly be *ie* but that reflects that collective agreements are not drafted with the precision of many other legal documents. This approach also reflects that an employee either works in accordance with the *HOW Agreement* or is required to work under clause 8.3 of the collective agreement or simply agrees voluntarily to work extra time.

[23] There is ambiguity about the meaning of the phrase *except during periods of extended/high kill specified in a plant HOW Agreement*. It could mean that T1.5 is not paid during such periods even if an employee does work greater than their own total applicable weekly hours. Alternatively, it could mean that during the period of *extended/high kill* an employee does not have to work greater than their own total applicable weekly hours but just *over their current daily hours* of work to be entitled to T1.5. Traditionally, penal rate provisions have tended to be construed restrictively rather than widely. In my view, the intention was to create an entitlement to a penal rate when the employee worked over the daily hours currently required and worked greater than their own total weekly hours currently required. The entitlement is then negated and does not arise during a period of *extended/high kill specified in a plant HOW Agreement*.

[24] *Extended/high kill* is obviously a phrase of rich history in the industry. It is not a phrase of common usage. The argument for Asure requires me to treat *OT* in the CMP Canterbury *HOW Agreement* as a synonym for *extended/high kill*. However, if the parties had intended that, they would have used the same words. It follows that *OT* worked by Asure employees at CMP Canterbury is not caught by the exclusion that limits the application of the penal rate. The *OT* worked by CMP Asure employees is to be paid for at the penal rate of T1.5 when it is over the daily hours and greater than their own total applicable weekly set out in clause 4 of the appendix to the *HOW Agreement*.

Summary

[25] Clause 10.4 (c) is to be applied in the manner described above.

[26] Costs are reserved. Generally, where there is a genuine dispute such as this, costs are left to lie where they fall. If either party considers that would not be an appropriate outcome, they may lodge and serve a memorandum with the other party having a right to reply within 14 days.

Philip Cheyne
Member of Employment Relations Authority