

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 192/07  
5077642

BETWEEN                      NZ AMALGAMATED  
   ENGINEERING PRINTING &  
   MANUFACTURING UNION  
   Applicant

AND                              MARLEY NEW ZEALAND  
   LIMITED  
   Respondent

Member of Authority:      Marija Urlich  
  
Representatives:            Tony Wilton, Counsel for Applicant  
   Rob Towner, Counsel for Respondent  
  
Investigation Meeting:      23 May 2007  
  
Determination:              26 June 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The EPMU has members employed at Marley sites in Manurewa, Auckland and Hornby, Christchurch. These members are employed on rotating shift rosters operating manufacturing plant which produces moulded plastic products. The EPMU and Marley are party to a multi-union, multi-employer collective employment agreement, the Plastics Industry Collective Agreement 2005 – 2007 (“the CEA”).

[2]     This employment relationship problem concerns a dispute over the interpretation of the CEA and boils down to whether that document provides that a shift allowance should be paid, in addition to overtime rates, for periods of unrostered overtime of eight hours.

[3] At the investigation meeting I received evidence from Tim Wihone, an EPMU organiser, who until recently was employed as a process technician at Marley's Manurewa plant, Nigel Donne, Marley's group human resources manager and James Meyland, who has many years experience advising the plastics industry on industrial relations matters. At the end of the investigation meeting counsel made submissions.

**Does 8 hours of overtime attract shift allowance?**

[4] Marley production employees work in rostered shifts. The CEA does not define a "shift". Clause 19.4 of the CEA provides definitions of the types of shifts that may be rostered:

<i><b>Day shift:</b></i>	<i>A shift starting not earlier than 6.00am.</i>
<i><b>Afternoon shift:</b></i>	<i>A shift starting after 12 noon and finishing at or before midnight.</i>
<i><b>Night shift:</b></i>	<i>A shift finishing after midnight and at or before 8.00am.</i>

*The above definitions include shift work which is alternating, rotating or fixed.*

*A "shift employee" is an employee who is employed on any of the above shifts."*

[5] Clause 19 also provides for 5 and 7 day shift spans (cl 19.5 and 19.6), a definition of overtime (cl 19.7), the circumstances when a shift meal allowance will be paid (cl 19.8), payment of a shift allowance (cl 19.10) and general shift provisions (cl 19.11):

**19. Shifts**

...

**19.5 Shift Operation – 5 Day Span**

*The ordinary hours of work shall not exceed five consecutive shifts of not more than eight hours each to be worked between the hours of midnight Sunday/Monday and 8.00am Saturday.*

**19.6 Shift Operation – Continuous 7 Day Span**

*Shifts may be worked over seven days of the week to cover continuous 7 day operations. Not more than five shifts each of eight consecutive hours shall be worked in any one week without the payment of overtime: ...*

**19.7 Shift overtime****19.7.1 Overtime is defined as:**

- Time worked in excess of 40 hours per week.
- Time worked in excess of 8 hours, or in excess of the hours established pursuant to clause 19.1.
- Time worked on any rostered day off.

...

**19.7.2** Overtime shall be paid at the rate of time and a one half for the first three hours and double time thereafter, calculated on a daily basis: Provided that any time worked after noon on Saturday or any time on Sunday shall be paid at the rate of double time.

...

**19.8 Shift Meal Allowance**

A suitable meal shall be provided by the employer in the following situations:

- After the first nine hours of work and after each subsequent four hours of work, providing work continues thereafter.
- After the first four and a half hours on a rostered day off or a public holiday.

If not provided with a suitable meal, the employee shall be entitled to a meal allowance...

**19.10 Shift Allowance**

A shift employee shall be paid a shift allowance in addition to the appropriate rate:

Rotating or alternating shifts:     **\$7.71 (\$7.98 from 1/12/06)**

Afternoon shifts:                     **\$7.18 (\$7.43 from 1/12/06)**

Night shifts:                           **\$8.24 (\$8.53 from 1/12/06)**

**19.11 General Shift Provisions**

**19.11.1**           The ordinary hours of work shall be fixed by roster and shall not be departed from except in the case of emergency.

**19.11.2**           Where practicable, the days off each week shall be arranged to fall consecutively.

**19.11.3**           Where an employee starts a working week on any one of his/her rostered starting times and is switched by the employer to another shift, overtime rates shall be paid for the first shift of eight hours. This shall not apply where an

*employee is required to switch a weekly shift provided notice is given before the end of the working week.*

...”

[6] Mr Wihone said in evidence that overtime of eight hours would be offered when a production run required part or all of the plant to operate over a weekend. He said that by Wednesday of the working week the team leader would ask if the machine operator could work the weekend overtime.

[7] It is common ground that weekend overtime is not rostered. It is also common ground that overtime such as three hours sweeping up on a Saturday morning does not attract a shift allowance.

[8] Mr Wilton submits that eight hours of overtime, worked on the sixth or seventh working day of a five-day rostered week, as part of a continuous period of production, is a shift and therefore should attract a shift allowance. He submits that such periods of work are shifts for the purposes of clause 19 of the CEA because:

- (i) the CEA does not define “shift”;
- (ii) in the absence of such a definition the commonly understood meaning of the word “shift” should be adopted i.e., relays of workers in a continuous production operation;
- (iii) the CEA provides that more than five shifts may be worked in a week (cl 19.6);
- (iv) the sixth or seventh day of production is an extension of the 5 day shift span;
- (v) those hours are still shifts because cl 19 does not require that shifts are rostered, the payment of overtime rates does not preclude a period of work being a “shift” and periods of work of more than 4.5 hours on a rostered day off qualify for a shift meal allowance (cl 19.9).

[9] Mr Wilton submits that sixth or seventh shifts should attract a shift allowance because:

- (i) cl 19.10 does not expressly limit the payment of shift allowance to a certain number of shifts per week or certain kinds of shifts or expressly excludes shifts which attract overtime rates;
- (ii) cl 19.10 anticipates some shifts will be paid differently to others with the phrase “*in addition to the appropriate rate*”;
- (iii) this phrase distinguishes this situation from that considered by Goddard CJ in *Carter Holt Harvey v Parkes* [2004] 2 ERNZ 1, where the Court considered the meaning of “*in addition to the ordinary rate of pay*” ;
- (iv) the appropriate rate is the rate payable for a particular shift.

[10] Mr Towner submits that cl 19.10 should be interpreted consistently with previous cases<sup>1</sup> and the traditional view that overtime does not attract the payment of a shift allowance. He submits that unless the CEA states with “...*clear language*”<sup>2</sup> or “*crystal clarity*”<sup>3</sup> that a shift allowance should be paid for overtime then overtime should not attract a shift allowance.

## Discussion

[11] *Parkes* is the leading case on this issue. The pertinent passage is as follows:

*[15] The plaintiff relies on the jurisprudence dating back to the days of the award system under which similar conflicts were often considered by the Court. I brought most of these cases together in Wellington Caretakers IUOW v Armourguard Security Ltd [1989] 3 NZILR 117. I there noticed the “traditional view ... that, in the absence of clear language, a shift allowance is not payable for [extra] shifts in a week where those shifts attract overtime rates.*

*[16] Having said that, I sounded a note of caution, reminding myself that, ... each document must be constructed in its own context and with regard to the terms used and the Court must give effect to the intent of the parties derived from the words they chose to use even if that was not what they meant to say.*

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<sup>1</sup> *Wellington Caretakers IUOW v Armourguard Security Ltd* [1989] 3 NZILR 117; *Parkes* (citation above)

<sup>2</sup> per *Parkes*

<sup>3</sup> *NZ Labourers etc IUOW v Joint Venture Zublin Williamson* [1986] ACJ 468, per Horn CJ

...  
 [17] *Coming to the present case, there are no fixed clock hours for the purposes of ordinary hours of work but these are not to exceed 40 per week and they are to be worked on not more than 5 days per week. Any work done in excess of 40 hours in a week or in excess of 5 (or the lesser agreed number) days in a week attracts overtime pay, normally at the rate of time and a half. For shift employees, their ordinary hours of work are to be fixed by roster. The shift allowance is expressed as being an addition to the ordinary rate of pay. These are the key words. Employees working an extra day and therefore being paid overtime are already receiving remuneration additional to the ordinary rate of pay. That additional remuneration is greater than the shift allowance. However, there is no intention expressed that overtime hours or overtime “shifts” should also attract the shift allowance. As the cases show, it is inaccurate and misleading to think of overtime periods of work as shifts.”*

[12] From this passage the following principles can be extracted:

- (i) the traditional view is that overtime will not attract payment of a shift allowance in the absence of clear language;
- (ii) each document must be considered in its own context;
- (iii) a shift allowance expressed as being paid *in addition to the ordinary rate of pay* is not an expression of the parties’ intention that overtime should attract a shift allowance; and
- (iv) periods of overtime are not shifts.

[13] The starting point for any discussion of shift allowances and overtime is the “traditional view” that overtime does not attract the payment of shift allowance. The cases are plain that unless it is crystal clear that a shift allowance is to be paid in addition to overtime rates that will not occur. Does the CEA express a clear intention that overtime work attracts the payment of a shift allowance?

[14] Clause 19.10 provides that a shift allowance will be paid in addition to the “appropriate rate”. The CEA does not define “appropriate rate”. The applicant argues that “appropriate rate” anticipates different pay rates attracting shift allowance and that this language is wide enough to apply to overtime rates.

[15] The respondent argues that there is no substantive difference between the *Parkes* “ordinary rate” and the CEA’s “appropriate rate”. I do not agree that on a

plain reading of “ordinary rate” and “appropriate rate” that there is no different in substance. “Ordinary” infers normal, “appropriate” references a particular situation.

[16] However, within the context of the CEA, with its system of individualised pay rates based on a skill-pay matrix, I accept that it is not possible to refer to an “ordinary rate” and that “appropriate rate” is a more accurate description.

[17] Putting aside the pay matrix explanation for appropriate rate, if I accept that “appropriate” is something wider than “ordinary”, the applicant still has to overcome the problem that clause 19 does not clearly state that some periods of overtime will attract the payment of a shift allowance. As I read *Parkes* what is required is a positive expression that the parties’ have agreed payment of this nature.

[18] A further barrier to the respondent’s argument that overtime is a shift is that the CEA defines the ordinary hours of work as being fixed by roster (cl 19.11.1) and the evidence that overtime is not rostered. As I understand it, for the applicant’s argument to succeed the Authority must read into the CEA a definition of a shift as a period of eight hours worked as part of a relay of continuous production. The period of eight hours that the applicant seeks to rely on to define shift in this way is referred to in the CEA at cl 19.5; there the eight hours is an element of the ordinary hours of work and the CEA is clear that ordinary hours of work are fixed by roster.

[19] For the reasons set out above the CEA does not enable 8 hours of overtime to be a shift and “*appropriate rate*” is not a clear statement that overtime attracts a shift allowance. The CEA does not provide that eight hour periods of overtime attract the payment of a shift allowance.

### **Costs**

[20] Given the nature of the application it may be appropriate that costs lie where they fall. If this is not the parties’ view they may apply for a timetable to be set.

Marija Urlich

Member of the Employment Relations Authority