

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 35/08
5093049

BETWEEN SOUTHERN LOCAL
 GOVERNMENT OFFICERS
 UNION INC UNION INC
 Applicant Applicant

AND DUNEDIN CITY COUNCIL
 Respondent

Member of Authority: James Crichton

Representatives: Peter Lawson, Advocate for Applicant
 Lesley Brook, Counsel for Respondent

Investigation Meeting: 12 December 2007 at Dunedin

Determination: 4 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, the Southern Local Government Officers Union Inc (the Union) brings to the Authority a dispute about the interpretation of a provision in a collective employment agreement covering its members who are employed by the respondent Dunedin City Council (the Council).

[2] There are in fact two relevant collective employment agreements, one called the Dunedin City Council Officers Collective Agreement (the Officers Agreement) and the other called the Dunedin City Council Utility Services Collective Agreement (the Utilities Agreement).

[3] The Utilities Agreement is a multi-union document involving the Amalgamated Workers Union (Southern) Inc while the Officers Agreement is simply an agreement between the Council and the Union.

[4] The dispute between the parties relates to the payment for work done by employees who are *on standby* and who are paid on or above the 100% rate for Grade 14 and above in the relevant agreement.

[5] The dispute arose when the Council declined claims from two officers for the payment of overtime pay when they worked a call out or standby, this being a departure from previous practice.

[6] The Union's interpretation of the disputed provision is that both agreements provide that overtime shall be paid for after hours call outs irrespective of the rate of pay of the relevant employee. The Union says that in departing from the practice of paying overtime to all employees in those circumstances, irrespective of their rate of remuneration, the Council has fallen into error.

[7] The Council say that there are general provisions in each of the collective agreements and there are specific alternative provisions for staff on the 100% step of Grade 14 and above and that the general provisions do not apply to employees on the 100% step of Grade 14 and above.

[8] The Council also says that it retains a discretion to make payments to employees in response to particular requirements including to make discretionary payments to employees on the 100% step of Grade 14 and above who perform overtime or call out work and who would not ordinarily be entitled to overtime payments.

Issues

[9] The fundamental issue is a dispute about the interpretation of the relevant provisions in the two collective employment agreements and in particular the relationship between those provisions.

[10] It follows that it will be helpful first to set out the relevant provisions, then consider the interpretation of those issues and finally reflect on whether any matters of custom and practice impact on the matter in question.

The relevant provisions

[11] Dealing first with the relevant clauses in the Officers agreement, I now set out the three relevant clauses:

7. *Overtime*

7.1 *All hours worked in excess or outside those specified in Clause 6.1, which are authorised, shall be deemed as overtime.*

7.2 (a) *Unless otherwise specified in this agreement authorised overtime shall be paid as follows:*

All hours worked in excess of the ordinary hours of work specified in Clause 6.1 of this agreement shall be deemed overtime and shall be paid at the rate of time and a half the ordinary rate.

(b) *For employees in receipt of a salary corresponding to the 100% step of Grade 14 and above, overtime shall not be paid but hours worked outside the recognised ordinary hours may be logged and recorded and where excessive hours are worked the General Manager shall grant such form of compensation as appears equitable in the circumstances.*

(c) *Except in emergency circumstances, where overtime is required to be worked, not less than five hours notice of the requirement to work overtime shall be given.*

8. *Standby*

8.2 *With the exception of public holidays, where an employee is called out whilst on standby, in addition to the payment of the appropriate standby allowance, the employee shall be paid overtime as specified in Clause 7 (Overtime) and in accordance with Clause 9 (Call Out)*

11.9 *Call Out*

Where an employee is called out outside normal hours or where he/she has completed his/her normal days work, he/she shall be paid for a minimum of two hours at the appropriate overtime rate.

For those employees in receipt of a standby allowance, the minimum payment should be made only once per day in respect to any call out in each standby period.

[12] The relevant clauses in the Utilities Agreement are as follows:

5. *Overtime*

5.1 (a) *All time worked in excess of 40 hours pursuant to clause 4 of this agreement shall be deemed overtime and shall be paid for at the rate of time and a half.*

- (b) *For employees in receipt of a salary corresponding to the 100% step of Grade 14 and above, overtime shall not be paid, but hours worked outside the recognised ordinary hours may be logged and recorded, and where excessive hours are worked, the General Manager shall grant such form of compensation as appears equitable in the circumstances.*

7. *Call Outs/Stand By*

- 7.1 *When any employee is called out to work after he/she has completed his/her normal days work, he/she shall receive overtime rates with a minimum of two hours for each separate call, provided that a further call out received while on the initial call out shall be deemed to be one call out. Actual time travelling to and from the employee's home shall be treated as time worked and a call out shall be deemed to be complete when the employee reaches home.*

[13] It will be discerned at once that the essence of the dispute between the parties is encapsulated in the clauses just recited. On the one hand, the Union argues that the effect of the standby and call out clauses in the Officers Agreement and the call outs/stand by clause in the Utilities Agreement in effect override the limitation on the payment of overtime to employees above the 100% step of Grade 14 contained in the general overtime clause in each agreement.

[14] Conversely, the Council invites the Authority to apply the broad provisions of the overtime clause in each agreement such that the limitation in the overtime clause pertaining to employees at 100% step of Grade 14 and above applies as well, to the force and effect of the standby and call out provisions in both collective agreements.

[15] To assist in carrying its argument, the Union contend first that until the dispute arose, the Council was in fact applying the agreement in a way that was consistent with the Union's understanding of its meaning (a custom and practice argument which I will deal with later in this determination). Second, the Union contend that while the general provisions relating to overtime contained that limitation relating to employees paid at the 100% step of Grade 14 or above, the provision relating to call outs and standby in the two collective agreement are effectively a special case and not simply a particular kind of overtime and so the limitation on payment in the general overtime clauses ought not to apply.

Issues of interpretation

[16] The law relating to the interpretation of documents in the employment jurisdiction is well settled.

[17] The primary obligation in an interpretation such as this one is for the Authority to give effect to the meaning of words that are plain and unambiguous. Regard may be had to the intention of the parties if that is discernible and to their subsequent conduct. Ambiguity must be resolved in a common sense fashion.

[18] Custom and practice is only an aid to interpretation where there is ambiguity but not *so as to contradict the meaning of plain words*.

[19] With those principles in mind it is useful to start by asking the question whether the provisions in consideration are clear and unambiguous or not.

[20] For reasons which I enunciate shortly, I have formed the view that the words in the relevant provisions are in fact, clear and unambiguous.

[21] Because there are effectively two separate sets of provisions, albeit with similar wording in some cases, it is useful to analyse the two employment agreements separately.

[22] I look first at the Officers Agreement. It will be remembered that that agreement has three relevant provisions, clause 7 relating to overtime, clause 8 relating to standby and clause 9 relating to call out.

[23] Clause 7 concerning overtime sets out the general principles relating to the performance of overtime work. The first such general principle is the provision which states that all authorised hours which are worked in excess of or outside ordinary hours are overtime hours. I hold, and this is fundamental to the determination of this matter, that that sub-clause must, by the plain nature of the words used, refer to all hours in excess of ordinary time hours including in particular standby hours and call out hours which by their very definition are hours where the employee is performing a service or standing by to perform a service in circumstances outside of the ordinary hours regime. It follows that the provision I have just referred to which is sub-clause

7.1 in my opinion qualifies the subsequent provisions in clause 8 relating to standby and clause 9 relating to call out.

[24] A similar set of considerations applies, in my opinion, in relation to the next sub-clause which pertains to the issue of payment for overtime hours and which says in essence that except where there is an alternative provision elsewhere in the agreement, payment for hours in excess of ordinary hours (namely overtime) shall be at time and a half except for employees receiving a salary of the 100% step of Grade 14 and above for whom there is a different regime. That different regime specifically requires that overtime *shall not be paid* but that hours worked in excess of the ordinary hours *may be recorded and the General Manager shall* arrange appropriate compensation.

[25] I am satisfied that on the balance of probabilities, the effect of these provisions in respect to the Officers Agreement is that clause 7 provides the fundamental provisions in respect to the circumstances in which overtime is payable by first defining overtime to include *all hours worked* in excess of ordinary time. I have decided that that phrase means what it says and that it applies to standby time and to call out time and that therefore the Union's argument that those provisions are somehow special examples of overtime for which there is a special code must, of necessity, fail.

[26] It follows that I accept the Council's argument that all overtime is governed by that fundamental definition in clause 7 and the subsequent differentiation further on in clause 7 between employees below the 100% step of Grade 14 and employees above that 100% step. In the former case, payment of overtime is automatic and in the second case payment of overtime is effectively discretionary at the order of the General Manager. It is to be noted that the General Manager may record the hours spent working overtime for that higher grade of employee but having potentially completed that recording exercise, he is obligated to turn his mind to the granting of *such form of compensation as appears equitable in the circumstances*. That form of compensation might be the payment of overtime but it might be appropriate to deal with it in another way, for instance by the taking of time off in lieu. Either way, the Council is very clear that it is not saying that the higher grade of worker that I have just referred to ought not to receive payment for overtime but only that that payment is not mandatory and is in fact at the discretion of the General Manager who must

make a determination on what form of compensation *appears equitable in the circumstances*.

[27] In relation to the Utilities Agreement there are only two clauses that need concern us. The first of these is the overtime provision, clause 5, which it will be recalled provides first that time worked in excess of 40 hours shall be deemed as overtime and paid at the rate of time and a half and then goes on to provide that for employees receiving the salary of the 100% step of Grade 14 and above, overtime shall not be paid but that hours worked in excess of the ordinary hours may be recorded and *where excessive hours are worked the General Manager shall grant the compensation that seems equitable in the circumstances*.

[28] Clause 7 of the Utilities Agreement styled Call Outs/Standby provides that employees call out to work after their normal days work has been completed *shall receive overtime rates with a minimum of two hours for each separate call, provided that a further call out received while on the initial call out shall be deemed to be one call out*.

[29] Again, I am satisfied on the balance of probabilities that the plain meaning of these words produces a result which supports the view advanced by the Council. The overtime clause defines overtime plainly as *all hours worked in excess of 40 hours* and then goes on to provide for two classes of payment, an ordinary provision of time and a half, and for employees in receipt of salary payment corresponding to the 100% step of Grade 14 and above, the discretionary entitlement reliant upon the General Manager's consideration.

[30] In the subsequent provision relating to Call Outs/Standby there is a definition of that status as *when any employee is called out to work after he/she has completed his/her normal days work* and that simply reinforces the conviction that this category of work is in truth work *in excess of 40 hours* or to put it another way is outside the workers normal span of hours and therefore that the overtime definition in clause 5 and the following on provisions which determine payment, must apply.

[31] The Union urge on me the alternative view that the provision entitled Call Outs/Standby is a free standing code and that this is a class of overtime which is special or different from *ordinary* overtime. I do not accept that submission as it seems to me to do violence to the plain words in the overtime provision.

[32] One argument that the Union uses to advance that view is the particular form of words in clause 7 relating to call outs and standby where, after describing what a call out is, the provision goes on to state that the worker will receive overtime rates (and that can be seen to be completely consistent with the overtime rates provided in the overtime clause above) but then there is a provision which provides for a minimum of two hours for each separate call and another provision following which allows for amalgamation of the minimum if there is a subsequent call out on top of an existing call out. The Union say that by virtue of this two hour minimum, a decision which does not automatically grant workers on salaries of the 100% step of Grade 14 and above overtime, inclusive of the two hour minimum, does violence to the language.

[33] I do not accept that submission. The minimum two hour provision applies whether the overtime payment is mandatory (as is the case for workers employed at less than the 100% step of Grade 14) or it must be taken into account in the discretionary calculation which the General Manager is obligated to do for those employees at the 100% step of Grade 14 and above. That does not do violence to the provision and simply requires the General Manager to include in his calculation for that affected group of workers, the entitlement to the two hour minimum.

Custom and Practice

[34] The Union says that for 14 or 15 years until mid 2007, workers had claimed overtime when they were in receipt of 100% step of Grade 14 and above by way of salary and had had that overtime paid. They say in consequence, that custom and practice support the continuation of those arrangements.

[35] I do not accept that submission. Custom and practice cannot contradict the meaning of plain words and I do not consider that there is any ambiguity here which could be clarified by reference to custom and practice.

[36] Indeed, I think the history of the negotiations between the parties, in so far as it is of assistance at all, suggests that the form of words closest to the meaning that the Union derives was last in place before 1993 and was then removed by agreement to create the discretion which now exists for the higher paid employees.

[37] The Council was at pains to emphasise in their oral submissions before the Authority that the higher paid workers were not being denied the payment of overtime

rates for standby and call out work but were being denied it *as of right*. Since 1993, the agreements have both provided for a discretion vesting in the General Manager and it is up to that officer to decide how to best recognise the additional work that senior employees are performing. That in my judgment is what the agreements both require and that is the thrust of this determination.

Determination

[38] I now determine the question before the Authority in the following way:

- (a) As to the Officers Agreement I have decided that clauses 8.2 and 9 of that Agreement do not entitle the employees who are in receipt of salary at the 100% step of Grade 14 or above to be paid overtime under clause 7.2(a) but rather to be paid overtime in terms of 7.2(b) when those officers work on call out or standby; and
- (b) As to the Utilities Agreement, I have determined that clause 7.1 does not entitle the employees in receipt of salary at or above the 100% step of Grade 14 to be paid overtime under clause 5.1(a) but rather that clause 5.1(b) applies to those employees working on standby or call out.

Costs

[39] Costs are reserved.

James Crichton
Member of the Employment Relations Authority