

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 7
5320057

BETWEEN NEW ZEALAND
 AMALGAMATED
 ENGINEERING PRINTING &
 MANUFACTURING UNION
 INC
 Applicant

AND AMCOR PACKAGING (NEW
 ZEALAND) LTD
 Respondent

Member of Authority: Dzintra King

Representatives: Anne-Marie McNally, Counsel for Applicant
 Richard Harrison, Counsel for Respondent

Investigation Meeting: 13 December 2010 at Auckland

Determination: 11 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter deals with a dispute about the interpretation of a provision of a collective employment agreement, the Amcor Beverage Cans Australasia Employees' Collective Agreement. The provision in question deals with overtime.

[2] The provisions are:

10.1 DEFINITION

Overtime is defined as:

Time worked in excess of 40 hours per week.

Time worked in excess of the agreed ordinary hours of work provided in **clause 9**.

10.2 Overtime shall be calculated on a daily basis subject to 40 actual hours being worked by an employee between Monday and Friday. Unauthorised absences shall not be counted as actual hours worked for the purposes of calculating overtime. Any hours of unauthorised absence shall be deducted from the total hours in any one week. Following any such deduction, overtime shall remain payable for hours worked in excess of 40 actual hours.

Authorised absences are as provided for in this agreement. Authorised unpaid leave may be granted by arrangement between an employee and the company.

Authorised absences shall not be deemed as default for the purposes of overtime calculation

10.3 Overtime shall be paid at the rate of time and a half for the first 8 hours and double time thereafter. Provide that double time is paid for working after 10.00pm, before 6.00am and all day Sunday.

[3] Clause 9 provides:

Forty hours shall constitute an ordinary week's work from Monday to Friday inclusive, of which not more than eight hours per day or the hours agreed pursuant to clause 8 may be worked between the hours of 6 a.m. and 6 p.m.

[4] The applicant says that authorised absences are added to the hours actually worked for the week, whilst unauthorised absences are deducted from a notional 40 hour week rather than from the hours actually worked.

[5] The applicant says that "actual hours" excludes unauthorised absences for the purposes of calculating overtime. Authorised absences are deemed to be time actually worked. Authorised absences are not deemed as default but unauthorised absences are. If both authorised and unauthorised hours are to be deducted from the actual hours there would be no need to have addressed the two concepts separately.

[6] If an employee has worked a 46 hour week, of which 8 of those hours are on a Friday which was an authorised absence and then worked 6 hours on a Saturday the total for the week is 52 hours so 12 hours overtime would be payable for the week.

[7] If the 8 hours on the Friday were an unauthorised absence then a total of 38 hours would have been worked for the Monday to Friday week. If 6 hours are then worked on the Saturday the hourly total is 44 hours. No overtime is payable as the employee has not worked a 40 hour Monday to Friday week.

[8] The respondent says that authorised absences are not deducted from the calculation of overtime hours but neither do they count towards actual hours. Unauthorised absences however are deducted from overtime hours.

[9] The respondent says that not only do unauthorised absences not count towards "actual hours worked" but that they are to be deducted from the actual hours worked.

[10] The starting point for interpretation is to give effect to the natural meaning of the words used. In *NZ Tramways and Public Transport Employees Inc and National Distribution Union v Transportation Auckland Corporation Ltd and Cityline (NZ) Ltd* AC 61A/06:

The starting point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their natural meaning. Consideration must be given to the whole of the contract. The circumstances of entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the

setting in which it was made and to construe it against the factual background having regard also to the genesis and, objectively, the aim of the transaction....

[11] If the words are unambiguous then they determine their own meaning. Only if there is ambiguity can broader extrinsic evidence be relied upon: *Godfrey Hurst v National Distribution Union*, AC62/04; ARC 45/04.

[12] The respondent says that accordingly “actual hours being worked” must mean that an employee must physically work those hours, not be on approved leave, which is not “actual work”.

[13] Mr Harrison submitted that this interpretation was consistent with clause 4, which sets out the objectives of the company and the employees. He contends that the ability of an employee to claim overtime when 40 hours have not actually been worked is antithetical to the agreed objectives.

[14] Something that is actual is something that exists in reality or fact. For hours that are not in fact physically worked to be deemed actual hours would require a specific provision setting that out. Work, which is the act that leads to the calculation of the 40 hours, has not in fact taken place. The 40 hours have to be actually, physically worked. If a person is on leave, a person is not working.

[15] I do not accept that authorised absences can be construed as actual hours worked. They are patently not that.

[16] Unauthorised absences do not count as actual hours worked. I deal now with the issue of what happens to unauthorised hours. What are they deducted from? The clause says “total hours.” What are the total hours? Are these actual hours worked or notional hours, that is, the notional 40 hour week? They are actual hours.

[17] Absent a clause such as the one in contention, neither authorised nor unauthorised absences would be taken into account when calculating hours for overtime purposes.

[18] This provision provides that authorised absences attract no penalty and form no default. They are neutral.

[19] Unauthorised absences are different. They are expressly deemed as default.

Summary

[20] Authorised absences are not to be counted as time worked for the purpose of calculating overtime. They do not constitute actual hours worked.

[21] Unauthorised absences are to be deducted from the hours actually worked. If a person has had a four hour absence, four hours will be deducted from the hours that person has actually worked.

[22] There is no issue regarding costs.

Dzintra King

Member of the Employment Relations Authority