

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 57  
5458359

BETWEEN            NEW ZEALAND MEAT  
                              WORKERS & RELATED  
                              TRADES UNION  
                              INCORPORATED  
                              Applicant

A N D                LEAN MEATS OAMARU  
                              LIMITED  
                              Respondent

Member of Authority:    M B Loftus

Representatives:        Peter Churchman QC, Counsel for the Applicant  
                                  Dale Lester, Counsel for the Respondent

Investigation Meeting:    2 December 2014 at Oamaru

Submissions Received:    At the investigation meeting

Date of Determination:    8 May 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     This is a claim for monies owing as a result of the respondent's purported failure to provide paid rest breaks following inclusion of a requirement it do so pursuant to s.6 of the Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008.

[2]     There is a further claim that the above failure means monies also owe for a consequential failure to pay overtime correctly.

[3]     Lean Meats Oamaru Limited (Lean Meats) response is the money claimed has already been paid.

## Background

[4] Lean Meats operates from a site originally established by the Oamaru Borough Council as a local abattoir. The Council subsequently sold the abattoir to a company called ABCO Meats Limited (Oamaru). ABCO had a collective employment contract with the Meatworkers' Union and while the Union has some negative views about the rates of pay contained therein there was at least one positive – ABCO provided paid rest breaks.

[5] In early 2006, ABCO went into receivership. The receivers chose to continue operating the plant in the hope of a future sale but did so on the basis of reduced subsistence level throughput.

[6] In August 2006, Lean Meats purchased the plant. It continued to apply the terms and conditions previously agreed between the Union and ABCO.

[7] Subsequently Lean Meats raised various initiatives aimed at increasing output and reducing costs. One option mooted was the removal of paid rest breaks. Lean Meats says this was discussed during renewal of the collective agreement in 2007 and resulted in the inclusion of a new clause reading:

7. ***Smoko***  
*Employees will be allowed three breaks during any one day, two 15 minute breaks and a half hour lunch break. No payment will be made in respect of piece or hourly workers (smoko payment inclusive). The timing of breaks shall be scheduled to suit operational needs.*

[8] The Union denies agreeing to waive paid rest breaks during the negotiation and says its position is supported by a negotiation proposal document circulated by Lean Meats at the time of the renegotiation. The Union says it did not realise clause 7 had been changed to its present form till after signature. It then raised the change with Lean Meats but did not vigorously pursue the issue at the time. It says it held its challenge for a future day given its recognition the company needed to improve profitability.

[9] As events transpired the provision has remained unchanged since and was not discussed during renegotiation of the collective agreement until 2013. During the intervening period two further collective agreements were completed and signed.

[10] In the interim, however, the law changed and s.69ZD was inserted into the Employment Relations Act 2000 (the Act) with effect 1 April 2009. It provides that full-time workers (which these are) are entitled to two 10 minute paid rest breaks and one 30 minute meal break.

[11] Notwithstanding the legislative change Lean Meats' practices did not alter and clause 7 continued to be applied as previously.

[12] The Union says it raised this as a concern but hoped to resolve the issue by negotiation rather than formal legal action. It also says it did not pursue the matter with urgency as Lean Meats continued to give the impression it was in a fragile economic state. That said the Union was not idle and, as an example of one attempt to advance its claims, approached the Department of Labour in the middle of 2012. This resulted in the Department advising Lean Meats it was of the view clause 7 did not comply with the Act but that did not see a change.

[13] The issue continued to fester and was, as already said, discussed during negotiations for renewal of the collective agreement in 2013 and it was at that negotiation the Union pursued its claims regarding paid meal breaks with some vigour. That saw the Lean Meats propose an allowance in lieu of payment for the rest breaks but the Union rejected the offer on the basis the amount was inadequate.

[14] While the allowance has been paid the issue has remained a stumbling block and, as a result, the 2013 collective remains unsigned.

### **Determination**

[15] Lean Meats response to the claim is:

- a. rest breaks are already paid with the required amount being *specifically incorporated* into the hourly rate;<sup>1</sup> and
- b. if not the current situation is the result of a contractual mistake and appropriate relief should therefore be applied pursuant to s.162 of the Act.

[16] For two reasons Lean Meats' argument rest breaks are already paid fails to convince me.

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<sup>1</sup> Statement in reply at paragraph 1

[17] There can be no dispute rest breaks must now be paid. Section 69ZD(3) of the Act requires that be so. The section became effective as of 1 April 2009. At that time clause 7 expressly states the breaks were unpaid and the evidence is that was the case. An additional payment must therefore have been required by statute but it is clear that did not occur. The claimed monies must, on a clear and literal interpretation of both the clause and the Act, be owing.

[18] The second reason I do not accept Lean Meats' argument the monies are already paid is the evidence does not support such a conclusion. Neither of Lean Meats witnesses were present during the 2007 negotiations. While Mr Conway (who was employed by Lean Meats at the time) says he remembers significant increases in the hourly rates in 2007 and implies this was at least in part to recompense workers for the loss of paid breaks his absence from the negotiations means he cannot assert that was the case. The other witness, Mr Spillane, was not even employed by Lean Meats at the time and his evidence as to what he thought the company was doing can only be second hand.

[19] Neither can be considered acceptable in the face of Mr Curran's evidence which was both credible and undisturbed. Mr Curran's evidence must be preferred and that, along with the words of the agreement, also leads to a conclusion the breaks were not already paid.

[20] His evidence also leads me to conclude, as claimed, that the allowance paid by Lean Meats since March 2013 is inadequate and here I have to comment, given the evidence, its payment tends to suggest there was a deficiency which required rectification.

[21] The contractual mistake argument fails for a similar reason – namely that there is no evidence to support it. As already said neither of Lean Meats witnesses was present at the 2007 negotiations. Neither can therefore offer direct evidence of what was in the mind of Lean Meats representatives, let alone evidence that what was in their mind lead them to mistakenly enter into the agreement negotiated that year. Furthermore there is no documentary evidence the increases were, in part, to compensate for the loss of paid meal breaks. Indeed, and as claimed by Mr Curran, notes produced by the company at the time make no mention of this and by noting paid meal breaks would remain suggest the contrary.

[22] The conclusion rest breaks have not been paid means it follows the claim in respect of overtime is also valid. The collective agreement provided that an employee be paid overtime at the rate of time and a half after completing eight ordinary hours in any one day. As rest breaks were not paid the time spent on them was not considered part of the eight hours.

[23] That means the workers were required to have their paid rest breaks in addition to, and not as part of, their ordinary hours. That means, in most cases, they were required to work an additional twenty minutes to complete the ordinary day and that time should have been paid at overtime rates. It was not.

### **Conclusion and orders**

[24] For the above reasons I conclude this matter should be resolved in the Union's favour.

[25] I therefore conclude:

- a. Lean Meats did not pay affected employees represented by the applicant union for rest breaks in accordance with the requirements of the Act between 1 April 2009 and 1 March 2013;
- b. Lean Meats has not paid affected employees represented by the applicant union an adequate amount for rest breaks since 1 March 2013; and
- c. Lean Meats has not paid affected employees represented by the applicant union overtime that should have been paid as a result of the failure to pay rest breaks since 1 April 2009.

[26] The amount owing to each employee will differ. The parties are to try and resolve the issue between themselves and in doing so should, as a starting point, use the calculations prepared by Mr Thomas and attached to the Statement of Problem. Should the parties be unable to conclude an agreement leave is reserved for them to return to the Authority for further directions.

[27] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority