IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 284
5628556

	BETWEEN	THE NEW ZEALAND PUBLIC SERVICE ASSOCIATION INC Applicant
	A N D	ASUREQUALITY LIMITED Respondent

Member of Authority:	T G Tetitaha
Representatives:	P Cranney, Counsel for the Applicant L Coates, Counsel for the Respondent
Investigation Meeting:	13 June 2017 at Auckland
Submissions Received:	13 June and 6 July from Applicant 13 June and 1 July from Respondent
Date of Determination:	15 September 2017

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. Clause 10.4(b) of the parties' collective agreement provides for remuneration at T1.5 for all work undertaken on Saturday and Sundays at Monday to Friday plants. This includes work on a Friday night shift that ends past midnight on a Saturday.

B. Costs are reserved.

Employment Relations Problem

[1] The applicant is a Union whose members include meat inspectors employed by AsureQuality Ltd to work at various third party meat processing plants. The meat processing plants at issue primarily operated rostered shifts Monday to Friday (Monday to Friday plants). AsureQuality provided meat inspectors for each shift.

[2] These parties' employment relationship is governed by a collective agreement.[1] The agreement provided for time and a half (T1.5) to be paid when employees work Saturdays or Sundays at Monday to Friday plants.

[3] It is common ground:

a) The Monday to Friday plants worked limited Saturdays and Sundays; and

b) The Monday to Friday plants have a Friday night shift that continues past midnight into Saturday morning.

[4] The dispute is about whether the part of the Friday shift that continues into the Saturday morning should be remunerated at T1.5.

Law

[5] The interpretation of clauses within a collective agreement requires establishing the meaning the parties to the agreement intended the words in dispute to bear.[2] This requires an objective approach to ascertain:[3]

> "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

[6] The starting point is the provision itself and an assessment of the ordinary and natural meaning of the language used.[4] A cross-check against the contractual context

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1 AsureQuality Meat Inspection Collective Agreement 2015-2018 Document 22 Respondents Bundle of Documents (RBD).

2 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19].

3 *Affco New Zealand Limited v New Zealand Meat Workers And Related Trades Union Incorporated* [2017] NZSC 135 at [39] citing *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 (footnotes omitted).

4 *Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc* [2016] NZCA 131at [40].

is required.[5] If the words are ambiguous the inquiry will move to an assessment of relevant facts and circumstance.[6]

[7] The next stage of the interpretative exercise asks whether the meaning would lead to a nonsensical result - whether it defies commercial (or employment relations) common sense or otherwise. [7] In exceptional circumstances, words used may be construed as having another meaning where the parties have adopted a special meaning or where estoppel arises.[8]

[8] However, words can never be construed as having a meaning they cannot reasonably bear. The plainer the words used, the more improbable it is that the parties intended them to be understood in any other way than what they plainly say. The Authority will not ascribe to the parties an intention that a properly informed and reasonable person would not ascribe to the clauses when aware of the circumstances in which the agreement was made.[9]

Parties' positions

[9] The applicant submits the collective agreement is clear and unambiguous. Time worked on a Saturday is remunerated at T1.5 including time worked at the end of a Friday night shift.

[10] The respondent alleges that T1.5 work by an employee on Saturdays and Sundays was only ever intended to apply to work started on a Saturday or Sunday i.e. it does not apply to work undertaken on a Saturday at the end of a normal rostered shift started on a Friday.

[11] Further it alleges clause 10.4(b) was inserted into the 2006-08 collective agreement in response to the applicant's claim for "non-normal rostered days" and "rostered days off" to be paid at T1.5. Friday shifts that finish on Saturday morning are not "non-normal rostered days". Further these shifts have never been considered

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5 *New Zealand Airline Pilots' Association Inc v Air New Zealand Limited* [2016] NZEmpC 161 at [33] citing *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [40].

6 See above n 5 citing *Vector Gas* at [59] per McGrath J.

7 See above n 5 citing *Pyne Gould Guinness Ltd v Montgomery Wilson (NZ) Ltd* [2001] NZAR 789 (CA) at [18], [29].

8 See above n 5 citing *Vector Gas* at [25], [34] per Tipping J.

9 See n 5 citing *Vector Gas* at [4], [22]; and at [61] citing the five principles set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 [HL] at 912-913.

"Saturday work" under previous collective agreements. The respondent has not paid T1.5 for Friday shifts finishing on Saturdays since its inclusion.

Plain and ordinary meaning

[12] The starting point is the 2015-2018 collective agreement.[10] Clause 10.4(b) of the collective agreement provides that:

> All work by an employee on Saturdays and Sundays at Monday to Friday plants will be paid at T1.5.

[13] The collective agreement also defined a "day" as:[11]

> "Day" Means the period from midnight to the next succeeding midnight

[14] Payment for work on Saturdays and Sundays is set out in clause 8.10(iii):

> **8.10 Payment for HOW**
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> …
>
> (iii) Saturday and Sunday hours worked are always paid in addition to the base 40 hours per week Monday to Friday, regardless of whether 40 hours were worked Monday to Friday. Saturdays and Sundays are paid under clause 10.4.

[15] Each plant has an agreement about hours of work (HOW). The HOW "identified the true/actual HOW worked at the plant to meet AsureQuality's client's needs."[12] The HOW does not override the terms and conditions of the collective agreement. It appears to be a tool for the parties to forecast the allocation of their resources to meet the needs of a third party meat processing plant business. The HOW set the start and end times for Friday night shifts at Monday to Friday plants.

[16] On its face, the collective agreement is clear and unambiguous – work that occurs on a Saturday or Sunday is paid at T1.5. Saturdays start after midnight. There is no specific exclusion of Friday night shifts ending upon Saturday mornings from being remunerated at T1.5 in the collective agreement.

Context – previous collective agreements

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10 See n1.
11 See n1 clause 6 Definitions.
12 See n1 clause 8.1 Plant HOW Agreement.

[17] The respondent provided evidence from previous collective agreements. This information revealed significant changes in the hours of work and remuneration for Saturday and Sunday work.

1998 to 2001 Collective Agreement

[18] This collective agreement contained the forerunner of the "hours of work" clause 8 that forms part of the current dispute. The collective agreement restricted the ability of the respondent to require some employees to work outside the hours of 6.00 am to 5.00 pm Monday to Friday.[13] Any changes had to be agreed with the employee and those already working outside those hours had the option to refuse to do so in future. Lump sum buy out payments had been made to individuals at sites that were already working outside of these hours of work.

[19] Employees had minimum hours of work calculated annually or over the term of their engagement. Permanent full-time employees were expected to work "not less than 2080 hours per year"; permanent seven month seasonal employees "not less than 1200 hours during a seven month season"; and temporary and part time employees were agreed on an individual basis.[14]

[20] No T1.5 was paid for working on Saturdays and Sundays. Hours of work in excess of 45 hours per week were "credited as time off in lieu" (TOIL). TOIL was required to be taken within one month of accrual. If not taken the hours were paid to the employee at their ordinary hourly rate.

2001 to 2003 Collective Agreement

[21] This collective agreement replaced the above hours of work with hours of work agreements determined on a site by site basis (HOW).[15] Hours of work in place at the commencement of the agreement could not be changed "without the agreement of the PSA Regional Organiser".

[22] This collective agreement introduced the concept of Monday to Friday plants and plants with a rotating roster pattern. Clause 8.4 prescribed a complex process of calculating hours of work at these plants:

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13 Document 1 RBD clause 8.2 at p9. The affected employees had to have been employed prior to 1 November 1998.

14 Document 1 RBD clause 8.4 at p10.

15 Document 2 RBD clause 8.1 at p20.

8.4 Number of hours to be worked

…

(b) For Monday to Friday plants that work some Saturdays or Sundays during the year, hours worked will be calculated for permanent employees as follows:

(i) Additional hours over 40 hours will be calculated on a Monday to Friday basis and paid fortnightly; and

(ii) Saturdays/Sundays will be paid as set out in clause 10.4 below.

(c) For all plants other than those referred to in (b) above, for example those on seven day rotating roster patterns, hours worked will be calculated for permanent employees as follows:

(i) Additional hours over 40 will be calculated on a full weekly (i.e. 7 days Monday to Sunday) basis and paid fortnightly.

(ii) However, where the site HOW agreement so provides, additional hours will be calculated over 80 hours on a fortnightly basis (not over 40 hours on a weekly basis) and paid fortnightly where patterns of work overlap between pay weeks (e.g. rotating roster patterns).

(d) For all plants, where the roster provides for a permanent employee to work 40 hours in less than 5 days, a permanent employee required to work on a non-rostered day will be paid for all hours worked on the non-rostered day, irrespective of the actual number of hours worked on rostered days. This overrides clauses 8.4(b)(i) and 8.4(c)(i) above.

[23] This agreement also introduced the payment of T1.5 for work on Saturdays and Sundays in limited (but complex) circumstances:

10.4 Penal Rates

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

(a) Work on Saturdays and/or Sundays at a plant that falls within normal patterns of work and/or hours contracted in a site hours of work agreement will receive as follows:

(i) Rostered employees at the plant receive T1 plus other entitlements.

(ii) Non rostered employees at the plant who receive less than two clear days notice to work receive T1.5.

(iii) Non rostered employees at the plant who receive two clear days notice to work or that they are required to on call to work receive T1 plus other entitlements.

(iv) Employees from other plants who receive two clear days notice to definitely work receive T1 plus other entitlements.

(v) Employees from other plants who receive less that two clear days notice to definitely work, or receive two days clear notice that they are required to be on call to relieve receive T1.5.

(b) From 1 November 2001, when employees (irrespective of the number of Saturdays and/or Sundays an individual has already worked that season or what plant they are from) are required to work at a plant on Saturdays and//or Sundays additional to either that plant's normal patterns of work and/or the hours as contained in that plant's HOW agreement, T1.5 will be paid for example:

Where plant A normally works Monday – Friday and also works X number of Saturdays during the season, when X number of Saturdays is exceeded, the Saturdays in excess of X are paid at T1.5.

As soon as it is apparent to ASURE that the number of Saturdays/Sundays is to decrease under or increase over normal patterns of work and/or the hours contained in the site hours of work agreement, and the decrease or increase is to become an established pattern of work, the parties will negotiate a new HOW agreement. In the case of an increase, the penal rates in this sub clause will not be applicable from either the date of a concluded HOW agreement or four weeks after a request from either party to commence negotiations for a new HOW agreement, whichever is the earliest.

(c) Normal patterns of work for the purposes of clauses 10.4(a) and (b) means the average number of Saturdays and/or Sundays worked per season at the individual plant based on the 1999/2000 and 2000/2001 seasons.

2003 to 2005 Collective Agreement

[24] This collective agreement significantly changed the basis for calculating remuneration at Monday to Friday plants. Employees were paid for 40 hours irrespective of the number of hours worked Monday to Friday. Work on Saturdays and Sunday was paid in accordance with clause 10.4:

8.10 Payment for HOW

(a) Monday to Friday Plants

(i) Permanent full time and seasonal meat inspectors are guaranteed a minimum payment for 40 hours per week working Monday to Friday, irrespective of the number of hours worked.

(ii) When greater than 40 hours are worked from Monday to Friday, the actual hours worked are paid fortnightly.

(iii) Saturday and Sunday hours worked are always paid in addition to the base 40 hours per week Monday to Friday, regardless of whether 40 hours were worked Monday to Friday. Saturdays and Sundays are paid under clause 10.4.

(iv) Where work on Saturdays or Sundays is notified then cancelled, affected permanent full time and seasonal employees based at the plant will be paid for 3 hours at T1 for the cancelled work. Such cancelled days are not counted towards the number of Saturdays and/or Sundays worked for the purposes of clause 10.4(c).

[25] Payment for Saturday and Sunday work was not automatic under clause 10.4 of the agreement. The number of Saturdays and/or Sundays at Monday to Friday plants were required to be recorded in an appendix to the plant HOW agreement.[16] An example of an appendix to a HOW showed 4 Saturdays and 0 Sundays for the year 2004/2005.[17]

[26] Clause 10.4(c) recorded the limited circumstances for payment at T1.5 for work on Saturdays and Sundays at Monday to Friday plants. In short this was confined to those days in excess of the number of Saturdays and Sundays specified in the HOW:

10.4 Penal Rates

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

(a) Normal patterns of work for the purposes of clauses 10.4(b) and (c) means the predicted plant operating profile for that year, or where that is not available, the average number of Saturdays and/or Sundays worked at the individual plant based on the immediately previous two years. In this clause 10.4 year means:

(i) For plants that are eligible for Shift TOIL, the 12 months beginning with the Shift TOIL reset date for the individual plant (as set under clause 6.3) and

(ii) For plants that are not eligible for Shift TOIL, 1 October to 30 September.

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16 Document 3 clause 10.4(a) at p 37.

17 Document 4 RBD.

For Monday to Friday plants, the number of Saturdays and Sundays will be recorded in an appendix to the plant HOW agreement.

…

(c) For Monday to Friday Plants when employees are required to work at a plant on Saturdays and/or Sundays that are additional to the lesser of that plant's normal patterns of work per year or 7 Saturdays and/or Sundays per year, T1.5 will be paid. The number of Saturdays and/or Sundays worked relates to the plant, not to individual employees or species processed. Saturdays and Sundays are calculated separately. For example:

(i) Where plant A normally works Monday-Friday and also normally works 4 Saturdays during the year, when 4 Saturdays are exceeded, employees who work on the 5th and any subsequent Saturdays are paid T1.5

(ii) Where plant A normally works Monday-Friday and also normally works 10 Saturdays during the year, when 8 Saturdays are exceeded, employees who work on the 8th and any subsequent Saturdays are paid T1.5

As soon as it is apparent to ASURE that the number of Saturdays/Sundays is to decrease under or increase over normal patterns of work and/or hours contained in a plant hours of work agreement, and the decrease or increase is to become an established pattern of work, the parties will negotiate a new HOW agreement. In the case of an increase, the penal rates in this sub-clause will not be applicable from either the date of a concluded HOW agreement or four weeks after a request from either party to commence negotiations for a new HOW agreement, whichever is the earliest.

2006 to 2008 Collective Agreement

[27] This collective agreement significantly changed clause 10.4 from previous agreements. It deleted the necessity to specify the number of Saturdays and Sundays worked at those plants in the HOW. Payment for Saturdays and Sundays at T1.5 was no longer limited in anyway (see paragraph [12] above).

[28] The historical development of clause 10.4 does not denote any intention to retain limits on remuneration at T1.5 for Saturday and Sunday work. It is consistent with the plain meaning contended for by the applicants.

Parties' conduct

[29] There is no dispute the parties subsequent HOW included Friday shifts that finished on Saturday mornings.[18]

[30] There is no dispute Union members have never sought to be remunerated for Friday night shift work ending on Saturdays until recently. This matter was initiated by a Union Member seeking time and a half for work from a Friday shift that continued into a Saturday in 2015.[19]

[31] Evidence about bargaining has limited relevance. There is an email setting out the applicants "initial list of claims" which include "All non-normal rostered days and rostered days off at T1.5" in July 2005. However the offer that came from the respondent on 14 December 2005 did not confine itself to those days for T1.5:

> **4. Payment of Non Rostered Days**
>
> 4.1 Work on all "non-normal rostered days" and "rostered days off" (definition to be agreed and specified) ***plus all work on Saturdays and Sundays will be paid at T1.5.*** … [Emphasis added]

[32] A Memorandum to the AsureQuality Board of Directors[20] did not correctly reflect the offer it had made when it states T1.5 is where "staff work additional Saturdays in Monday to Friday operations." This is not binding upon the applicants in any event. At best it reflects the writer's views.

[33] The offer that was made on 13 March 2006[21] and subsequently ratified in the collective agreement did not limit payment of T1.5 to "staff work additional Saturdays in Monday to Friday operations". Neither did it exclude payment of T1.5 for work done on a Saturday at the end of the Friday night shift.

[34] Both parties agree the applicants' general concerns in bargaining for the 2006 collective agreement was the encroachment upon personal time in weekends for Monday to Friday workers. From the collective agreement the respondent simply

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18 Document 9 RBD. The 2014 HOW for Silver Fern Farms Pareroa shows a Friday night shift ending at 2.02 am. See Document 5 RBD a 2004 HOW showed Friday night shifts finishing at 1.05 am, to 3 am.

19 Brief of evidence KA Gutsell sworn 13 June 2017 paragraph 11.

20 Document 16 RBD.

21 Document 17 RBD.

agreed to pay all Saturday and Sunday work at T1.5 without limitation to meet that concern.

[35] The respondent also received the benefit of a simpler remuneration structure and dispensed with the necessity to forecast or limit the number of Saturdays to be worked. This allowed more flexibility for AsureQuality to require employees to work as many Saturdays as needed by the third party meat processing plant. Both parties obtained benefits from the remuneration arrangements.

Common sense?

[36] The interpretation sought by the respondent could also lead to a nonsensical result. An employer could be required to start a Friday night shift at 11.59 pm. The majority of the work would be undertaken on a Saturday without recourse to the T1.5 remuneration. This could make clause 10.4(b) largely redundant at Monday to Friday plants. This is not an outcome reasonable parties would have sought.

[37] The fact litigants are unaware of their contractual rights does not necessarily mean they have forgone their enforcement. Although remedies are not a part of this determination, any wage arrears will be limited to 6 years by statute.

Determination

[38] Having considered the above evidence and submissions, it is determined that clause 10.4(b) of the parties collective agreement provides for remuneration at T1.5 for all work undertaken on Saturday and Sundays at Monday to Friday plants. This includes work on a Friday night shift that ends past midnight on a Saturday.

[39] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority