IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 358
3055277

	BETWEEN	E TU INCORPORATED Applicant
	AND	ORORA PACKAGING NEW ZEALAND LIMITED Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	Anne-Marie McInally, for the Applicant Kent Duffy, the Respondent
Investigation Meeting:	On the papers
Submissions [and further Information] Received:	14 June 2019 from the Applicant 14 June 2019 from the Respondent
Date of Determination:	18 June 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Orora Packaging New Zealand Limited (Orora) is a specialist packaging company that manufactures various products including glass bottles, aluminium cans, boxes, cartons as well as a variety of other forms of packaging.

[2] E Tu Incorporated (the Union) and Orora are parties to a Collective Agreement (CA).

[3] A dispute has arisen between the Union and Orora as to how overtime rates under the CA apply to work that union members perform on Sundays under a "5 day Span" shift pattern. Specifically, whether union members are entitled to have the work they perform on Sundays under a "5 day Span" shift pattern counted towards overtime for the purposes of clause 14.5(d) of the CA.

[4] While no employees currently work a "5 day Span" shift pattern, having changed to a "7 day Span" in March 2019, the parties have sought a determination from the Authority as to the correct interpretation of clause 14.5(d) of the CA to provide certainty in the event they revert back to the "5 Day Span" shift pattern.

The process

[5] With the parties' consent this investigation was held on the papers. To assist with this process the Authority was provided with an affidavit from Andrew McNicoll, a Member of the Union, and Ross MacKay, the General Manager, Beverage Cans, at Orora. In addition, the parties filed an agreed summary of facts and each filed submissions.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Legal Principles

[7] *Vector Gas Ltd v Bay of Plenty Energy Ltd* is the leading authority on contract interpretation.[1] It is well established that the principles referred to in that case apply to the interpretation of employment agreements.[2]

[8] These principles were summarised in *Tertiary Education Union v Vice-Chancellor, University of Auckland* in this way:[3]

> [6] The starting point is an assessment of the natural and ordinary meaning of the words themselves. Even if the words are plain and unambiguous, a cross-check will nevertheless be undertaken against the contractual context. If the words are ambiguous the enquiry will similarly move to an assessment of relevant facts and circumstance. This part of the process is directed at ascertaining the meaning of the words when read contextually.
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> [7] The second stage of the interpretative exercise may result in the preliminary assessment of meaning being dislodged. Such a result will not readily arise. That is because the plainer the words used, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say. However, the Court will not ascribe to the parties an intention that a properly informed

[1] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5 (SC).
[2] *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2010] ERNZ 317; *E tu Inc v NZ Transport Agency* [2017] NZEmpC 51 at [36].
[3] *Tertiary Education Union v Vice-Chancellor, University of Auckland* [2015] NZEmpC 169.

and reasonable person would not ascribe to them when aware of the circumstances in which the agreement was made. It follows that dislodgment of an apparently plain and ordinary meaning may occur when such a meaning would lead to a nonsensical result, whether because it defies commercial common sense or otherwise. Exceptionally, words used may be construed as having another meaning where the parties have adopted a special meaning or where estoppel arises.

[8] An objective approach is required. That impacts on the proper scope of the evidence. Evidence of facts, circumstance and conduct relating to the negotiations which show objectively the meaning the parties intended their words to convey is relevant to the contextual enquiry, including the circumstances in which the agreement was entered into. Evidence of post-contractual conduct may be relevant if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both parties intended their words to bear. Evidence of what a party subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time, is irrelevant.

The terms of the CA

[9] The relevant terms in the CA are:

14.3 SHIFT OPERATION- 5 DAY SPAN

The ordinary hours of work shall not exceed five consecutive shifts of not more than eight hours each or the hours agreed pursuant to clause 8, to be worked between the hours of midnight Sunday/Monday and 8.00am Saturday.

14.5 SHIFT OVERTIME

Any shift meetings deemed necessary by management will be paid at single time provided attendance is voluntary.

Any training outside normal rostered hours will be paid at single time provided attendance is voluntary.

(a) Overtime is defined as:

(i) Time worked in excess of the agreed hours of shift work provided in clauses 14.3 and 14.4.

(ii) Time worked in excess of 40 hours per week.

(iii) Time worked on any rostered day off.

(d) Overtime shall be paid at the rate of time and a half for the first 8 hours and double time thereafter. Provided that any time worked on Sunday shall be paid at the rate of double time.

The meaning of Clause 14.5(d) of the IEA

[10] At the heart of this dispute are competing contentions as to how overtime rates under the CA apply to work that union members perform on Sundays under a "5 day Span" shift pattern. Specifically, whether union members are entitled to have the work they perform on Sundays under a "5 day Span" shift pattern counted towards overtime for the purposes of Clause 14.5(d) of the CA.

[11] Orora submits that Clause 14.5(d) does not permit time worked on a Sunday to count towards the first 8 hours of overtime. The essence of the submissions filed for Orora was, first, that Sunday work is paid at double time and therefore there is no basis for this work to form part of the "first 8 hours" of overtime for the purposes of the first sentence of clause 14.5(d)". Second, had the parties intended Sunday work to be included in the "first 8 hours" of overtime in clause 14.5(d) of the CEA, they would have simply included words to this effect. However, they did not.

[12] I was not persuaded by Orora's submissions. For reasons that will become apparent, I am satisfied that, pursuant to Clause 14.5(d), overtime must be paid at the rate of time and half for the first 8 hours worked except on a Sunday where overtime must be paid at double time. Once a total of 8 hours' overtime has been worked, irrespective of the day of the week it is worked, this is to be paid at the rate of double time.

[13] The meaning I have reached is what a reasonable and properly informed third person would consider the parties intended the words of the CA to mean.

[14] First, it accords with the natural and ordinary meaning of the words in Clause 14.5(d). Clause 14.5(d) prescribes the rate of payment for overtime i.e. the first 8 hours of overtime are paid at the rate of time and a half followed thereafter by payment at double time. The words "provided that" in the second sentence record "a condition or understanding".[4] They add to the earlier sentence by recording the parties' understanding that where a Union Member works on a Sunday they will be paid at the rate of double time instead of time and a half for the overtime worked. There is no limitation placed on when the first 8 hours of overtime must be worked.

[15] Second, the meaning I have reached is consistent with other contractual terms.

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[4] The Shorter Oxford English Dictionary, 3rd Edition, 1970.

a. The first sentence of Clause 14.5(d) records that "overtime" shall be paid. Overtime is defined in Clause 14.5(a)(i) as including any time worked in excess of the agreed hours of shift work specified in Clause 14.3. A Sunday falls outside the agreed hours of shift work specified in Clause 14.3 and is therefore "overtime".

b. Other clauses in the CA consistently provide for payment of double time on a Sunday regardless of whether that time is worked as overtime or not. For example Clause 14.4, that covers union members who work a shift pattern over a continuous 7 day span, provides that payment on a Sunday shall be paid at double time for all hours worked. Similarly Clause 10.3, which addresses overtime for day employees, provides for payment of double time that includes where employees work on a Sunday.

[16] Lastly, and for completeness, I record that I did consider, but have not found persuasive one way or the other, the parties' post-contractual conduct. While the parties agree that the company's practice has been not to include any overtime worked on a Sunday towards the "first 8 hours" under clause 14.5(d) of the CA, the evidence of Mr MacKay was that the parties have been in dispute since 2016 regarding the interpretation and application of this clause.

Finding on Issue 1

[17] Union members are entitled to have the work they perform on Sundays under a "5 day Span" shift pattern counted towards overtime for the purposes of Clause 14.5(d) of the CA.

[18] Pursuant to Clause 14.5(d) of the CA, overtime must be paid at the rate of time and half for the first 8 hours worked by a union member except on a Sunday where overtime must be paid at double time. Once a total of 8 hours' overtime has been worked, irrespective of the day of the week it is worked, this is to be paid at the rate of double time.

Costs

[19] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[20] If they are not able to do so and an Authority determination on costs is needed the Union may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Orora will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[21] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[5]

Outcome

[22] The overall outcome that I have reached is:

a. Union members are entitled to have the work they perform on Sundays under a "5 day Span" shift pattern counted towards overtime for the purposes of Clause 14.5(d) of the Collective Agreement.

b. The meaning of Clause 14.5(d) of the Collective Agreement is that overtime must be paid at the rate of time and half for the first 8 hours worked by a union member except on a Sunday where overtime must be paid at double time. Once a total of 8 hours' overtime has been worked, irrespective of the day of the week it is worked, this is to be paid at the rate of double time.

c. Costs are reserved

Jenni-Maree Trotman
Member of the Employment Relations Authority

[5] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].