



## **Issues**

[3] The following issues were identified for investigation and determination:

- (i) Did Barnes underpay the workers their holiday pay;
- (ii) Did Barnes fail to provide the workers with paid rest breaks;
- (iii) Did Barnes subsequently underpay paid rest breaks;
- (vi) Is “donning and doffing” work performed by the workers within the meaning of s 6 of the Minimum Wage Act 1983;
- (v) Should interest be made payable on any outstanding amounts; and.
- (vi) Should either party contribute to the costs of representation of the other party?

## **The Authority’s investigation**

[4] During the Authority’s investigation meeting I heard evidence from Herepaenga Witehira, Raewyn Rautahi, and Shintelle Wikeepa on behalf of the workers; Trevor Hobbs, E tū organiser; and Graeme Wright and Maxwell Russell for Barnes.

[5] Having regard to s 174E of the Employment Relations Act 2000 (the Act), I have not referred to all the evidence or other information provided to the Authority in this determination. However, I record that I have carefully considered all material placed before the Authority. Further, while I have also not referred to all submissions advanced by the representatives during my investigation. I have also fully considered these.

[6] This determination is issued outside of the statutory three month timeframe provided by the Act. However, to the extent that exceptional circumstances are required to exist for this to be issued, these do exist. I apologise to the parties for the delay in issuing this determination, which arises out of the consequences of the COVID-19 pandemic, including a nationwide and Auckland-wide “lockdown”, on the administration of the Authority.

## **What caused the employment relationship problem?**

### *Underpayment of public holiday pay*

[7] The workers say that until August 2017, Barnes used the default rate contained in collective agreements to calculate payments for public holidays. They say that s 49 of the Holidays Act 2003 required Barnes to pay them for public holidays at either their relevant daily pay or average daily pay. As a consequence, the workers say they were underpaid for public holidays.

[8] Barnes said that as the workers were casuals until March 2018, and because it did not process oysters on public holidays, it was under no statutory obligation to pay them for public holidays; although it did make some payments under the collectives to the workers associated with public holidays. The workers seek arrears of public holiday pay and interest.

[9] However, Barnes said it was required to make some payments to the workers under the relevant collective agreements and, although less than the applicable statutory entitlements, this was permissible given the circumstances set out in paragraph [8].

### *Payment for rest breaks*

[10] The workers say that Barnes is required to provide them with paid rest breaks in accordance with Part 6D of the Act, an obligation which has been in place since 2009. The workers say that up until August 2017, Barnes failed to provide paid rest breaks. The workers seek arrears of wages and interest.

[11] Barnes says the piece rate covered all work undertaken by the workers Barnes said there was no separate and express statutory requirement to pay workers for rest breaks.

### *Underpayment of paid rest breaks*

[12] The workers say that since 1 March 2018, Barnes has paid them for their rest breaks. However, such payment has been made at the “default rate” contained within the collective agreement rather than at what they would have earned at “piece rates”. The workers seek arrears of wages and interest.

[13] Barnes denied any underpayment issue and said the workers were paid the default rate because, in effect, piece rates are a function of productivity. Barnes said if it was required to pay rest breaks based on piece rates it would be unworkable given the variables involved in the calculation of piece rates in the first place.

*“Donning and doffing” and walking undertaken before and after shifts and breaks*

[14] The workers say they are entitled to be paid for all the work they perform for Barnes at no less than the minimum wage. The workers say they are required to work in the form of “donning and doffing” personnel protective equipment and walking before and after shifts and rest breaks. The workers seek arrears of wages and interest.

[15] Barnes said an employer is not required to pay an employee to ensure they are properly attired for work. Barnes also said paid rest breaks and additional unpaid rest breaks, as provided for in the collective agreement, provided sufficient remuneration for donning and doffing and walking. Barnes said there had been, and are currently, no breaches of the Minimum Wage Act.

### **The Authority’s view of the employment relationship problem**

*Underpayment of public holiday pay*

[16] Both parties referred to *Firm PI 1 Ltd v Zurich Australian Insurance Limited*<sup>1</sup> and *Vector Gas Ltd v Bay of Plenty Energy Limited*<sup>2</sup> as being the leading authorities on contractual interpretation. It is clear that such authorities apply to the interpretation of collective agreements entered into under the Act.<sup>3</sup>

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<sup>1</sup> [2014] NZSC 147 (SC)

<sup>2</sup> [2010] NZSC 5 (SC)

<sup>3</sup> *Silver Fern Farms. Limited v New Zealand Meat Workers and Related Trades Unions* [2010] ERNZ 317 (CA).

[17] It must be recognised that a collective agreement is not a commercial contract; as in *Vector*. Such commercial contracts are often entered into following painstaking negotiation and the involvement and intervention of professional advisors, often phalanxes of the same. In contrast, collective agreements are achieved through collective bargaining. Collective bargaining is much more an art than a science and is often carried out by a lay employer and union representatives. Collective bargaining can and does become difficult and protracted. It may involve forms of industrial action or require the intervention of the mediation service or facilitation through the Authority. The collective agreement that results from collective bargaining is often a product of pragmatic rather than precision drafting. Consequently, it is not uncommon for collective agreements to contain inconsistencies, anomalies or innovative forms of drafting arising out of concession and compromise. Construing a collective agreement in such circumstances must be an exercise in achieving logical and sensible industrial justice between the parties within the parameters, of course, of the principles of interpretation outlined above.

[18] The workers, through their representative, said “on their face” the collective agreements that bound the parties were ambiguous as to their status as employees. Reference was made to clauses 1.3, 2.1 and 2.2 of the collective agreements referring to the workers as “casual”. However, this needed to be contrasted with other clauses relating to such matters as payment for public holidays, sick and bereavement leave, holiday pay at the end of the season, a tool allowance and a redundancy provision which allowed for “redeployment”. The workers said these clauses were “wholly consistent” with permanent employment. It was also argued that there was no background material providing a context within which the meaning of the collective agreement’s ambiguous clauses could be gleaned.

[19] Additionally, the collective agreements contained the following statement: “[the Union does not accept the employee's [sic] use of casual”. It was said despite the statement being perhaps “awkward”, its meaning was made clear by Mr Hobbs who said in his evidence that the collective agreements contained this statement because the union disputed the workers' casual designation by Barnes.

[20] For the workers it was put that there was no evidence of a consistent turnover of employees that might be expected in an industry dominated by casual employees. Rather, there was evidence that workers returned to Barnes over a number of years; a point which it said was accepted by Mr Wright who confirmed that Barnes had low turnover. It was further submitted that workers status was akin to that of a permanent seasonal employee in the meat industry and the end of casual status with the commencement of a new collective agreement in 2018 was recognition of that fact.

[21] Barnes said the statement contained in the collective agreement, that the union disputed the casual status of the workers, did not change that the terms of the collective agreement provided for casual employment, nor did it allow the union and the workers to siphon off terms it did not agree with. Barnes said, through the evidence of Mr Wright, that it was made clear “early on” that if the casual nature of employment changed for the workers, other terms would need to be reconsidered as well.

[22] Barnes also suggested that the “conduct” of the workers, or the union or “custom” may have some bearing on the casual status of the workers.

[23] For the workers it was submitted that any asserted failure by Barnes to raise the casual/permanent issue was inconclusive, and any alleged silence on the point was broken by the concluding words in all the collective agreements confirming the union's disagreement with the workers being classified as casual. It also said there was no evidence of custom within the industry. Reference was made in this regard to *Woods v N J Ellingham and Co Limited*<sup>4</sup> as to how “custom” can be read into contracts: it must be certain; reasonable, proved by clear evidence and not be inconsistent with the express words of the contract.

[24] The Authority requested a copy of the collective agreement that Ngāi Tahu , which also operates in the oyster processing industry, entered into with the union and its employees. It was submitted on behalf of the workers that the current Ngāi Tahu agreement was “equivocal” about whether its employees were casual or permanent fixed term and given the dominance of Barnes and Ngāi Tahu in the industry (approximately 80% of all processing), and with both companies’ collective agreements ambiguous or equivocal on the point, there was no evidence of a “notorious” custom of casual labour.

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<sup>4</sup> [1977] NZLR 218

[25] Having carefully considered the evidence and the parties' submissions, I find the workers were misclassified by Barnes as "casual" employees prior to 2018 and that the true nature of employment for the workers was that of permanent employees. Perhaps the workers are permanent seasonal employees, akin to the meat industry, as suggested by the workers themselves, although for the present purposes it is not necessary to go beyond the finding that they were permanent employees.

[26] While Barnes refer to the union and workers seeking to "siphon" off terms of the collective agreements that they do not agree with, it has attempted to do the same by discounting a provision of a collective agreement which, with the aid of extrinsic material (the evidence of Mr Hobbs), as is permissible in the circumstances by *Vector*, plainly calls into question the casual status of the workers.

[27] Factors weighing heavily against casual employment at law, rather than by (mis)description in the collective agreements, are the regularised, systematic and programmed nature of the employment coupled with very low turnover of labour. Such factors are the antithesis of *genuine* casual employment. In my view, the formal end of casual status with the commencement of a new collective agreement in 2018 was actually belated recognition by Barnes that the workers were in law and fact permanent employees of this nature.

[28] It is clear from the Barnes and Ngāi Tahu collective agreements there is no clear and unequivocal custom of "casual" employment in the industry. Indeed the late submission made on behalf of the workers about the Otago and Southland Oyster Openers and Other Deport Employees Award 1991 and its provision relating to permanent employment and payment by piece rate, reinforces this conclusion. Barnes provided no submissions on this point. Further, nothing in my view turns on the suggested conduct of union and workers over some form of failure to raise as a concern the classification of Barnes' employees as casuals. If anything the statement contained in the collective agreements challenging this position consistently demonstrates opposition to it.

[29] Despite valiant, but ultimately unpersuasive submissions by Barnes to the contrary, this finding has consequences for Barnes' treatment of public holidays. While the workers may have received payments for public holidays based on the "default rate" under the relevant collective agreements prior to 31 August 2017, they have not been paid their relevant daily pay or their average daily pay as required by s 49 of the Holidays Act. I appreciate this places Barnes in a problematic situation but it is one of its own making and the consequences are for it to bear; rather than it being visited on its workers, who have, in probability, been underpaid for public holidays.

#### *Payment for rest breaks*

[30] The workers say their claim for paid rest break covers the six-year period March 2013 to March 2019 and for the period March 2013 to 31 August 2017, Barnes failed to provide paid rest breaks. As observed by the workers, through their representative, the period of their claim crosses over two versions of s 69ZD of the Act. Between 1 April 2009 and 6 March 2015, the length of the rest breaks and when they were to be taken was prescribed (e.g. for an 8 hour day such breaks were two 10 minute rest breaks and one unpaid 30 minute rest break). Between 6 March 2015 and 6 May 2019, prescriptive nature of the provision was replaced by a requirement rest breaks were "reasonable and necessary".

[31] It was submitted on behalf of the workers that while in *Ovation New Zealand Limited and Te Kuiti Meat Process Limited v New Zealand Meat Workers Union*<sup>5</sup> the Employment Court held payment for rest breaks may be included in a wage comprising piece rates, payment for the rest break must be at the same rate that the employee would have been paid as if at work at the time of the break. The workers said there was nothing in the collective agreements providing how rest breaks are to be paid and/or that the piece rate includes payment for the rest breaks. The workers suggested this omission was "deliberate" and demonstrated an "intention" not to pay the rest breaks. It was submitted that the failure of the collective agreements to address the issue was telling as the collective agreement was very specific about such things as the hours of work, wages, the permissible rate of damaged oysters and payment for public, annual and other forms of leave.

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<sup>5</sup> [2018] NZEmpC 151

[32] Barnes said rest breaks were remunerated through piece rates and that each time the collective agreement was renewed such past terms based on prior practice were reincorporated. Barnes said the fact rest breaks were remunerated in this way need not be at the forefront of the minds of the parties and it was not necessary to allocate a particular part of the “piece” to remuneration for rest breaks. It was also submitted both sides “knew and accepted” how rest breaks were remunerated and the union and workers cannot now seek to retrospectively argue otherwise when the basis of the payment is lawful based on the decision in *Ovation*.

[33] The workers, through their representative, rejected this argument and said there was no agreement rest breaks would be remunerated through piece rates and that such an agreement was reflected, in some way, in the relevant collective agreements.

[34] Having carefully considered the respective positions of both parties, I find that while it was open for the parties to agree that the piece rate remunerated the workers for their rest breaks, there is no evidence which actually supports this agreement. Whether the approach taken by Barnes to the remuneration of rest breaks was “deliberate” or “intentional”, as the workers alleged, is not essential to a finding that piece rate did not, in fact, remunerate rest breaks as envisaged by Barnes.

[35] That the collective agreement clearly articulated all other forms of remuneration (default rate, piece rate, payments for public, annual and sick leave and tool allowance) is instructive. Further, that the collective agreements were renegotiated, as contended by Barnes, without remuneration for rest breaks being at the forefront of the parties minds is of no assistance because the law, at least in so far as rest breaks were concerned, evolved over the top of the bargaining to renew the agreements. Given the obligations under s 69ZD of the Act are placed on Barnes, it was for it to ensure that rest breaks were separately remunerated in the renewed collective agreement or that it was made clear in the collective agreement that remuneration for the same was provided for through piece rates. It did neither.

[36] The workers, prior to 31 August 2017, were not paid for their rest breaks. The difficulties for Barnes, however, do not rest there.

*Underpayment of paid rest breaks after 1 March 2018*

[37] The workers say that while they have been paid for their rest breaks since 1 March 2018, they are remunerated at the default rate under the collective agreement rather than at the amount which would have been earned at the piece rate. They say this is inconsistent with the Court's decision in *Ovation* and results in an underpayment.

[38] Barnes denied any underpayment issue and said, after providing a number of variables and other complications that would need to be taken into account if paid at the piece rate, the workers were paid the default rate because this is the only rate which is available at the time the break is taken.

[39] While I am not unsympathetic to Barnes in relation to the potential complexities of establishing the requisite piece rate to be paid in each particular instance, I find the workers have been underpaid for their rest breaks since 1 March 2018 because, based on *Ovation*, the default rate is less than the rate which they would have earned if they had been working during their rest breaks.

*Donning, doffing and walking*

[40] The workers through their representative said that *Ovation* is the authority for the proposition that donning and doffing personal protective equipment and walking at the start and finish of shifts, and the start and finish of rest and meal breaks amounts to work for which Barnes must pay them. They said that in the absence of any other arrangement, the time spent on these activities must be paid in accordance with s 6 of the Minimum Wage Act. The workers claim is for 30 minutes donning and doffing and walking each day which translates to 2.5 hours for each worker x \$17.70 per hour = \$44.25 per five day week.

[41] The workers said the collective agreements do not provide for payment for donning and doffing and walking within the piece rate. Given the *Ovation* decision is dated 17 December 2018 it is highly unlikely that the parties would have ever turned their mind to the possibility of the employees being paid for donning and doffing and walking.

[42] The workers relied in particular on the evidence of Ms Rautahi who said that 29 minutes was taken in the course of one day's work comprising one meal break and two rest breaks, and the evidence of Ms Witehira who said 31 minutes was taken in the same circumstances. Both witnesses detailed their arrival at work, movement through corridors to the drying room, the locker room, sanitising and cleaning, taping, donning personal protective equipment and the reverse of that process at the end of each work period. Both witnesses described their movements through the factory by reference to a diagram whose measurements were agreed by Barnes. Both witnesses said they walked a minimum of 24 metres at the commencement of their shift, being from one end of the factory to the other, with a similar distance travelled to the "smoko" room. Reference was also made by the witnesses to congestion points within the factory which slowed the process.

[43] Barnes submitted that tasks including in donning and doffing were "de minimis" and, as such, the law should not concern itself with the issue. Barnes further submitted that the preparatory task performed by the workers (donning personal protective equipment, cleaning knives etc.) was part of what was required to complete the workers duties. It was said the workers accepted these tasks were required of them and it was always an expectation that they complete these them before commencing their "core" role. And, as a consequence, that such an established practice, the parties to the successive collective agreements must be taken to have accepted that these preparatory steps were part of the duties of oyster openers.

[44] Barnes said there was never a suggestion raised on behalf of the workers that the remuneration these received, presumably the piece rate, did not compensate them for performing the preparatory steps necessary to be ready to start opening oysters. Barnes submitted there was no need to separately identify a component of remuneration for preparatory tasks nor was the rate of remuneration less than the minimum wage (even for the slowest oyster openers).

[45] On behalf of Barnes, Mr Wright and Mr Russell said the workers evidence about donning and doffing and walking was exaggerated. In a schedule to Mr Wright's evidence he set out Barnes' estimate of donning and doffing as being an average of approximately 13 minutes per day.

[46] For the workers, it was submitted that this evidence can be discounted for reasons including:

- (a) the workers were not involved in the process by which the time estimates were collected;
- (b) the time estimates do not appear to have been calculated during the working day;
- (c) the time estimates did not take into account knife sharpening by the workers.

[47] For the workers it was submitted the evidence of Mr Wright and Mr Russell was further weakened by concessions in response to questioning, including about unrealistic assessments for the time taken to complete particular tasks.

[48] Having carefully considered the evidence, and the submissions of the parties, I find that “donning and doffing” and walking is work for the purposes of s 6 of the Wages Protection Act. I further find, and in doing so prefer the evidence of the workers as the people who actually undertake the tasks, that these processes take place over a period of approximately 30 minutes per day. And, indeed, even on Barnes’ own evidence, and perhaps its best case, this period is approximately 13 minutes, for which the workers ought to have been remunerated based on the decision in *Ovation*.

### **Interest**

[49] The workers sought interest on their arrears of wages. I have decided in all the circumstances of the case it is appropriate to make such an award. Interest on the arrears for each of the workers, based on their particular circumstances in relation to each of the four claims, will need to be calculated by Barnes with reference to the Interest on Money Claims Act 2016.<sup>6</sup> Consistent with the recovery period for wage arrears, the maximum interest payable on each of the claims is for a period of six years. Interest on each of the four claims should be separately calculated and clearly discernible.

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<sup>6</sup> See, [www.justice.govt.nz/fines/civil-debt-interest-calculator/](http://www.justice.govt.nz/fines/civil-debt-interest-calculator/)

## **Summary**

[50] The following findings have been made:

- (a) the workers are not casual employees who, prior to 31 August 2017, were not paid their relevant daily pay/average daily pay for their public holidays;
- (b) the workers, prior to 31 August 2017, were not paid for their rest breaks;
- (c) the workers have been underpaid their rest breaks since 1 March 2018 because the default rate is less than the rate which they would have earned if they had been working during their rest breaks;
- (d) “donning and doffing” and walking is work for the purposes of s 6 of the Wages Protection Act for a period of approximately 30 minutes per day;

## **Costs**

[51] Costs are reserved. The parties are encouraged to resolve the issue of costs between them. In the event this is not achieved, E Tu may seek a direction from the Authority for a timeabled exchange of submissions dealing with the same.

Andrew Dallas  
Chief of the Employment Relations Authority

## **SCHEDULE OF PARTIES**

### **Applicants**

Second Applicant:	OTENE ABRAHAM
Third Applicant:	PEGGY-ANNE BISHOP
Fourth Applicant:	GREGORY CLAXTON
Fifth Applicant:	NORMAN DAY
Sixth Applicant:	MARK FAGASA WITOHARIKI
Seventh Applicant:	STEPHEN WILSON
Eighth Applicant:	RICCI GRANT
Ninth Applicant:	BRUCE GREIG
Tenth Applicant:	TONY MAHENO
Eleventh Applicant:	ROGER MATAHAERE
Twelfth Applicant:	KAIARANGA MATANGI
Thirteenth Applicant:	VICTORIA PEARSEY
Fourteenth Applicant:	RAEWYN RAUTAHI
Fifteenth Applicant:	LEAH RUSSELL
Sixteenth Applicant:	ERROL RYAN
Seventeenth Applicant:	LINC POTTINGER