

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 234
3089974

BETWEEN NEW ZEALAND PUBLIC
 SERVICE ASSOCIATION INC
 Applicant

A N D NELSON MARLBOROUGH
 DISTRICT HEALTH BOARD
 Respondent

Member of Authority: Peter van Keulen

Representatives: Carolyn Mayston, counsel for the Applicant
 Barnaby Locke, counsel for the Respondent

Investigation Meeting: 22 January 2021 in Nelson

Submissions and further
information received: 22 January 2021 and up until 31 May 2021 from the
 Applicant
 22 January 2021 and up until 31 May 2021 from the
 Respondent

Date of Determination: 31 May 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem concerns the interpretation and application of a clause relating to public holidays in the Disability Support Service Collective Agreement between the New Zealand Public Service Association Inc (PSA) and the Nelson Marlborough District Health Board (NMDHB), (the DSS CEA).

[2] In its statement of problem PSA refers to the clause in dispute as clause 15 in the DSS CEA, which I assume is a reference to the DSS CEA for 1 December 2015 to 30 November

2018. This clause was originally drafted in the DSS CEA for 1 December 2013 to 30 November 2015. And it is also replicated as clause 14 in the DSS CEA for 1 December 2018 to 30 November 2020. For the purposes of my determination I will interpret and apply clause 14 of the DSS CEA for 1 December 2018 to 30 November 2020 but my analysis and conclusions also apply to the two prior DSS CEAs.

Clause 14

[3] Clause 14 is a lengthy clause but it is worth setting out most of it because the dispute arises not simply because there are two conflicting parts to clause 14 but also because the overall drafting, including the order of the sub clauses creates some ambiguity.

[4] Clause 14 of the DSS CEA:

14 PUBLIC HOLIDAYS

14.1 The following days shall be observed as public holidays:

New Year's Day

2 January

Waitangi Day

Good Friday

Easter Monday

ANZAC Day

Sovereign 's Birthday

Labour Day

Christmas Day

Boxing Day

Anniversary Day (as observed in the locality concerned).

In accordance with the Holidays Amendment Act 2013, Waitangi Day and Anzac Day holidays are 'Mondayised' when they fall on a weekend. This is effective on Anzac Day 2015 and Waitangi Day in 2016.

Where Waitangi Day or Anzac Day fall on a Saturday or Sunday, and that day is not otherwise a working day for an employee, then the public holiday will be treated as falling on the following Monday for that employee. For those who work weekends, the public holiday will continue to be recognised on the actual day.

If an employee works on a day that is designated as a public holiday for them (either the weekend day or the Monday, depending on their normal working days), the employee will receive time and a half for the hours worked, and become entitled to an alternative holiday.

14.2 The following shall apply to the observance of Christmas Day, Boxing Day, New Year's Day or 2 January, where such a day falls on either a Saturday or a Sunday:

(a) Where an employee is required to work that Saturday or Sunday the holiday shall, for that employee, be observed on that Saturday or Sunday and transfer of the observance will not occur. For the purposes of this clause an employee is deemed to have been required to work if they were rostered on or on-call and actually called in to work. They are not deemed to have been required to work if they were on-call but not called back to work.

(b) Where an employee is not required to work that Saturday or Sunday, observance of the holiday shall be transferred to the following Monday and/or Tuesday in accordance with the provisions of Sections 45 (1) (b) and (d) of the Holidays Act 2003.

(c) Should a public holiday fall on a weekend, and an employee is required to work on both the public holiday and the week day to which the observance is transferred, the employee will be paid at weekend rates for the time worked on the weekday/transferred holiday. Only one alternative holiday will be granted in respect of each public holiday.

14.3 In order to maintain essential services, the employer may require an employee to work on a public holiday when the public holiday falls on a day which, but for it being a public holiday, would otherwise be a working day for the employee.

14.4 When employees work on a public holiday as provided above they will be paid at double the ordinary hourly rate of pay (T2) for each hour worked and they shall be granted an alternative holiday. Such alternative holiday shall be taken and paid as specified in the Holidays Act 2003.

14.5 An employee who is on call on a public holiday as provided above, but is not called in to work, shall be granted an alternative holiday, except where the public holiday falls on a Saturday or Sunday and its observance is transferred to a Monday or Tuesday which the employee also works. Such alternative holiday shall be taken and paid as specified in the Holidays Act 2003.

14.6 ...

The dispute

[5] PSA claims that clause 14 means that any employee, covered by the DSS CEA, who works on a public holiday where that day would otherwise be a working day for them should be paid double time for each hour worked. The exception is for Waitangi Day and ANZAC Day, for which employees who work on those days, where the days would otherwise be a working day, are paid time and a half for each hour worked.

[6] NMDHB refutes this and says clause 14 means any employee, covered by the DSS CEA, who works on a public holiday where that day would otherwise be a working day for them should be paid time and a half for each hour worked. The exception is for Christmas

Day, Boxing Day, New Year's Day and 2 January where any of those days falls on a weekend then employees who work on those days and the days would otherwise be a working day are paid double time for each hour worked.

[7] At its simplest this dispute arises because clause 14 has two conflicting parts. I will set those parts out again as it highlights the conflict:

(a) The fourth paragraph of clause 14.1 provides:

If an employee works on a day that is designated as a public holiday for them (either the weekend day or the Monday, depending on their normal working days), the employee will receive time and a half for the hours worked, and become entitled to an alternative holiday.

(b) Clause 14.4 provides:

When employees work on a public holiday as provided above they will be paid at double the ordinary hourly rate of pay (T2) for each hour worked and they shall be granted an alternative holiday. Such alternative holiday shall be taken and paid as specified in the Holidays Act 2003.

PSA position

[8] To support its interpretation of clause 14, PSA relies primarily on clause 14.4. PSA says the reference to "as provided above" in clause 14.4 is to clause 14.3, which provides:

14.3 In order to maintain essential services, the employer may require an employee to work on a public holiday when the public holiday falls on a day which, but for it being a public holiday, would otherwise be a working day for the employee.

[9] So PSA says the double time payment provided for in clause 14.4 is for all public holidays for an employee, which is otherwise a normal working day for that employee, that the employee is required to work (as set out in clause 14.3).

[10] Then it says the inconsistent fourth paragraph of clause 14.1 which provides for time and a half payment is an exception that applies only to Waitangi Day and ANZAC Day. It says this is so because:

- (a) The paragraph follows two other paragraphs dealing with what happens when Waitangi Day and ANZAC Day are “Mondayised”.
- (b) The reference to “designated as a public holiday” is described in the brackets as being either the weekend or Monday, depending on the employees normal working day, this being an allowance for Waitangi Day and ANZAC Day if either is “Mondayised”.

NMDHB position

[11] To support its interpretation NMDHB relies on the fourth paragraph of clause 14.1. NMDHB says the reference to “a day that is designated a public holiday for them” is a reference to the observance of public holidays generally; this being language used in other DHB collective agreements. It says as clause 14.1 starts by setting out all public holidays the clause must apply to all public holidays unless there is a specific reference to certain public holidays, which the paragraphs dealing with Waitangi Day and ANZAC Day being “Mondayised” do. So it follows that the paragraph dealing with payment for designated public holidays provides for time and a half payment for all public holidays listed, including Waitangi Day and ANZAC Day when they are “Mondayised”.

[12] NHMDB then says clause 14.4, which provides for double time payment relates only to Christmas Day, Boxing Day, New Year’s Day and 2 January when those days fall on a weekend. The reference in clause 14.4 to “a public holiday as provided above” is a reference to clause 14.2 which deals with these public holidays when they fall on a weekend. NMDHB says this interpretation is supported by the fact that traditionally NMDHB has paid more to employees who work on Christmas Day and New Year’s Day when they fall on a weekend; this has been an historical acknowledgement of the significance of these particular public holidays and weekends.

Analysis

The law

[13] In order to resolve this issue I must interpret and apply clause 14.

[14] There are many decisions dealing with contractual interpretation from the Supreme Court through to the Employment Court.

[15] In *Vector Gas v Bay of Plenty Energy* Justice Tipping stated at [19]:¹

[19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[16] Then, in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*, Judge Ford summarised the principles from *Vector Gas* saying:²

[17] In summary, it would appear from *Vector* that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is, nevertheless, a valid part of the interpretation exercise for the Court to "cross-check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language used is, on its face, ambiguous or flouts business common-sense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[17] So, I must establish, objectively, the meaning the parties intended their words to bear. I establish the objective meaning by taking the natural and ordinary meaning and applying that interpretation if the language is not ambiguous, including when that meaning is cross

¹ *Vector Gas v Bay of Plenty Energy* [2010] NZSC 5.

² *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149.

checked against the contractual context, and it does not flout business common sense. If the natural and ordinary meaning of the words is ambiguous or it flouts business common sense then I should establish what the parties intended their words to mean by considering the contractual context further; the facts and circumstances that would be operating in the parties' minds. However, this contractual context is not about what the parties say they intended the words to mean or what their negotiating stance was at the time.

My approach

[18] The first and obvious point, which I have already highlighted, is that the natural and ordinary meaning of the words in part four of clause 14.1 and clause 14.4 create an ambiguity and an illogical formulation that flouts business common sense. On the face of it, these parts of clause 14 provide that where an employee works on a public holiday which is otherwise a normal working day then that employee should be paid at time and a half and at double time. So it follows that one must prevail as setting the rate for payment for work on public holidays and the other must be an exception to that rate; arguments which each party has advanced as their explanation for the interpretation of clause 14.

[19] In order to decide which of these parts of clause 14 prevails as setting the payment rate for public holidays and therefore which part is an exception to that rate applied only to certain public holidays I will consider the whole of clause 14 to see if the natural and ordinary meaning clarifies the ambiguity and makes business common sense.

Clause 14.4

[20] In order to decide if clause 14.4 provides for the payment rate for all public holidays or just a subset (as an exception) I need to determine what the words "as provided above" refer to. This is because the double time payment in clause 14.4 applies to public holidays that employees work "as provided above".

[21] Clause 14.4 follows clause 14.3. Clause 14.3 enables NMDHB to require employees to work on a public holiday if that holiday is otherwise a working day for the employee. So, by its very order and based on the natural and ordinary meaning of the words "as provided above" appears to refer to clause 14.3. This also makes business common sense.

[22] However, the words “as provided above” are also used in clause 14.5 in reference to employees who are on call on a public holiday. This same language in clause 14.5 is not a reference to the immediately preceding clause as that is clause 14.4 and that is illogical. And it cannot be a reference to clause 14.3 as that clause does not deal with employees who are on call on a public holiday; only clause 14.2 refers to employees who are on call on a public holiday. So there is a significant inconsistency to say “as provided above” refers to 14.3 for one clause and 14.2 for another.

[23] Added to this is the fact that clause 14.2 also deals with employees required to work on a public holiday, albeit only in relation to a specific subset of public holidays, Christmas Day, Boxing Day, New Year’s Day and 2 January when any of those days falls on a weekend; which fits with the exception argument advanced by NMDHB. So the natural and ordinary meaning of the words “as provided above” can also be a reference to clause 14.2 and this is logical and not ambiguous in the context of the whole clause, particularly clause 14.5.

Clause 14.1 providing an exception

[24] Moving on to clause 14.1, in order for clause 14.4 to prevail as setting the payment rate for all public holidays the fourth part of 14.1, providing for payment at time and a half, must be the exception.

[25] In order to decide if the fourth part of clause 14.1 provides for an exception to payment at double time I need to determine what the words “designated as a public holiday for them” refers to. This is because the time and a half payment applies to employees who work on a day that is “designated as a public holiday for them”.

[26] The fourth part of clause 14.1 follows two parts that deal with Waitangi Day and Anzac Day being Mondayised. So there is a basis for saying the logical sequence of the parts of clause 14.1 means designated as a public holiday is a reference to where Waitangi Day or Anzac Day are Mondayised, particularly because in brackets following the words “designated as a public holiday for them” are the words “either the weekend day or the Monday”, this being a reference to Mondayised public holidays.

[27] However, this part also follows the first part of clause 14.1, which sets out all of the public holidays observed. So there is also a basis for saying the words refer to any public

holiday designated as a public holiday for an employee; the designation arising if it falls on a day that would otherwise be a working day for the employee. And the words in the brackets do not limit the application to only Mondayised public holidays, all those words do is clarify that the designation includes either the weekend day or the Monday when a public holiday is Mondayised.

[28] So the natural and ordinary meaning supports either application however business common sense is instructive. If I apply the fourth part of clause 14.1 as the exception this means where a public holiday is Mondayised the employee only gets paid time and a half rather than double time – this is illogical as there is no business case for having such an exception. It becomes even more illogical because it could mean an employee who works on Christmas Day which is Mondayised only gets paid at time and a half but if that employee then works on Boxing Day on the Tuesday that will be paid at double time.

[29] The alternative is to apply the exception only to Waitangi Day and Anzac Day when Mondayised. This application is not because of the wording but because of the order of the clause. Even then the exception lacks business common sense as it means employees who work Waitangi Day or Anzac Day when it is Mondayised get paid time and a half but if they work either day when it falls on a weekday then they get double time.

[30] So, on this analysis it makes more sense for the fourth part of clause 14.1 to provide the overall payment for public holidays being time and a half.

Clause 14.4 providing an exception

[31] If the fourth part of clause 14.1 provides the payment for public holidays then clause 14.4 must be the exception. That exception will be that when employees work on Christmas Day, Boxing Day, New Year's Day or 2 January when they fall on a weekend, where that weekend day is otherwise an ordinary working day for them, then they will be paid double time.

[32] NMDHB says this is more logical or makes business common sense because weekends have always been seen as favourable days off for employees and Christmas Day, Boxing Day, New Year's Day and 2 January are preferred public holidays i.e. are more likely to be days an employee would rather not work. In these circumstances, combining both

working on a weekend and on one of these particular public holidays justifies an additional payment. And it says that historically this is what NMDHB has done, at least in relation to Christmas Day and New Year's Day.

[33] I accept that submission and agree; it makes more business sense for clause 14.4 to provide an exception for double time payment when an employee works on Christmas Day, Boxing Day, New Year's Day or 2 January when any of those days also falls on a weekend.

Contractual context

[34] Much of the evidence I heard in my investigation meeting related to the negotiating or bargaining process and was only evidence of what the parties say they intended to agree. So, for example, that PSA advised members it was negotiating on the basis of seeking double time payment for public holidays or that NMDHB negotiated changes to wage rates and other benefits on the basis that it budgeted for public holidays to be paid at time and a half and it never produced budgets based on double time payment for public holidays.

[35] Both parties referred me to other DHB collective agreements that they say support their view of the interpretation; I do not consider this to be contractual context as it simply informs what one party may have been thinking at the time in terms of the drafting they negotiated.

[36] However what I did find instructive was the fact that the collective agreement prior to the DSS CEA for 1 December 2013 to 30 November 2015 provided for payment for public holidays at time and a half with the exception of double time payments for Christmas Day or New Year's Day when that falls on a weekend.³

Conclusion

[37] In all of the circumstances I am satisfied that clause 14 in the DSS CEA for 1 December 2018 to 30 November 2020 provides:

³ *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317, where the Court of Appeal stated it is appropriate to take into account prior instruments reflecting the approach of the parties to the underlying issue in the disputed clause, i.e. in this case how the parties dealt with payment of public holidays in prior collective agreements.

- (a) Payment of public holidays, which are worked by an employee on a day which would otherwise be a working day for that employee, is at the rate of time and a half. This is set out at clause 14.1.

- (b) An exception to this pay rate applies to those public holidays identified in clause 14.2 being Christmas Day, Boxing Day, New Year's Day and 2 January when any of those days falls on a weekend. For any of these days that are worked by an employee and would otherwise be a working day for that employee they are paid at double time. This is set out at clause 14.4.

Orders

[38] As a consequence of my conclusion I will not order compliance, wage arrears and interest as sought by PSA. PSA's claim is dismissed.

Costs

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

[40] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority