

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 326
3115492

BETWEEN JANICE SUTHERLAND (and
others named in the Schedule)
Applicants

AND SOUTH PACIFIC MEATS
LIMITED
Respondent

3115495

BETWEEN ARAPATA COX (and others
named in the Schedule)
Applicants

AND SOUTH PACIFIC MEATS
LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: Peter Cranney, counsel for Applicants
Paul Wicks QC and Tim Clarke, counsel for Respondent

Investigation meeting: 11 and 12 April 2022 in Christchurch

Submissions: 14 April 2022 via ZOOM

Determination: 15 July 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Janice Sutherland, Connie Horo and Wendy Te Patu were or are process workers employed at the Awarua meat processing plant in Southland (the Awarua workers). Arapata Cox, Daphne Ashton and Edward Paraha were or are, process workers employed at the Malvern meat processing plant in Canterbury (the Malvern workers).

[2] Both plants are operated by South Pacific Meats Limited (South Pacific), which is a wholly owned subsidiary of the AFFCO group of companies. The Awarua and Malvern workers were or are employed by South Pacific at both plants on seasonal individual employment agreements (IEA).

[3] Collectively the workers have the same claims against South Pacific. First, they say they have not been paid for “donning and doffing” personal protection and equipment at the beginning of the workday and the end of the workday. Second, they say South Pacific is underpaying their paid meal breaks. Third, they say work infringes into paid and unpaid breaks such that they are not receiving their full break entitlements.

[4] South Pacific deny the claims in respect of both plants, claiming they have acted in compliance with their statutory and contractual obligations in respect of the Awarua and Malvern workers. South Pacific say the workers should be denied the relief they seek and further or by way of an alternative defence the Awarua and Malvern workers cannot recover wages in relations to work done before 6 August 2014.¹

Issues

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

- (i) Is South Pacific paying the workers for work performed as pre and post shift “donning and doffing” at:
 - (a) Awarua; and/or
 - (b) Malvern; and
- (ii) Is South Pacific underpaying the workers for paid rest breaks at:
 - (a) Awarua; and/or
 - (b) Malvern
- (iii) Is work infringing into paid rest breaks and unpaid lunchbreaks at:
 - (a) Awarua; and/or
 - (b) Malvern; and
- (iv) Should either party contribute to the costs of representation of the other party?

¹ Employment Relations act 2000, s 142

The Authority's investigation

[6] During the Authority's investigation meeting, I heard evidence from Ms Sutherland, Ms Horo, Ms Te Patu, Mr Cox, Ms Ashton and Mr Paraha. On behalf of South Pacific, I heard evidence from Regan Gillies, Processing Manager at Awarua, James McFarlane, Personnel and Safety Co-ordinator at Malvern and Dane Gerard, National Human Resources Manager for AFFCO New Zealand Limited.

[7] I record my appreciation for the constructive way in which the parties approached these proceedings. While lodged in the Authority as two separate matters, given the common problems identified in each, it was agreed the proceedings would be consolidated and investigated together. As the outcome is the same for both proceedings, only one determination has been issued. However, where separate findings are made about each plant or group of workers, these are separately set out below to preserve the parties' respective rights.

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

What caused the employment relationship problem?

Non-payment for work performed as "donning and doffing"

[9] There is no dispute between the parties that "donning and doffing", the tasks of putting on (donning) and taking off (doffing) protective equipment and uniforms, is "work" which must be remunerated by, at least, the prevailing minimum wage.² However despite this, the Awarua and Malvern workers claim that they are not actually being paid for donning and doffing at the beginning and at the end of their shifts.

²See, *Idea Services v Dickson* [2011] NZCA 12 and *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union* [2016] NZEmpC 151

[10] South Pacific disagree and says, through the evidence of Mr Gerard, its workers are “generally paid an all-encompassing payment for each and every hour of any work performed. This payment is based primarily on the base hourly rate (which vary according to role and grade), plus piece rates and a production bonus paid over the total production time. South Pacific claim the total production minutes encapsulates “any work” performed, including processing time, donning and doffing, walk and other non-processing time”.³

[11] South Pacific also points to generic provisions contained in the Awarua and Malvern workers IEAs. Since 2016, the IEAs has relevantly provided:

- X The minimum hourly rate of pay for *any work* performed by employees shall be as required by legislation deemed applicable at that point in time. When calculating whether the minimum hourly rate has been met, any contribution from production bonuses and piece rates that the employee has earned over the calculation period shall be applied.⁴ (emphasis added)

[12] A previous version of the clause 8.4 relevantly provided:

- X The minimum hourly rate of pay for any work performed by employees shall be a minimum of \$[X] per hour and otherwise as specified in the schedule. When calculating whether the minimum hourly rate has been met, any contribution from production bonuses and piece rates that the employee has earned over the calculation period shall be applied.

[13] South Pacific say the restructuring of the first sentence of cl 8.4 was designed to add clarity rather than change its intent with the clause and maintains compliance with ongoing changes to the statutory minimum wage orders.

[14] In 2019, South Pacific caused the further clause to be inserted into its IEAs:

- [x] The parties accept and acknowledge that:
 - (a) the rest breaks as outlined in clause [X] include an additional 5 minutes per break for daily donning and doffing at break times; and
 - (b) the earnings set out in the pay rate schedule attached (including hourly rates, piece rates and production bonuses) include a reasonable remuneration payment for the employee to complete the necessary donning and doffing at the start and end [of] each shift and during unpaid breaks

³ Witness Statement of Dane Gerard, 11 March 2022 at [103]

⁴ The numeration for these clauses has been removed to save confusion as to positioning within the respective IEAs.

[15] South Pacific submitted that unlike other industries or businesses:

... shift time do not determine when a worker starts and finishes work, and consequently, do not determine the basis on which payment of wages is calculated. The shift times are not fixed and are only indicative of the production start and finish times.

[16] South Pacific further submitted that shift start and finish times were dependent upon workers positions on the production chain.

[17] Mr Gerard explained as set out in the schedule to the Awarua and Malvern workers IEAs, the base hourly wage for workers, including payments for donning and doffing, at both plants are based on “production minutes” rather than shift times. Production minutes for Awarua are 555 minutes of ordinary production time based on four possible day/night configurations. Production minutes for Malvern are 480 minutes of ordinary production time across two-day shift configurations for ovine and bovine processing. However, as explained by Mr Gerard, plant supervisors often round up finishing times to the nearest 15 minutes to give workers more paid time.

[18] South Pacific submitted that the Awarua and Malvern workers were “weekly wage” (category “C”) workers for the purpose of testing compliance with the Minimum Wage Order (MWO) because: (a) they were paid weekly by virtue of their IEAs; (b) their pay rate consisted of three components: a base hourly rate, piece rates and a production bonus and (c) their week runs Sunday to Saturday.

[19] South Pacific submitted it was permissible to “average” out wages *within* MWO assessment periods but not *across* them. As a consequence, sufficiency of all three components of the rate of pay to meet compliance with the MWO needed to be tested on a weekly basis.

[20] Further, South Pacific sought to distinguish their position from that found in *Idea Services v Dickson*⁵ and *A Labour Inspector v Smith City Group Ltd*⁶ (that the agreed hourly rate never contemplated sleepovers or pre-start meetings, respectively) on the basis that South Pacific accepts time spent processing meat as well as donning and doffing, cleaning, walking and other non-processing time is “work”.

⁵ [2011] NZCA 12

⁶ [2018] NZEmpC 43

[21] Finally, South Pacific said AFFCO monitored its payroll as a safeguard to ensure that workers at both plants did not receive less than the minimum wage.

[22] The Awarua and Malvern workers say that their main concern is that it is not the exact time that pre and post donning and doffing takes but rather that they are not paid for it by piece rates and/or production bonuses.

[23] The Awarua and Malvern workers submitted the current and former version of the clause of their IEAs reproduced at paragraphs [11] and [12] were, in effect, irrelevant in assessing whether South Pacific was paying them for pre and post shift donning and doffing. They say the first sentence of the clause, requires South Pacific to pay the minimum wage for “any work”. However, they say there is no payment for pre and post shift donning and doffing work undertaken and no accounting for this work in piece rates and production bonuses.

[24] The Awarua and Malvern workers further say that in respect of the second sentence of the clause⁷, there is no contribution at all from production bonuses and piece rates when engaged in pre and post shift donning and doffing. In respect of the IEA clause reproduced at paragraph [14], the Awarua and Malvern workers submitted that when read as whole this clause related to “Standby Rate and Minimum Payments” and, in any event, there was not a “reasonable remuneration payment” for pre and post shift donning and doffing work, as the workers had not earned any production bonuses and piece rates during these periods.

Underpayment for meal breaks

[25] The Awarua and Malvern workers claim they were underpaid for their meal breaks prior to July 2019. In their evidence, the Awarua workers including Ms Patu and Ms Sutherland, say they were only paid their base hourly rate and not what they should have been paid as if they were at work. The position for the Malvern workers was slightly different. Ms Ashton, Mr Paraha and Mr Cox said that prior to February 2020 their breaks were paid at \$14.60 per hour. And since then, their breaks have been paid at what South Pacific say is an “indicative hourly rate”.

⁷ Which provides: “[w]hen calculating whether the minimum hourly rate has been met, any contribution from production bonuses and piece rates that the employee has earned over the calculation period shall be applied”.

[26] South Pacific says that at all material times it has allowed the Awarua and Malvern workers a reasonable opportunity to take sufficient breaks under s 69ZD of the Act and their respective IEAs and, they were paid at the correct rate of pay. South Pacific says that even if it did not provide Awarua and Malvern workers with a reasonable opportunity to take rest and meal breaks, wages arrears could not be claimed and only a compliance order issued and penalties imposed.

[27] South Pacific said the Awarua and Malvern workers' IEA provide them with two paid 10 minute rest breaks plus 5 minutes donning and doffing time (a further rest break is provided for when working overtime) and an unpaid 30 minute meal break at each plant per shift. Evidence was given by Mr Gillies and Mr McFarlane detailing the previous. South Pacific observed that the claims made by Awarua and Malvern workers' traverse three versions of s 69DZ of the Act.

[28] Mr Gerard helpfully set out how paid rates for an "A Grade" worker in the "slaughter board" at Awarua is calculated⁸:

- (i) 555 minutes production (+ 45 minutes paid rest breaks) = 600 minutes (10 hours);
- (ii) base hourly rate of \$17.98 x 10 hours = \$179.80⁹;
- (iii) an availability allowance of \$1.02 x 10 = \$10.20;
- (iv) (if 2700 carcasses processed that day) a piece rate of \$0.0409 x 2700 = \$110.43¹⁰;
- (v) \$179.80 (base) + \$10.20 (availability) + \$110.43 = \$30.05 per hour.

[29] South Pacific says the Awarua and Malvern workers were paid the same rate for rest breaks they would have been paid as if at work. The 2017 Awarua IEA is silent on the rate of pay for workers who were not "hourly paid" and the rate for other workers being the same as if they were at work. South Pacific further says the 2017 Malvern IEA provided that paid meal breaks were paid at the "standby rate" which was then supplemented by the piece-rate and production bonus.

⁸ Above n 3 at [24]. Edited for drafting consistency.

⁹ Excluding a 30-minute unpaid meal break

¹⁰ The "piece" involves the full processing of an entire carcass (slaughter to packing)

[30] South Pacific says the 2019 Awarua and Malvern workers' IEAs expressly provided that "rest breaks will be at the base hourly rate only as the parties acknowledge that all piece rates, including carcass rates and production bonuses that incorporate payment for rest breaks".

[31] By contrast, Awarua and Malvern workers say they are being underpaid and use the example of the calculation of paid rates provided by Mr Gerard at paragraph [28] above to demonstrate this. They say that a piece rate of \$110.43 (2700 carcasses x \$0.0409) equates to \$0.1989 per minute based on 555 minutes of production. Together with a base hourly rate of \$17.98 (\$178.98 for 10 hours) or \$0.299 per minutes this gives a total of 0.4973 cents per minute (\$0.299 + \$0.1989). So, based on these calculations the Awarua and Malvern workers say they should be being paid \$0.4973 cents per minute for paid rest breaks (their production rate) but they are only being paid \$0.299 per minute for rest break (their base rate).

[32] The Awarua and Malvern workers say the underpayments of paid rest breaks are as high as \$2.00 per break and \$4.00 per day (or \$6.00 per day, depending on the number of breaks).

Is work infringing into paid rest breaks and unpaid lunchbreaks?

[33] The Awarua and Malvern workers said that work infringed upon their rest and meal breaks. Rest breaks at both plants are 15 mins (10 minutes + 5 for donning and doffing) and 30 minutes for lunch. The Awarua and Malvern workers all gave evidence about the difficulty they had consistently taking their full break entitlement. The tasks and activities the workers undertook before and during their breaks include:

- (i) doff their whites (overalls, or pants and shirt and hat), protective and other equipment;
- (ii) cleaning (more or less depending on role);
- (iii) walk to the canteen
- (iv) going to the toilet;
- (v) have their 10 minute rest break;
- (vi) obtain new clean whites from the laundry;
- (vii) walk back to the work area;
- (viii) don their whites, protective and other equipment; and
- (ix) return to their position on the chain.

[34] The Awarua and Malvern workers gave slightly varying accounts of the time the pre and post break preparatory tasks required after leaving the chain and prior to returning to it. However, the weight of the evidence pointed to an inability by them to consistently take their full 10 minute rest breaks and 30 minute lunch breaks.

[35] South Pacific strongly resisted the contention that work infringed upon the ability of the Awarua and Malvern workers to fully and consistently access their paid and unpaid breaks. Mr Gerard gave extensive and very helpful evidence about meat production processes and his assessment, based upon his extensive experience with both South Pacific and AFFCO, about donning and doffing, walking time and the circumstances within which workers take breaks within the context of a chain production process.

[36] Mr Gerard said breaks were typically taken at the same time each day, but the actual time is determined by when the Halal slaughtermen decide to slaughter their last carcass before taking the breaks. However, sometimes breaks are determined by an equipment breakdown, delays in livestock or a change of species being processed.

[37] The interface between production and breaks is summarised as follows. As the last carcass slaughtered by the Halal slaughtermen makes its way along the chain, each worker or group of workers “roll off” the chain and commence their breaks with doffing. The process of workers “rolling off” the chain is required because carcasses cannot be left on a plant’s slaughterboard for food safety reasons. The supervisors are the last group to take their breaks. The process occurs in reverse with the halal slaughtermen recommencing production and other meat workers progressively returning or “rolling back on” to the chain.

[38] Mr Gerard said the workers knew when to return from their breaks based on their position on the chain and that there were “automated timers or signals”. Mr Gerard said as a general rule every worker is back at their workstation after paid rest breaks within about 25 minutes. Mr Gerard said the Awarua and Malvern workers are provided with the opportunity to take their paid rests breaks and an extra five minutes of paid time is allocated for donning and doffing; with workers in the boning room receive a further five minutes (or 10 minutes in total) of paid donning and doffing time.

[39] Mr Gerard further said:

... the supervisors records the duration of rest and meal breaks in accordance with each worker's individual employment agreement (e.g. 2 x 15 minutes paid rest breaks and 1 x 30 minutes unpaid lunch break). However, the supervisor does not police the duration of each break. In essence, the taking of rest and meal breaks, and the duration of those breaks, is self-governed by each worker. Production stops to the extent necessary to ensure that workers take adequate breaks.

[40] In respect of Malvern, Mr McFarlane gave extensive evidence about what he said were the daily activities of the Malvern workers. He also provided time estimates for each worker in respect of donning, doffing and walking activities.

[41] In respect of Awarua, Mr Gillies also gave extensive evidence about what he said were the daily activities of Awarua workers.

The Authority's view of the employment relationship problem

Pre and post shift donning and doffing

[42] Having carefully considered the evidence and the submissions of the parties, the answer is straightforward. I find that both the Awarua and Malvern workers were and are not paid for pre and post shift donning and doffing.

[43] In making this finding, I accept the submissions advanced by the Awarua and Malvern workers and I do so because I cannot find any evidence of payments being made by South Pacific to these workers for pre and post shift donning and doffing. While the IEAs purport, in various formulations, to provide such payments, the reality is otherwise.

[44] The workers have not been paid either the minimum wage or a "reasonable remuneration payment" for this period.¹¹ Production minutes set by South Pacific at the plants do not include pre and post shift donning and doffing nor are the piece rates and bonuses generally payable to the workers during these periods because there is no production occurring.

¹¹ Per the IEA clause set out in paragraph [14] above.

[45] Even if ever viable, this finding is also terminal to South Pacific's practice of averaging *within* MWO assessment periods because there is no pay at all to assess compliance on a weekly basis with the MWO. Further, while South Pacific accepts that time spent donning and doffing is "work", it is no different a position than, for example: Idea Services found itself in, because South Pacific has failed to convince me that it is actually paying for the work being performed by the Awarua and Malvern workers.

[46] As a consequence of this finding the Awarua and Malvern workers are entitled to wages arrears at no less than the rate of the minimum wage applicable during the statutory period of recovery. For completeness, it is observed that there were some differences in the composition of some of the Malvern and Awarua IEAs, including the final combination of wage rate structure, but this ultimately did not materially change the correctness of the Awarua and Malvern workers' submissions.¹²

Underpayment of paid rest breaks

[47] Paid rest breaks under s 69ZD of the Act must be paid at the same rate for which an employee would be paid as if at work.¹³ The parties can agree to the incorporation of paid rest breaks into piece rates.¹⁴ However, an employer in such circumstances, would be required to demonstrate: (a) a clear and unambiguous agreement with its workers to do so and (b) how provision for payment for rest breaks has been made in the piece rate. The rationale ultimately being that however expressed and accounted for, workers are not financially disadvantaged for taking paid rest breaks.¹⁵

[48] To the extent the Awarua and Malvern workers have not been paid "as if at work" for rest paid breaks prior to July 2019, they are entitled to wages arrears from South Pacific. The parties need to work together in good faith to determine whether the workers have been paid "as if at work" for such breaks and if not, what arrears are owing.

¹² Above n 3 at [23]

¹³ *Lean Meats Oamaru Limited v NZ Meat Workers and Related Trade Union* [2016] NZCA 495 at [23]

¹⁴ *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union* [2016] NZEmpC 151 at [287]

¹⁵ Above n 13 at [17]

Infringement of work on breaks and meal breaks

[49] Section 69ZD places a duty on employers to provide rest and meal breaks. Consequently, in meeting the duty, an employer, unless one of the exemptions under s 69ZEA applies (which they do not here) must establish and maintain a system of work which make taking breaks consistently permissible on a break-by-break basis.

[50] In light of the contentions made by the Awarua and Malvern workers, and the evidence they provided about work infringing on breaks at both plants, I suggested to the parties that they jointly undertake a time-in-motion study at the Awarua and Malvern plants to ascertain whether this was the case and if so, work towards resolving it. While the Awarua and Malvern workers were agreeable to this course, unfortunately, this proposal was rejected by South Pacific. This was surprising given the issue of, at least, the sufficiency of donning and doffing time for boning room workers pre and post breaks had clearly been constructively addressed at plant level.

[51] While it seems South Pacific is recording the duration of breaks for each worker, this would seem to be on a plant-wide rather than individual basis because as Mr Gerard observed, supervisors do not police the duration of each break. Taking Mr Gerard's observation that "production stops to the extent necessary to ensure that workers take adequate breaks" – this, is the central issue.

[52] For South Pacific, Mr Gillies' evidence was stronger than that of Mr McFarlane's on this question because he is both a processing manager and has worked with, and performed many of the tasks of the Awarua workers. In contrast, when asked by the Authority, Mr McFarlane, who is personnel and safety coordinator at the Malvern plant, said his observations and time estimates for the workers actions were provided to him by supervisors. However, like the Barnes Oysters' workers,¹⁶ the Malvern workers were not aware that such an exercise was or had been undertaken.

[53] In respect of Mr Gillies evidence, the Awarua workers were similarly unaware of his studies of their labour process. Mr Gillies also acknowledged that when he was engaged in donning, doffing and walking activities. This was often not done during periods of congestions: pre and post shift and pre and post breaks.

¹⁶ *Witehira v Barnes Oysters Limited* [2020] NZERA 447 at [46]

[54] I accept the totality of the evidence given by Awarua and Malvern workers about the necessary tasks and activities performed by them to enable them to take paid rest and meal breaks once their role in production ceases. Based on this evidence, and weighing it against that provided by South Pacific, I find on the balance of probabilities that production at the Awarua and Malvern plants is not stopping long enough to ensure the workers are consistently able to take their rest and meal breaks which are enshrined in both statute and their IEAs.

[55] The Awarua and Malvern workers did not seek a compliance order requiring South Pacific to comply with its duty to provide them with breaks, nor would I have imposed one if sought as there is an ongoing employment relationship between most of the parties. The parties should work in good faith to ensure South Pacific achieves compliance with its statutory duty and contractual obligation to provide breaks. A time-in-motion study jointly undertaken by the parties at each plant would be a good start.

Summary

[56] In response to the following issues the findings that have been made are:

- (a) Is South Pacific paying the workers for work performed as pre and post shift “donning and doffing” at:
 - (i) Awarua? No
 - (ii) Malvern? No

- (b) Is South Pacific underpaying the workers for paid rest breaks prior to July 2019 at:
 - (i) Awarua? Yes, insofar as those workers have not been paid as if at work;
 - (ii) Malvern? Yes, insofar as those workers have not been paid as if at work.

- (c) Is work infringing into paid rest breaks and unpaid lunchbreaks at:
 - (i) Awarua? Yes
 - (ii) Malvern? Yes

[57] In the event the parties are having difficulty calculating or agreeing arrears or suitable arrangements for an agreed time-in-motion study at each plant; leave is granted for either or both parties to return to the Authority to seek directions and if necessary, fixing of the wages arrears found to be owing.

[58] For completeness, as there are currently no quantified arrears of wages and no claim for interest has been made by the Awarua and Malvern workers, no award of interest on any subsequently quantified arrears is made by the Authority. However, the parties are at liberty to agree that interest is payable in such circumstances.

Costs

[59] Costs are reserved. If a determination of the Authority is required on costs, the Awarua and Malvern workers, who were represented by the same counsel, may lodge a memorandum within 14 days of the date of this determination and South Pacific would then have 14 days from the date of service to lodge a memorandum in reply. No submissions on costs will be considered outside this timetable, unless prior leave has been sought.

Andrew Dallas
Chief of the Employment Relations Authority

SCHEDULE OF PARTIES

Applicants in 3115492

Second Applicant: CONNIE HORO

Third Applicant: WENDY TE PATU

Applicants in 3115495

Second Applicant: DAPHNE ASHTON

Third Applicant: EDWARD LANI TAURA PARAHA