IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 220
3166965

	BETWEEN	AWUNZ INCORPORATED Applicant
	AND	VINCI CONSTRUCTION GRAND PROJETS First Respondent
	AND	SOLETANCHE BACHY INTERNATIONAL NEW ZEALAND LIMITED Second Respondent
	AND	DOWNER NEW ZEALAND LIMITED Third Respondent

Member of Authority:	Robin Arthur
Representatives:	Garry Pollak, counsel for the Applicant Bridget Smith and Tim Oldfield, counsel for the Respondent
Investigation Meeting:	2 February 2023
Determination:	4 May 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Amalgamated Workers Union (AWUNZ) and three companies involved in the Link Alliance project to build Auckland's City Rail Link negotiated a collective agreement (CA) for workers specifically hired to work on the project.

[2] Representatives of Vinci Construction Grands Project (VCGP), Soletanche Bachy International New Zealand Limited (SBINZ) and Downer New Zealand Limited (DNZL) and the union signed the CA in mid-2020. Its term was agreed to run from 1

July 2020 to 30 June 2023. Another term said the CA "ceases to apply" at the completion of the major tunnelling and build on the CRL project.

[3] In February 2022 AWUNZ raised a dispute over how payment for shift work was calculated for the workers who worked on the part of the project that involved use of the tunnel boring machine (the TBM).

[4] The roster used for the TBM workers – called Roster E – enabled the companies to have crews available for continuous operation of the machine, 24-hours a day, seven-days-a week.

[5] Roster E was described as a 7:4:7:3 roster. Over a 21-day period the crews worked 12-hour shifts for seven nights in a row (the night shifts), then had three days off (RDOs), then worked 12-hour shifts for seven days in a row (the day shifts) and then had four more RDOs. This pattern then repeated for the following 21 days and so on.

[6] The set of seven-night shifts in a row began on a Friday and the set of seven-day shifts began on a Tuesday. This meant the workers' shifts ran over more than one Monday-Sunday week.

[7] The union said the CA's provisions should have been interpreted so the pay for workers on Roster E was calculated on the basis of the number of rostered days worked in a row, regardless of which week they fell in. The companies disagreed. They said they correctly calculated payments on the basis of what days were worked in each Monday to Sunday period. They said this was consistent with a clause in the CA which referred to "a calendar week" as including all the hours worked between 12am Monday and 12pm Sunday.

[8] The reason this difference of interpretation was important was because the CA provided an overtime allowance of pay at time-and-a-half of the ordinary rate for hours worked after the first 45 hours. This overtime rate was paid for all hours worked on the days from Monday to Saturday. All hours worked on a Sunday were paid at double-time, whether or not the 45 hours total of ordinary time worked had been reached.

[9] On the union's analysis the workers qualified for overtime pay during the fourth shift of every set of seven shifts that they worked in a row because, during that fourth

shift they passed the threshold level of having worked 45 hours of ordinary time. However, on the companies' analysis the tally of ordinary hours ended each Sunday. Its tally of ordinary time began from zero each Monday.

[10] A more detailed description of the difference in calculations was not necessary for the purposes of this determination. The effect, put in a simplified way, was this. On the union view, workers qualified for the overtime rate during the fourth shift and for all of the fifth, sixth and seventh shift. On the companies' view, because of how the shifts worked fell over the days of the week during the 21 days of the roster, the qualifying threshold of 45 hours ordinary time worked was crossed for only three hours in each of the first and second weeks and 27 hours in the third week. The union's argument, again put in a much-simplified way, was that the workers were entitled to be paid overtime rates for more than twice the number of hours that the companies said they were.

[11] Discussions between the union and the companies did not resolve their different views on the correct interpretation and application of the provisions in the CA about weeks and rosters. AWUNZ lodged an application for the Authority to determine its dispute with the companies. Mediation did not resolve the issue and the Authority proceeded with an investigation.

The Authority's investigation

[12] The following witnesses provided written witness statements and attended the investigation meeting where, under affirmation, they answered questions from me and the parties' representatives:

- Dave Clements, a tunnel boring machine fitter;
- Maurice Davis, the AWUNZ secretary who negotiated the CA on the union's behalf;
- Kirsten Mayne, the Link Alliance people and capability manager who co-ordinated negotiation of the CA for the project; and
- Philippe Begou, who was seconded from SBINZ's international French-based parent company to work, until October 2022, as the civil director of the Link Alliance project and was involved in the negotiation of the CA.

[13] Mr Begou attended the investigation meeting by audio-visual link from France.

[14] The representatives provided written and oral closing submissions on the issues for resolution.

[15] 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. It has not recorded all evidence and submissions received. This determination has been issued outside the usual statutory period as the Chief of Authority decided exceptional circumstances existed for the delay.[1]

The issues

[16] The issues requiring investigation and determination were:

(i) Do clauses 6.2(i), (iii) and (iv), clause 6.3.1, clause 6.3.6 and Schedules 3 and 4 of the CA require payments to workers to be made on the basis of a calendar week or on the run of seven shifts in a row specified in their rosters?

(ii) In the light of whatever finding may be made regarding the application, operation and interpretation of those clauses, are any orders required?

The clauses and schedules

[17] The following terms from the parties' CA were relevant (emphasis added):

> **6 Remuneration and hours of work**
> …
> 6.2 The minimum rates payable to employees are listed in Schedule 2.
>
> (i) Employees, other than by their default, will receive forty (40) hours pay per week. **Your days, start and finish times are set out in the rosters attached to this agreement**. Paid leave, which is authorised by the employer, shall count toward the 40 hours per week.
>
> (ii) …
>
> (iii) All hours per week worked between Monday and Saturday shall be paid for at the Employee's ordinary rate (plus any applicable allowances). Daily hours/roster will be notified to the Employee on commencement and may be varied from time to time after consultation between the Employee and the Employer. Additional hours may be offered.
>
> (iv) A **calendar week** includes all hours worked between 12am Monday – 12pm Sunday.

[1] Employment Relations Act 2000, s 174C(4).

6.3 Shift requirements

6.3.1 The Project requires shift work to be performed to meet construction and tunnelling requirements, employees may be required to work on any **shift pattern** set out in the Schedules attached to this agreement. Changes of **pattern**, or start and finish times, will be subject to twenty-four hours notice, or a lesser period by agreement. However, it is recognised employees will want certainty to plan their work and non-work time and changes will be kept to a minimum where practicable.

6.3.2 No employee other than in exceptional circumstances will be required to work in excess of one hundred and eighty (180) hours over any consecutive three-week period.

6.3.3 Employee work groups and their management group are entitled to agree additional roster patterns, where this is agreed the pattern will be reduced to writing, signed off by the union, and attached in schedule 4 of this agreement.

…

6.3.6 Where a Sunday is worked on a roster E or F listed in schedule 4, or by direction of the employer, the rate of pay will be paid at double time, however no additional penal rates will be applied.

…

6.3.8 Wages will be paid fortnightly by direct crediting to a bank account nominated by the employee.

…

6.4.3 Tunnelling Attendance Allowance

6.4.4 Where the Employee is required to work in vaulted excavation tunnelling, an additional attendance allowance of $45 per shift will be paid for attending all shifts that the Employee is rostered on for that calendar week. The calendar week is all shifts rostered between 12am Monday and 12pm Sunday. …

Schedule 3

Allowances … for union members

Applies to	Allowances	Definition	Amount
All	Day shift < 45 hours	All hours up to and including 45 hours	Ordinary time
All	Overtime > 46 hours	All hours worked in excess of 45 hours	Ordinary Time + 50%
All	Sunday Shift		Double time
…			
Tunnels	Attendance Allowances	Paid if worker attends all the consecutive shifts in the pattern	$45.00 per shift

Schedule 4

…

Roster E		**Week**	Mon	Tues	Weds	Thurs	Fri	Sat	Sun
56-hour average over 3 weeks	6am-6.30pm	***1***	12	0	0	0	12	12	12
7 nights on, 3 Days off, 7 Days on, 4 Days off	6am- 6.30pm	***2***	12	12	12	12	0	0	0
	6pm-6.30am	***3***	0	12	12	12	12	12	12

Principles for interpretation of collective agreements

[18] Interpretation of collective agreements is guided by the legal principles applied to the interpretation of contracts generally.[2]

[19] As explained by the Supreme Court:[3]

> [60] ... the proper approach is an objective one, the aim being to ascertain "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 provides by the contract as a whole and any relevant background informs meaning. …
>
> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. …

The context

[20] In the present case, as the companies submitted, neither they nor AWUNZ had sought to rely on extrinsic evidence about the negotiations of the CA or subsequent conduct to any great degree.

[21] Some history of how the CA came to be negotiated was useful context supporting a conclusion that, ultimately, that the meaning of the agreed words had to be drawn from their ordinary and natural meaning.

[22] The union and the companies negotiated the CA before any workers were employed for the project. The AWUNZ and company representatives used a collective

---

[2] *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd* [2017] NZSC 111 at [74]–[78].
[3] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147 at [60] and [63] (footnotes omitted).

agreement negotiated with Downer New Zealand for use on civil construction sites as a starting point for drafting their agreement for the CRL project.

[23] That agreement did not however have clauses applicable to the tunnelling work involved in the CRL project. To address that difference the companies proposed adding a 7:4:7:3 shift roster. It was a roster pattern used for TBM work on some similar Australian infrastructure projects. A 7:4:7:3 roster provided the operational benefit of being able to have the tunnelling machine in continuous operation. The companies hoped using a shift pattern already familiar in Australia would also help them recruit experienced workers from there for the CRL tunnelling work in Auckland.

[24] The 7:4:7:3 roster, called Roster E and intended for the continuous TBM work, was one of seven different roster patterns agreed for use on the project. They were set out in a schedule to the CA. The other six were for use in other parts of the project. They had features which were more familiar in civil construction. For instance, some had day shifts only, no weekend work or had consecutive work days of no more than five or six in a week.

[25] Ms Mayne said the companies, during negotiations, had calculated labour costs for each roster pattern on the basis that workers would be paid for the hours they worked in each calendar week. She said those calculations were made for the information of the representatives of the companies in those negotiations. It was not information shared with AWUNZ during the bargaining of the CA.

[26] For his part Mr Davis said he "did not pick up" during those negotiations that calculation of overtime pay for tunnellers on the 7:4:7:3 roster would "reset to zero on Monday" when their rostered shift of seven days or nights in row crossed over the end of a calendar week. He said that going back to ordinary hours for the first 45 hours of work from each Monday meant the workers got paid fewer hours at "premium rates". He said that was an "unintended consequence" that he had not contemplated.

[27] Mr Davis' observation was not, however, a reason to read the language used in the CA differently from its ordinary and natural meaning. The Authority cannot reach or impose a better or different bargain than the one that application of the words agreed by the parties, considered in context, showed they had reached at the time of making their agreement.

[28] It was clear from the evidence of Mr Davis and Ms Mayne about the bargaining context that, as AWUNZ submitted, the CA was "cobbled together" clauses from a number of different precedents. This was relevant to instances where the wording in some parts was said to be inconsistent with others.

Interpreting the clauses

[29] AWUNZ submitted the method used by the companies to calculate how many hours were paid at overtime rates, using the Monday to Sunday week, was really an administrative decision rather than what was required by the terms of the CA. It submitted those terms, properly interpreted, meant the week for the purpose of calculating pay, including overtime rates, was determined by the span of shifts set in the roster. It submitted there was nothing in the CA that allowed the companies to use the calendar week to break up or interrupt the rostered shifts to calculate pay.

[30] There were three key strands to the union's more detailed analysis of the agreed terms, as expressed in the clauses and schedules of the CA. Each are addressed below.

[31] Firstly, AWUNZ pointed to the reference in subclause 6.2(i) to the workers' "days, start and finish times" being set out in the rosters attached to the CA. It submitted this indicated the days of those rosters were to be used for calculating pay. The calendar week was not mentioned in sub-clause 6.2(i) and AWUNZ submitted the definition of it given in subclause 6.2(iv) was not relevant to how 6.2(i) should be interpreted.

[32] However, as the companies submitted, the other sentences in that subclause – before and after the phrase focussed on by AWUNZ – refer to the workers receiving a minimum of "40 hours pay per week". The use of the phrase "per week" raised the question of what was meant by a week. The answer to that question is found in the definition of a week given within the same clause at subclause (iv).

[33] This view is strengthened by reference to the language in subclause (iii). Its explanation that "all hours per week worked before Monday and Saturday" were to be paid at ordinary time (plus any applicable allowances) is predicated on the concept of the week starting on a Monday and running through to Sunday. The Sunday is not mentioned in that subclause because it was subject to a separate term, at clause 6.3.6 for any work on that day to be paid at double rates.

[34] Secondly, AWUNZ submitted its interpretation was supported by reference to the wording about the tunnelling attendance allowance in clause 6.4.4. The clause expressly refers to use of "the calendar week" in assessing whether a worker has met the criteria to get that allowance – that is to have attended each shift they were rostered on for in that Monday to Sunday week. On AWUNZ's argument the absence of an express reference to "the calendar week" in other clauses about the tunnellers' remuneration indicated the calendar week definition was not intended to apply to other clauses, including the provision for overtime allowances.

[35] This argument had to be considered with the third strand of AWUNZ's analysis that referred to the apparently contradictory "definition" given in Schedule 3 of the criteria for a tunneller to receive the attendance allowance. It said the allowance was to be paid "if [the] worker attends all the consecutive shifts in the pattern". AWUNZ pointed to this as an indicator that pay was to be calculated on work done through the full span of seven consecutive shifts and not broken by the calendar week in which those shifts fell.

[36] However, the interpretation of both clause 6.4.4 (referring to "the calendar week") and the tunnel attendance allowance definition in Schedule 3 (referring to "consecutive shifts in the pattern") had to be considered in the context of what witnesses for both parties had described as some "cobbling together" of terms as the CA was drafted and agreed in bargaining.

[37] There appeared to be a contradiction in the criteria set the clause 6.4.4 and the definition in Schedule 3. The clause said a tunneller would get the allowance for attending all the shifts that fell in a particular calendar week. In weeks 1 and 2 of Roster E that would be only four days in a row, not all seven in the set of shifts being worked.

[38] The schedule definition, on the other hand, appeared to say all seven shifts had to be attended, even where they fell across two calendar weeks, before the worker qualified for the attendance payment for that run of shifts.

[39] This was an instance of what both parties described as some "untidy" parts of the CA. It was not, however, an inconsistency that resolved, one way or the other, whether the calendar week was objectively intended to apply to every other aspect of the calculation of the tunnellers pay, including the overtime allowance.

[40] More persuasive was the companies' argument about how Roster E was set out in Schedule 4. The table for that roster, like the other six rosters, was set out over three weeks, labelled 1, 2 and 3. The days of each week were set out, starting at Monday and running through to Sunday.

[41] Within Roster E, the days shifts started on the Friday in week 1 and the nights shifts start on the Tuesday in week 3. Objectively, the roster did not need to be set out like that if it was intended to run and to be paid without regard to those calendar weeks. The fact it was set out in that way was an indicator that the ordinary and natural meaning of the terms agreed contemplated those weeks being applied to the calculation of pay for the hours worked during them.

[42] There was a coherent argument, constructed sometime later, that a better bargain could have been struck providing for hours to be paid in the way AWUNZ submitted they should be. However, objectively assessed, it was not the deal the union and the companies had struck at the time of agreeing the CA.

[43] Standing back and assessing the evidence overall, it was clear that a reasonable person, having all the background knowledge reasonably available to the parties at the time of agreeing the CA, would conclude that the pay for the TBM workers on Roster E was intended to be calculated by application of the calendar week.

Outcome

[44] For the reasons given, the companies correctly interpreted and applied the terms of the CA by paying workers on the basis of the rostered hours they worked in a calendar week, that is from Monday to Sunday.

Costs

[45] From 2 May 2022 the Authority has exercised its discretion to award costs on the presumption that parties will bear their own costs in disputes about the application, interpretation or operation of a collective agreement.[4]

[4] Practice Note 2: Costs in the Employment Relations Authority (29 April 2022).

[46] The companies submitted that presumption should apply in this case. As they were the successful parties who might otherwise have wished to pursue the issue of costs, it was appropriate to accept that submission. Costs lie where they fall.

Robin Arthur
Member of the Employment Relations Authority