

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 356
3209859

BETWEEN	DANIEL GOODWIN First Applicant
AND	ASSOCIATION OF PROFESSIONALS AND EXECUTIVE EMPLOYEES INCORPORATED (APEX) Second Applicant
AND	TE WHATU ORA/HEALTH NEW ZEALAND Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	David Munro, advocate for the Applicants Susan Hornsby-Geluk, counsel for the Respondent
Investigation Meeting:	27 June 2023
Determination:	5 July 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A dispute about the interpretation or operation of a provision of an employment agreement has arisen between an employee, his union, and the employer. Resolution of the problem is sought with a determination of the Authority declaring the correct interpretation or operation of the provision.

[2] The first applicant Daniel Goodwin is employed by the respondent Te Whatu Ora/New Zealand Health as a Medical Physicist. His work is covered by a collective agreement (the CEC) negotiated between the second applicant union, APEX, and Te Whatu Ora. Mr Goodwin is a member of APEX.

[3] At an investigation meeting the Authority received evidence or information from Mr Goodwin and Lydia Baines who is a payroll specialist of Te Whatu Ora. Submissions were received from advocate David Munro for the applicants, and from counsel Susan Hornsby-Geluk for the respondent.

[4] This determination is given in accordance with s 174E of the Employment Relations Act 2000 (the ER Act) and does not therefore record all the evidence or information received, or submissions received.

Overtime clause of the CEC

[5] The disputed CEC provision is a sub-clause of a provision found under the heading Overtime and Penal Time, as follows;

8.0 OVERTIME AND PENAL TIME

8.1 OVERTIME

8.1.1 Overtime is time worked in excess of eight hours or the rostered shift, whichever is greater per day or over 40 hours per week.

8.1.2 Overtime will be paid at time and one half (T1.5) of the ordinary rate for the first three hours worked, thereafter double time (T2).

8.1.3 Overtime worked between 10 pm and 6 am Monday to Friday will be paid at double time (T2).

8.1.4 From 18 July 2022, overtime worked between midnight Friday and midnight Sunday will be paid at double time (T2).

[6] The meaning of subclause 8.1.1 in particular, as underlined above, is disputed.

[7] The following are the contentions of the parties as to what is intended by that provision.

APEX

[8] The union contends that subclause 8.1.1 is intended to be applied on ‘a weekly basis’ only. APEX claims that overtime has been paid correctly this way on at least one occasion, when Mr Goodwin, who had worked in excess of 40 hours in a week, received pay calculated at T1.5 for the following three hours worked in excess of 40 hours, and T2 for all hours worked thereafter.

[9] Apart from that occasion, it is contended Mr Goodwin has always been paid incorrectly by Te Whatu Ora and consequently has received less than his entitlement for overtime.

Te Whatu Ora

[10] Under the CEC a week is seven consecutive days commencing on a Monday. The employer contends that subclause 8.1.1 is intended to be applied progressively as an employee works over the course of time in a week. The way the subclause is to be applied may alter, depending on whether 40 or more hours are worked over the entire week. Up to the 40 hour mark, the accounting for time worked and overtime is daily, and over 40 hours it becomes weekly.

[11] The employer submits that a conventional approach to the interpretation or operation of the subclause is appropriate, so that where possible the words of it should be given their ordinary and natural meaning, unless that results in absurdity or ambiguity or there is any other reason why a different approach should be taken.

[12] On that basis it is submitted the plain meaning of subclause 8.1.1 is that hours worked are to be viewed with two scenarios;

i) each day before 40 hours have been worked in a week, and

ii) beyond 40 hours worked in the week.

[13] In the first scenario, overtime is paid at T1.5 for the first three hours in excess of either eight worked or rostered shift hours worked, and at T2 for each hour worked thereafter.

[14] This is likely to be repeated for a second and third day worked until the earliest point where 40 hours have been worked, whether that occurs on the fourth or fifth day. At that point the second scenario unfolds; the employee becomes entitled to payment of T1.5 for the first three hours worked in excess of 40 hours, and T2 for each hour worked thereafter.

[15] Te Whatu Ora puts emphasis on the reference to ‘per day’ in the subclause, and on the use of ‘or’ to signify that alternatives were intended to be addressed by the provision.

[16] Also, Te Whatu Ora submits that the words ‘or over 40 hours per week’ should be viewed as a necessary part of the provisions, which were intended to give meaning to the subclause and should therefore be given full effect to. By convention, those words should not be read as mere surplusage that could be excised without affecting the meaning of the provision.

[17] That submission is made because in APEX’s view, the words are unnecessary if employees are intended to receive T2 for any overtime hours worked in excess of three hours at any time in any week.

First impressions

[18] Assuming the draftsman of his subclause of an employment agreement wanted to use the language that would best convey to readers the meaning intended by Te Whatu Ora and APEX, first impressions may sometimes give a sense of whether anything went wrong in the drafting. To the Authority, the structure of the subclause, and its grammar and punctuation, give no immediate indication of a problem with meaning. There is no appearance of ambiguity or omission of words or punctuation, which could lead to an unintended meaning.

[19] Checking these impressions against other related provisions which expand on or clarify the operation of subclause 8.1.1, the Authority takes into consideration in particular the definition of ‘overtime’ given in clause 2, and the definition of ‘ordinary hours’ in clause 4.1.

[20] **“Overtime”** is defined as ‘... time worked in excess of the ordinary hours of work as set out in clause 4.1’

[21] Clause 4.1 defines ordinary hours of work as follows;

Ordinary hours per week shall be 40 and not more than 8 per day with two consecutive days off per week. By mutual agreement rostered duties can be up to 10 hours per day but in that case shall be limited to not more than four consecutive days

[22] Applying the clause 4.1 definition, the 40 ordinary hours could be worked over 5 days at no more than 8 hours per day, or they could be worked on rostered duties for 4 days at up to 10 hours per day. There are also other possibilities. The 40 ordinary hours mark may therefore be achieved at different points during the week.

[23] This appears to explain why it is necessary in subclause 8.1.1 to provide an alternative scenario for 'over 40 hours per week'. If that is achieved from working up to 10 hour rostered shifts per day (for 4 consecutive days), overtime will begin at T1.5 and progress to T2 sooner than would be the case if ordinary hours are not more than 8 per day. The extra burden of a rostered shift (where greater than 8 hours) is intended to be compensated.

[24] The Authority finds no incongruence apparent when subclause 8.1.1 is read together with the definitions of ordinary hours of work and overtime.

Payslip for week commencing 24 January 2022

[25] APEX put this forward as evidencing a concession or affirmation by Te Whatu Ora that Mr Goodwin's pay, which included overtime worked by him, had been correctly calculated for this week in accordance with the union's interpretation of the subclause 8.1.1.

[26] To the Authority, it is apparent that the calculation has not been correctly made, because it shows as ordinary hours (against 'T') the number 13 for each of three consecutive days (24, 25 and 26 January). This does not match the definition of ordinary hours at clause 4.1, which are limited to 8 hours per day.

[27] Because a higher value has been used for ordinary hours (13 instead of 8), the mistake flows through into the calculation of pay for overtime at T1.5 and T2.

[28] By contrast the payslip for the previous period in the pay fortnight, the week commencing 17 January 2022, is based on the same hours worked by Mr Goodwin that week, but the calculation of overtime has been made in the way Te Whatu Ora contends is correct. The hours are broken down into T, T1.5 and T2, at the values specified by clause 4.1. Earnings are correspondingly less for the week commencing 17 January, although it has the same hours and pattern of hours as 24 January, the week following.

[29] From the face of the payslip, it is obvious an error has been made with it. The payslip cannot be relied upon to show that the employer understood the calculation of overtime as shown was correct for that week but had determined not apply the same calculation in other weeks.

[30] The Authority accepts it is unlikely the 24 January calculation was repeated at any other time, either for Mr Goodwin or any other Medical Physicist. The 24 January payslip is simply a product of unintended mistake and it does not help to resolve this dispute.

Previous absence of any dispute

[31] The Authority also accepts that although subclause 8.1.1 has been in existence with its current wording since the CEC of 1 April 2004 was negotiated, before now there has not been any other dispute or complaint about its interpretation or application. This circumstance cannot be determinative of a dispute one way or another, but in principle it may give some indication of the likelihood that the subclause was drafted as intended and has regularly been interpreted correctly since 2004.

[32] Subsequent conduct has been held to be admissible in interpreting a contract¹, although it must be kept in mind by the Authority that a contract, including an employment agreement, is to be interpreted as at the time it was made².

[33] Although such a thing is possible, it is unlikely an established union representing well educated science and maths specialists such as Medical Physicists, would not have raised a dispute in 20 years if there had been a problem with subclause 8.1.1 and the way the employer had been calculating overtime during that long time.

¹ *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277

² *Bathurst Resources Ltd and another v L&M Coal Holdings Ltd* [2021] NZSC 85, at [89]

Conclusion

[34] The Authority considers correct the meaning of subclause 8.1.1 contended for by Te Whatu Ora.

[35] The subclause addresses a developing or progressing situation as each day is worked over the course of a week (as defined). It does not retrospectively change the way overtime has earlier been recorded or accounted for, when the point is reached where 40 hours work has been done. That point triggers a forward change to an alternative methodology for counting overtime. It is one which provides more remuneration to a Medical Physicist under the CEC. It could be viewed as providing a disincentive to having employees work too much overtime, especially if the overtime follows on after a rostered shift has been worked.

[36] Until the 40 hour trigger point is reached, overtime is counted daily. It remains counted that way for that period but after 40 hours there is a change and counting continues on a weekly basis.

Costs

[37] As this employment relationship problem is a dispute, the Authority will be inclined to let costs lie where they fall, as it usually does in such cases, should an application for costs be made.

Alastair Dumbleton
Member of the Employment Relations Authority