IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2026] NZERA 227
3378783

	BETWEEN	WORKERS FIRST UNION INCORPORATED Applicant
	AND	THE PRIORY IN NEW ZEALAND OF THE MOST VENERABLE ORDER OF THE HOSPITAL OF ST JOHN OF JERUSALEM Respondent

Member of Authority:	Sarah Blick
Representatives:	Peter Cranney and Sabrina Sachs, counsel for the applicant Chloe Luscombe, counsel for the respondent
Investigation Meeting:	16 October 2025
Submissions received:	24 November 2025 and 16 January 2026 from the applicant 12 December 2025 from the respondent
Determination:	16 April 2026

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Workers First Union Incorporated (the union) is a party to a multi-union collective agreement (the MUCA) with the Priory In New Zealand of the Most Venerable Order of the Hospital of St John of Jerusalem (St John).[1] The MUCA covers the work of operational employees, including ambulance officers. The union has asked the Authority to resolve a dispute about provisions in the MUCA relating to payment of overtime (time worked by employees after normal rostered duty hours) and

[1] The term of the MUCA was 1 December 2023 to 30 June 2025.

"recalls" (additional shifts or duties worked by employees on rostered days off in excess of their rostered hours).[2]

[2] The union says in around 2024 it came to its attention that St John was not paying overtime rates to employees covered by the MUCA when full time employees worked in excess of the agreed rostered hours for a recall shift. It submits full time employees who work in excess of their agreed rostered hours for a recall shift are working overtime for the purposes of clause 5.1 of the MUCA, which outlines overtime entitlements.

[3] Clause 5.1 provides excess hours "will be paid at the equivalent hourly rate of pay for that particular shift (taking into account any allowances, penalties, penal rates or other adjustments) plus 50% for such overtime". Under clause 5.3 of the MUCA, recall shifts are paid at time and a half. Taking into account this adjustment, the union says hours worked in excess of the agreed hours for a recall shift must be paid at double time and a quarter (time and a half for the recall shift x time and a half for overtime). The union seeks a determination that full time employees who work in excess of the agreed rostered hours for a recall shift should be paid double time and a quarter (T2.25) for such work.

[4] St John says it has always and does pay employees correctly for work done as recall shifts. St John says it does not 'stack' the recall rate with the overtime rate, as recall is already overtime and being paid at the overtime rate. It says recall is a subset of overtime, and clause 5.3 of the MUCA confirms the same entitlement set out in clause 5.1. As both clauses address the same entitlement, St John submits there is no basis to pay the rate twice or to stack the entitlements. St John's position is that its interpretation accords with the plain wording of the MUCA and the union's interpretation is inconsistent with the wording of the clause and the MUCA as a whole.

[5] St John further says it has never stacked recall and overtime throughout the long history of the provision between the parties, and prior to 2024 no concern was raised by the union or any employee regarding payment for early starts or late finishes on recall shifts.

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[2] While a new MUCA has been agreed between the parties, the dispute remains a live one.

The Authority's process

[6] At a case management conference setting this matter down for an investigation meeting, I asked the union's counsel to confirm if s 129(2) of the Employment Relations Act 2000 (the Act) had been complied with, namely that the other union party to the MUCA, the Amalgamated Workers Union New Zealand Inc (AWUNZ) had notice of the existence of the dispute. Counsel confirmed notice had indeed been given. The Authority has received no communication from AWUNZ that it wished to be heard in relation to this application.

[7] Witness statements were lodged for former St John employee, now union organiser, Faye McCann. Witness statements were received for St John Payroll Manager Sue Farquhar, Senior Advisor – Employment Relations Megan Burns and Senior Business Partner holding the Ambulance Services portfolio Kathryn Caulfield. Each answered questions under oath or affirmation from the Authority and representatives at the investigation meeting.

[8] Prior to the investigation meeting, the union lodged an email from former Secretary Transport, Logistics & Manufacturing Division for the union, Jared Abbott responding to certain evidence outlined in Ms Caulfield's witness statement. St John objected to the email being admitted as evidence, unless Mr Abbott was made available for cross-examination given contentious statements in the email. The Authority advised that if the union wished to rely on the contents of the email, Mr Abbott would need to be made available at the investigation meeting for questioning. He attended the investigation meeting by audio visual link and also gave evidence under affirmation.

[9] As permitted by s 174E of the Act this determination does not record all the evidence and submissions I received and considered during my investigation, but it states findings of fact and law and expresses conclusions on issues necessary to dispose of the matter.

Issues

[10] The following are the agreed issues for investigation and determination:

(a) Under the relevant terms of the MUCA, correctly interpreted and applied:

(i) Are full time employees who work in excess of agreed rostered hours for a recall shift working overtime for the purposes of clause 5.1.1 of the MUCA?

(ii) What should a full-time employee who works in excess of agreed rostered hours on a recall shift be paid for those excess hours?

Background

Relevant terms of the MUCA

[11] Section 5 of the MUCA is entitled 'Allowances & Expense Reimbursement' and clause 5.1 is titled 'Overtime'. It relevantly states:[3]

> 5.1.1 Full Time Employees
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> The following provisions relate to all time worked after the normal rostered duty hours…
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> Where an employee is required to work overtime, Hato Hone St John will endeavour to give them as much notice as possible. Where the employee works in excess of the daily/weekly hours specified on their shift roster, they will be paid at the **equivalent hourly rate of pay for that particular shift (taking into account any allowances, penalties, penal rates or other adjustments) plus 50% for such overtime**.
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> This includes up to 30 minutes prior to the commencement of a shift and all time after the conclusion of a shift until back on station. A maximum of 15 minutes shall be allowed for handover and clean up after returning to station. Overtime will be paid in 15 minute blocks rounded up to the nearest 15 minutes.
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> **For clarity, a Recall shift that attracts a higher premium would only attract a penal rate when required to extend the shift due to an early start or a late finish.**

[12] Clause 5.3 is entitled 'Recalls' and relevantly states:[4]

> The following provisions relate to all employees who work additional shifts or duties on their rostered days off in excess of their rostered hours.
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> **Penal rates for weekend and night work will not be paid when undertaking a Recall shift that attracts a higher premium.**
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> 5.3.1 General Recalls
> a. Full Time Employees
> Where an employee is offered and accepts a request by Hato Hone St John to undertake additional shifts or duties on their rostered days off the employee

[3] Emphasis added.
[4] Emphasis added.

> will be **paid their usual hourly rate, calculated in accordance with clauses 4.2, 4.3 and 4.4, plus 50% for such overtime i.e. T1.5**.

[13] Recalls for work on a public holiday are addressed at clause 5.3.6, which states where an employee accepts a recall on a public holiday "shall be entitled to T2.25 for the duration of the shift that falls on the public holiday."

[14] A comparison between an earlier collective agreement between the parties from 2018-2020 and a collective agreement from 2020-2022 shows terms emphasised above regarding penal rates was added in the latter agreement. The 2020-2022 collective agreement (unchanged in the MUCA) introduced a new penal rate clause at clause 5.6 relevantly states:

> **5.6 Penal Rate for work during unsocial hours**
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> 5.6.1 Where an employee is required to work during the night or weekend, excluding Recall shifts that attract a higher premium, the employee will be paid at the employee's standard hourly rate, plus 25% (T1.25).
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> - Night: Between 8pm and 6am.
> - Weekend: From 8pm Friday evening through to 6am Monday morning.
>
> For the avoidance of doubt, penal rates do not apply to Recall shifts that attract a higher premium.

History of collective agreements

[15] Ms Burns, for St John, gave evidence about the history of collective agreements between the parties, including of her own involvement in bargaining since 2016.

[16] The history between the union and St John is lengthy, and in both cases has involved the merging together of smaller entities into one, resulting in multiple name changes for both parties, as well as the other unions who have been involved. Ms Burns' evidence was that clauses 5.1 and 5.3 (without the 2020 amendments) were included in the first national collective agreement in 2011. She traced the provision's origins to its initial inclusion in a 2008-2009 North Island Collective Agreement (the 2008 agreement).

[17] Ms Burns' evidence was also that during bargaining in 2008 for the 2008 agreement, the union had sought to include a provision which provided for the position being advanced by it now:

> Overtime on Recalls & Public Holidays

> Where an employee is requested to work overtime on a recall or public holiday the usual hourly rate is deemed to be T1.5 of the rate defined in clauses 3.1.1, 3.1.2 and 3.1.3. Any overtime worked on a recall or public holiday shall be paid their usual hourly rate for the shift (as defined above), plus 50% i.e. T2.25.

[18] Ms Burns' evidence was that St John rejected that claim and proposed a clause dealing only with public holidays, and as a consequence it was not included in the 2008 agreement. Accordingly, she says it is clear there was no mutual intention or agreement at the time to enter into an agreement that provided for overtime and recall rates to 'stack' – if there was, this clause would not have been rejected and would have appeared in the 2008 agreement.

[19] Ms Caulfield spent 14 years working in Ambulance Communications (from 1999 as a call handler, to despatcher, to Team Manager and with stints as its Centre Manager). She gave evidence of being involved in the 2008-2009 bargaining round on St John's bargaining team. She also says St John did not agree to 'stacking' overtime and recall in that bargaining round – she would have remembered if that had been, as it would have had implications for her team, signing off timesheets, and for herself as a union member.

[20] Ms Farquar has been in payroll with St John since 2008, now being its Payroll Manager. She refers to having had a strong working relationship with the delegate for the union's predecessor, who she says had a deep understanding of the parties and how the collective agreements were operationalised. That delegate was the signatory for the union on the 2008 agreement. Ms Farquar is sure that if she had misunderstood the recall provision, the delegate would have drawn that to her attention.

[21] Ms Farquar refers to St John running a payroll pilot for a new payroll system in 2009, involving a group of around 50 employees in Hawkes Bay, with the aim being to move from a paper-based system to electronic system. Over the course of the pilot, employees were asked to use both a new electronic timesheet system, and paper time sheets simultaneously, and to review and check all of their payslips to ensure that the new electronic system was paying them the way they expected. She reports issues were raised and the system adjusted where needed, with no one raised any issues around the payment rate for late starts and early finishes on recall shifts.

[22] Ms Farquar notes the time of the payroll pilot was very close to the introduction of the first version of clause 5.3 - if that clause was intended to change the rate for

working a late finish or early start on a recall to T2.25, she would have been told about it at the time. She says she was never informed of this, because no such rate was intended.

[23] Prior to working at the Union, Ms McCann was employed by St John in its communication centre for around 7 years. She says when she was a St John employee, it was her understanding that overtime worked on a recall shift would be paid at T2.25, with other employees having commented regularly to that effect.

[24] Ms McCann says at the time of her employment she did not know St John was not paying T2.25 for overtime worked on a recall shift. She describes the payslips sent out by St John as very confusing, so it was hard to tell how her wages were calculated. It was also hard to tell because if she only worked a small amount of overtime, the difference between T1.5 and T2.25 was not much in the context of her overall weekly pay, so it was not obvious she was being underpaid. Ms Farquar disputed that the payslips were confusing and provided sample payslips addressing Ms McCann's evidence. She says she found one example of Ms McCann working a recall on public holiday for which she was paid T2.25, in accordance clause 5.3.6. Ms Farquar stated she could find no examples of Ms McCann working an early start or late finish on a recall over the course of her employment with St John, as to do so was quite uncommon for a call handler. Ms McCann stated late finishes were not uncommon, and indicated she may not have understood what her timesheets should record to reflect a late finish.

[25] An extract of a report provided by Ms Farquar showing pay rates for late starts and early finishes for the month of July for every second year in the last 10 years indicated employees were always being paid at a rate of T1.5 when they worked a late finish or early start.

2020 bargaining and MUCA amendments addressing penal rates

[26] It is common ground that the 2020 bargaining was difficult, with a number of disputes between the parties. However, St John says the union did not question what an employee who has an early start or late finish on a recall was paid, and no claim in respect of that was raised in the 2020 bargaining.

[27] Ms Burns' evidence was that the new wording in 5.1.1 and 5.3 regarding penal rates was connected to the addition of the new clause at 5.6. The union had been wanting the Unsocial Hours Penal Rate to 'stack' when employees worked recalls that

were within the applicable hours. Ms Burns says St John was against this. St John was opposed to allowing the unsocial hours penal rate to be applied to a recall shift, having received professional advice. Ultimately, it says agreement was reached on this issue. However, it was acknowledged that such a limitation should not apply where a part time employee worked a recall shift which did not attract the T1.5 rate, and therefore was only applicable to recall shifts with a 'higher premium'.

[28] Ms Burns says the term 'penal rate' is referencing the new Unsocial Hours Penal Rate, and the reference to attracting a 'higher premium' is to distinguish between recall shifts paid at T1 (for example for part timers), and recall shifts paid at T1.5 which are receiving a 'higher premium'. She further says none of these wording changes were intended to alter any other element of how payments were made for either recall shifts or early starts/late finishes. It was only added to ensure that the Unsocial Hours Penal Rates were not 'stacked' with the T1.5 paid for a recall shift.

[29] During the last year of her employment with St John, Ms McCann was a union delegate and part of the union's bargaining team for the 2020-2022 MUCA. She says during the bargaining for the 2020-2022 MUCA, the union agreed that penal rates would not be applied to recall shifts, except where the shift was required to be extended due to an early start or late finish. She says the union never agreed that overtime rates would not be applied to a recall shift. Her evidence was that the interaction of the recall rate and the overtime rate was never raised or discussed in the 2020 bargaining.

[30] Mr Abbott said there was a number of disputes in the 2020 bargaining, and this partly revolved around unsocial hours penal rates. He says they did not spend a lot of time discussing or arguing about whether the unsocial hours penal rate should stack with the recall rate because the union's focus was on getting the unsocial hours penal rate into the document in the first place.

[31] Mr Abbott said it was already a huge fight to get the unsocial hours penal rate included in the document, so once St John agreed to the inclusion, the union was prepared to compromise on it stacking with recall rates. He says this was an industrial decision in the context of that particular bargaining and had nothing to do with any broader understanding or interpretation of how stacking should or did operate in relation to other rates in the MUCA.

[32] Ms Caulfield's evidence was that during bargaining in a meeting in 2020, Mr Abbott agreed with her comment that "you don't pay a penal rate on a penal rate". Mr Abbott could not recall the purpose or content of the meeting in any detail.

St John notified of issue with overtime

[33] Ms McCann says in November 2023, the union was notified by members that St John was incorrectly paying members T2 for overtime worked on a public holiday instead of the correct rate of T2.25. Ms McCann told the Authority that during this dispute, the union became aware that St John was also not paying T2.25 for overtime worked on a recall shift, and the union raised this with St John. After St John responded disputing the union's interpretation, the union notified that there was a dispute and the union would apply for mediation.

[34] While the parties were waiting for a mediation date the parties continued to bargain for the 2023–2025 MUCA. The disputed clauses were not amended.

[35] The parties attended mediation which was unsuccessful in resolving the parties' dispute about the interpretation and application of the overtime and recall clauses.

Relevant law

[36] The relevant case law on the interpretation of a collective agreement was recently summarised by the Employment Court in *E Tū Inc v New Zealand Steel Limited* [2024] NZEmpC 29:[5]

> [16] The proper approach is an objective one, the aim being to ascertain the meaning the written agreement would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties at the time of the agreement. This objective meaning is taken to be that which the parties intended. The context provided by the agreement as a whole and any relevant background informs meaning. Nevertheless, while context is a necessary element of the interpretive process, and the focus is on interpreting the document as a whole, rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the whole agreement, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.
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> [17] It is, however, also relevant that collective agreements are not contracts and nor are they commercial in the way that business contracts usually are. They are not drafted, negotiated, and settled by practising lawyers, and the people covered by the collective agreement are not party to the negotiation. Collective

[5] *E Tū Inc v New Zealand Steel Limited* [2024] NZEmpC 29 (footnotes omitted).

> agreements represent the development of a particular employment relationship between an employer and a union (and its members) over a long period that is confirmed and altered from time to time in the collective agreements between them, which must and do expire and are renegotiated. In that sense, they are relational agreements and are the product of compromise and opportunism. Viewing collective agreements as relational is consistent with the theme of the Employment Relations Act 2000 (the Act), which the Supreme Court in *FMV v TZB* noted is focused on relationships, not contracts.
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> [18] This means that, as collective agreements occur in a different context from arm's length commercial contracts, arrangements that may seem counterintuitive from a business perspective, nevertheless, may exist in a collective agreement.

Discussion

The union's position

[37] The union submitted that:

(a) Clause 5.1 applies to all time worked after normal rostered duty hours (whether they are required hours or requested hours).
(b) This conclusion follows from the use of the phrase "all time" in clause 5.1.1 and also from the definition of "Overtime" in clause 1.9 – "all time worked in excess of the normal duty hours."
(c) The phrase "all time" makes clear that clause 5.1.1 applies to Recalls.
(d) When overtime is requested, the overtime is done by consent (with the definition of "Recall" in clause 1.8 being "a request for an employee to return to work for additional shifts or duties").
(e) When overtime is worked (regardless of it being required or requested and then consented to) employees are to be paid at "the equivalent hourly rate of pay for that particular shift (taking into account any allowance, penalties, penal rates or other adjustments) plus 50% for such overtime" (clause 5.1.1).
(f) The clause requires the identification of "an equivalent hourly rate of pay for that particular shift". This must take into account any allowances, any penal rates and any "other adjustments". There is then a requirement to add 50% to that figure.
(g) St John is inviting the Authority to ignore the phrase "plus 50%" which is not permissible, as they must be given full effect as described.

[38] In submissions in reply, the union responded that clause 5.6 sets out a general proposition that penal rates do not apply to recall shifts that attract a higher premium.

It submitted clause 5.1.1 is a carve out from that general proposition, which supports its interpretation. If the premium that applied to a recall shift did not apply to early starts and late finishes on that recall shift (as claimed by St John), there would be no need to specify that penal rates applied to early starts and late finishes on a recall shift.

[39] The union referred the Authority to *Vulcan Steel Ltd v Manufacturing & Construction Workers Union*, in which the Court considered the issue of admissibility of evidence of prior negotiations and subsequent conduct concerning an agreement.[6] That judgment concluded that evidence that shows only a party's subjective intentional belief as to the meaning of words, or as to an undeclared negotiating stance or position is not relevant. The union says the evidence of its claim in bargaining in 2008 and St John's rejection of that claim is irrelevant as it does no more than provide evidence of both parties' respective negotiating stances at a particular time during the bargaining. They do not aid in determining the meaning of the clause that was ultimately included in the collective agreement.

[40] The union further submitted that evidence given by St John around clause 5.1.1 and subsequent negotiations regarding the inclusion of a penal rate in 2020 is not admissible in determining the correct interpretation of clause 5.1.1. It says St John's statement that "in 2020 neither party believed that recall and overtime were stacked with one another" is an impermissible reference to subjective intention during bargaining (which in any event was not proved by the evidence). It submits that the relationship between recall and overtime rates was not discussed as part of the 2020 negotiations, and it is apparent that despite St John's claims, there was no broad philosophical agreement that any rates could not be applied on top of one another. Rather, the result of the negotiations in 2020 was a subclause inserted in clause 5.1.1 which provided recall shifts that attracted a higher premium would attract a penal rate "when required to extend the shift due to an early start or a late finish" - in other words, it was agreed a penal rate could be paid on a penal rate.

[41] The union submitted that the history of clause 5.1.1, if deemed admissible, supports its view of its plain and natural meaning. It says the result of the bargaining for the 2008 agreement was that:

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[6] *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2022] NZEmpC 78, [2022] ERNZ 304 at [28]-[31].

(a) Recalls and overtime were separated into two completely separate sub clauses under the heading "Remuneration, Allowances & Expense Reimbursement".
(b) The overtime clause was amended into its current form at clause 3.2.1, so that overtime was no longer calculated solely based on the employee's base salary but would instead be paid "at the equivalent hourly rate of pay for that particular shift (taking into account any allowances, penalties, penal rates or other adjustments) plus 50%").

[42] In reference to St John's evidence that the first time it became aware of this matter being raised was in 2024, the union says that is similarly irrelevant to the proper interpretation of the clause. The union says it is not uncommon for interpretation disputes over the meaning of certain clauses in collective agreements to arise many years after the negotiation and inclusion of the clause.[7] In this case, the union was unaware St John was not paying for overtime worked on a recall shift in accordance with clause 5.1.1. When it became aware of the issue in 2024, it promptly raised it with St John.

Provisional assessment of the clauses

[43] The starting point is to reach a provisional meaning of the words used and then to cross check that provisional view against relevant contextual matters.

[44] Clause 5.3.1 provides that where a full-time employee is offered and accepts a request to undertake additional shifts or duties on a rostered day off the employee will be paid their usual hourly rate, calculated in accordance with clauses 4.2, 4.3 and 4.4, plus 50% "for such overtime i.e. T1.5". As submitted by St John, the recall clause expressly confirms that recall work is itself overtime, and identifies the rate of T1.5 is for that overtime.

[45] Further, the overtime and recall clauses which apply in respect of part time employees, and Callouts On-Call clauses, demonstrate that like the recall clauses for full time employees, the entitlements provided are a repetition of those provided in the overtime clause, and in this regard, employees who are working a recall are being paid

[7] Authorities cited included *Fire and Emergency New Zealand v New Zealand Professional Firefighters Union* [2023] NZEmpC 90; *New Zealand Post Primary Teachers' Assoc v Board of Trustees for Rodney College* [2022] NZEmpC 118; *AsureQuality Ltd v New Zealand Public Service Association Inc* [2018] NZEmpC 70, (2018) 15 NZELR 896.

the overtime rate for doing so. Considering the above I find the union's interpretation would be inconsistent with the plain wording of the MUCA, in that it would create an inconsistency between clause 5.1.1, and other clauses.

Wider context between the parties

[46] Even if the MUCA was deemed to be uncertain or ambiguous on this point, based on an objective approach, and taking into account the relevant context, a reasonable person would conclude that employees who work an early start or late finish on a recall, are paid at the rate of T1.5, not T2.25.

[47] Putting aside the extent to which St John's evidence demonstrated its subjective belief as to the meaning of the words in the clauses and potentially undeclared negotiating stance or position on 'stacking', it is appropriate to have regard to the background circumstances of the MUCA given the long history of the provisions, adopted in successive collective agreements. Evidence of such must assist in the task of proving something relevant to the notional reasonable person. I agree that some of that context does so. In the absence of sufficient evidence from Ms McCann and Mr Abbott challenging or disputing that of St John's witnesses, I largely accept the latter's witness evidence.

[48] This showed the first appearance of effectively the same clauses in a collective agreement between the parties was in the 2008 agreement. The unchallenged evidence for St John showed that the union attempted, unsuccessfully, to add a term into the collective agreement which provided for employees to be paid T2.25 when they worked an early start or late finish on a recall shift. Accordingly, the parties cannot be said to have intended to agree to such a provision at that time.

[49] Looking back over the history of agreements between the parties and their predecessors, prior to the 2008 agreement, recall and overtime were generally dealt with in the same clause, and the same continued to apply in the South Island until the 2011 First National Collective Agreement was entered into. St John's reading of clause 5.3.1 is consistent with the approach taken historically, whereby recall was regarded as a subset of overtime and was dealt with in one clause.

[50] During the 2008-2009 bargaining period, as outlined, Ms Farquhar was involved in setting up the electronic timesheets, the pilot of the payroll system, and

interactions with the union's signatory on that collective agreement, who at no point raised this issue, or indicated there was anything wrong with how employees were being paid for working an early start or late finish on a recall shift.

[51] The overtime and recall clauses incorporated into the 2011 First National Collective Agreement remained, effectively unchanged, until the amendments made in 2020 to clarify that the Unsocial Hours Penal Rate could not stack with a Recall shift that is paid at T1.5.

[52] I accept Ms Farquhar's evidence that in Ms McCann's her role as a call handler it was uncommon to work late finishes or early starts – she was unable to find an example of Ms McCann working an early start or late finish on a recall – she could find only one example of Ms McCann's payslip when she worked a recall on a public holiday, and was paid at T2.25. Her first-hand experience of the issue of recall as an employee was necessarily limited. Further, I do not accept the claim that the payslips were confusing, at least in respect of those provided to the Authority.

[53] The evidence of St John's witnesses was that until 2024 no issues were raised in relation to St John's application of these clauses – either by the union or employees. St John's longstanding practice (from 2008-2009 at least) with respect to the calculation of overtime rates, was consistent with the agreement between the parties. I find this demonstrated a shared understanding in respect of clause 5.1.1, and that St John's actions accorded with that.

[54] St John's position is that this lack of action on the part of the union indicates that the parties' shared understanding in 2008-2009 was consistent with St John's position in respect of the disputed clauses. In all the circumstances, I agree. The factual circumstances in other cases cited by the union distinguishable from the present. St John's interpretation is consistent with the subsequent conduct of the parties and successive collective agreements, and was supportive of its conclusion that its interpretation should stand.

[55] St John submitted that in the event that the Authority considers that the clause is ambiguous, its interpretation must be favoured under the contra proferentem rule. That rule can apply to break the impasse of ambiguity, in favour of the party who did not draft the clause. St John submitted that if the Authority believes that there is an impasse caused by ambiguity, it must be resolved in St John's favour, with the union

having drafted the original clause. Having made the above findings, it is not necessary to make findings on this point.

Outcome

[56] I find the rate referenced in the recall clause (5.3.3) is a reaffirmation of the rate due under the overtime clause (5.1.1), not an additional rate. This means that full time employees who work in excess of agreed rostered hours for a recall shift should be paid in accordance with clause 5.3.3.

[57] The question is therefore answered in favour of St John. Having made these findings, no declaration or compliance order is required to be made.

Costs

[58] The Authority's practice note on costs indicates certain matters will generally not be subject to the daily tariff, including for example, disputes about the application, interpretation or operation of a collective agreement. In cases of this type, which the parties acknowledge, the presumption is that parties bear their own costs.

[59] Accordingly, this is a matter where costs should lie where they fall.

Sarah Blick
Member of the Employment Relations Authority