

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE**

[2026] NZERA 278
3302520

BETWEEN	DAVID JOYCE First Applicant
AND	ETHAN YARR Second Applicant
AND	MCKAY LIMITED Respondent

Member of Authority:	Alyn Higgins
Representatives:	Lou Yukich, advocate for the Applicant David Grindle, counsel for the Respondent
Investigation Meeting:	27 January 2026 in Rotorua
Submissions received:	30 January and 6 February 2026 from the Applicant 4 February 2026 from the Respondent
Determination:	4 May 2026

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] David Joyce and Ethan Yarr (the applicants) were employed by McKay Limited (McKay) as electrical and instrument technicians at the OJI Fibre Solutions Kinleith Pulp and Paper Mill (the Mill).

[2] The applicants are members of the Independent Electrical Workers Union 1995 Incorporated (the Union) and at the material times their employment was covered by

the McKay Limited and Independent Electrical Workers Union 1995 Inc Collective Agreement – 1 April 2023 to 31 March 2026 (the CA).

[3] OJI Fibre Solutions (NZ) Ltd (OJI) is a manufacturer of pulp, paper and wood-fibre based packaging solutions. Amongst other things, OJI operates the Kinleith Mill, a pulp and paper mill situated in Tokoroa and has a service contract for the Mill with McKay. The applicants were employed by McKay as Electrical & Instrument Technicians at the Kinleith Mill and are members of the Union. The employment of both applicants by McKay has since ended, although other employees are impacted by the issue for determination.

[4] The CA covers the work undertaken by employees of McKay who are employed at the Kinleith Mill. The matter for this determination concerns the pay and meal break entitlements where day shift employees undertake what is called around the clock cover (RTC) and cover for start ups at the Mill where OJI requires continuous 24-hour electrical and instrument services.

[5] The applicants claim that their timesheets were subsequently changed by McKay after they had completed them and without their authorisation and they were paid for one 30 minute meal break instead of two 30 minute meal breaks as they say had previously been the practice where RTC and start ups occurred.

[6] The applicants accordingly believe they are entitled to be paid for two 30 minute meal breaks based on clause 3.5.4 of the CA. The applicants claim that these payments for RTC and start up cover were routinely made for day shift workers for the 12-hour 08.00 to 20.00 shifts without deduction and are also in accordance with the commercial contract between McKay and OJI. The applicants also claim that the applicants' manager at McKay made assertions that OJI instructed McKay to cease payments for RTC and start up cover for McKay's employees. The applicants claimed an unjustified disadvantage resulting from this.

[7] McKay's position is that the timesheets were not erroneously amended and that the timesheets had errors that were rectified in the course of usual processing. McKay submitted that the matter under enquiry before the Authority is a contractual interpretation issue only and does not arise from OJI's actions.

[8] On 17 April 2025, the Authority issued a determination¹ finding that the employment relationship problem raised by the applicants is a dispute about the interpretation and application of an employment agreement,² specifically the CA between the Union and McKay.³ It is not an unjustified disadvantage grievance. This determination now determines that interpretation issue.

The issue

[9] The sole issue requiring investigation and determination concerns the interpretation and application of clause 3.5.4 of the CA, which provides:

3.5.4. Around the Clock and Start Up Cover (RTC)

Where there is a need for ongoing work outside the normal hours of work due to breakdowns, shuts or other operational requirements one regime will be used to remunerate employees and to ascertain hours of work.

Around the clock and start up cover is for breakdown repairs or for periods of start ups where the work required by the client is between 8pm to 8am or other hours specified by the client.

Payment for this cover will be based on:

- Eight hours ordinary earnings prior to the first or only shift commencing 8pm.
- T1.5 for the 8 / 12 hours worked on the afternoon shift / night shift and any hours worked on a Saturday or Sunday
- Eight hours ordinary earnings post the last or only shift commencing 8pm
- Employees providing RTC or Start Up cover may attract step up.

Work from 8am to 8.00pm will be considered normal time and overtime/penal time rate of T1.5 will apply.

[10] The same clause also includes the following:

¹ *Joyce and Anor v McKay Limited* [2025] NZERA 218

² Employment Relations Act 2000 s5

³ Employment Relations Act 2000 s103 (3)

Meals

Where an employee works a 12 hour day start up Monday to Friday, the employee will be entitled to one meal allowance.

[11] Elsewhere the CA makes a distinction between day employees and shift employees. In the present case the applicants are day employees, but the problem arises when they undertook RTC work or start up cover between the hours of 08.00 and 20.00 and what remuneration entitlements arise when they did so.

The Authority's investigation

[12] A statement of problem was lodged by the Union with the Authority in June 2024. McKay lodged its statement in reply in July 2024. The Union also applied to join OJI as a second respondent. However, as the Authority has determined that the matter is a dispute and not a personal grievance OJI is unable to be joined as a party as OJI is not a party to the CA.⁴

[13] Following the Authority's preliminary determination⁵ the matter was set down for an investigation meeting in Rotorua for the interpretation issue.

[14] For the Authority's investigation written witness statements were lodged from the first applicant, Mr David Joyce along with other day shift workers Mr Graeme Farrow and Mr Barry Williams and for the respondent from Mr Donald Grainger, Contract Manager for the service contract with OJI and Mr Ross Rowe who is Regional Manager for the Bay of Plenty and Eastern Region, which includes the Kinleith Mill.

[15] The second applicant, Mr Ethan Yarr, did not participate in the investigation. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also provided written closing submissions after the investigation meeting.

[16] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and

⁴ Employment Relations Act 2000 s 129 (1)

⁵ Above n 1

submissions received but all information provided in the course of the investigation has been considered.

Relevant background

[17] The arrangements that the operation of clause 3.5.4 relates to are coordinated between the OJI Business Unit Manager, the OJI Maintenance Manager, the OJI Operations Maintenance Coordinator, the OJI Area Engineer and the McKay Area Supervisor.

[18] The applicants say that when these arrangements occur (typically two or three times a year) they are scheduled for either 12 hour day or night shifts for periods of startups, either from 08.00 until 20.00 or from 20.00 until 08.00 in order to satisfy OJI's requirement for continuous 24-hour electrical and instrument services during Mill start-ups. This determination concerns the application of clause 3.5.4 of the CA to day shift employees who undertake RTC and start up cover work. It does not concern night shift employees.

[19] McKay secured the scheduled mill startups and cover work sometime in 2018. At the time this work was not provided for in employment agreements. A variation was accordingly sought by McKay in 2018 and this was produced in evidence. The essential elements of this 2018 employment agreement variation document, albeit with minor changes, were subsequently incorporated into the collective agreement when it was concluded in 2020 and then carried over into the current CA.

Relevant legal principles

[20] The relevant approach to the interpretation of collective agreements has been set out by the Employment Court in *E Tū Inc v New Zealand Steel Limited* [2024] NZEmpC 29.

[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.

[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 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.

[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.⁶

Discussion

McKay's submissions

[21] McKay says that there are two documents that are of most relevance in determining the application of clause 3.5.4 of the CA. These are the CA itself and the 2018 variation agreement between the Union and McKay. The 2018 variation also included the Eastern Bay Independent Industrial Workers Union Inc, which represents employees at the Tasman mill.

⁶ *E Tū Inc v New Zealand Steel Limited* [2024] NZEmpC 29

[22] McKay further says that the 2018 variation agreement has a stated purpose “to; provide terms of contract for RTC and Start Up.” Under the heading of “Around the Clock Cover and Start Up Cover” the variation agreement states:

Where there is a need for ongoing work outside the normal hours of work due to breakdowns, shuts or other operational requirements one regime will be used to remunerate employees and to ascertain hours of work. Around the Clock and start up cover is for breakdown repairs or for periods of start ups where the work required by the client is between 8pm to 8am at Kinleith and 7pm to 7am at Tasman or other hours specified by the client. Payment for this cover will be based on:

- Eight hours ordinary earnings prior to the first or only 8pm/7pm commencing shift;
- T1.5 for the 12 hours worked on the night shift.
- Eight hours ordinary earnings post the first or only 8pm / 7pm commencing shift.

Work from 8 / 7 am to 8 / 7 pm will be considered normal time and overtime penal time rate of T1.5 will apply.”

[23] The 2018 variation agreement was replaced by the CA, which commenced on 1 April 2023. The wording of clause 3.5.4 of the CA is similar in form to the wording in the 2018 variation agreement. The differences are caused by the fact that the 2018 variation agreement had to make provision for employees working at both the Kinleith and Tasman mills where there are different start and finish times. Although in the present case the applicants were employed at the Kinleith mill.

[24] McKay says that a plain reading and interpretation of clause 3.5.4 of the CA provides that RTC only relates to work outside normal hours of work. Normal hours of work for day employees are defined in the CA as the period between 0600 to 1800 each weekday⁷.

⁷ Clause 3.1.1 of the CA

[25] McKay further says that RTC is for work required by the client (OJI) between 20.00 and 08.00. McKay says that the relevant CA conditions for employees undertaking RTC and start ups is 8 hours ordinary pay for the first shift prior to 20.00. Then T1.5 for hours worked after the normal hours of work and or on weekends.

[26] McKay says that the objective and reasonable definition of clause 3.5.4 is that there is strictly no RTC entitlement for work carried out between 08.00 and 20.00 on weekdays because clause 3.5.4 clearly says that “work from 8am to 8pm will be considered normal time and overtime/penal rate of T1.5 will apply.”

[27] McKay says that the reasonable and ordinary meaning of clause 3.5.4 is that RTC entitlements do not apply to employees working between 08.00 and 20.00 Monday to Friday and accordingly, employees working on Monday to Friday between the hours of 08.00 and 20.00 hours should, under a proper interpretation of the CA receive the following:

- (a) 8 hours paid at normal time;
- (b) 3.5 hours paid at the applicable overtime rate;
- (c) One 30 minute paid meal break and one 30 minute unpaid meal break, and
- (d) Any allowances such as for any step up in accordance with the CA.

[28] McKay further says that McKay employees are required to complete daily time sheets for their shifts. The employee completes their time sheet and submits it to their supervisor who checks and approves the timesheet. The time sheet data is then entered into a daily summary spread sheet, which is reviewed and approved by the Site Manager. Approved information is then entered into the monthly invoicing process.

[29] Mr Grainger further said that the timesheet for Mr Joyce for the dates in question was incorrect based on McKay’s interpretation of clause 3.5.4 of the CA because an employee only gets two paid meal breaks when they are working under RTC protocols and the CA is clear that RTC entitlements do not apply to employees working between 08.00 and 20.00 because the clause says that work from 08.00 and 20.00 is considered normal time. Work between 08.00 and 20.00 is outside the time specified in the clause as being RTC and start up where the clause specifies this as 20.00 to 08.00. Although clause 3.5.4 does contemplate hours outside of the 20.00 to 08.00 when it refers to other hours as specified by the client.

The Union's submissions

[30] The Union says that the distinction between RTC and start up cover vs normal or planned work is that on both the 08.00-20.00 and 20.00-08.00 shift periods the work is largely reactive as distinct from being planned. This is because on RTC and start ups the work requests come directly from OJI such as by cell phone, radio or face to face and therefore the timing of meal breaks is not (or cannot be) fixed and there is a requirement for continuous availability across the full span of the 12 hour work period, which can make it difficult to take breaks.

[31] In their evidence Mr Joyce, Mr Farrow and Mr Williams all told me that they generally took breaks when they could around the work but also said that times do occur when they might be called back to work whilst on a break and that this was the case for planned as well as RTC and start up work. Although I accept in principle that by the nature of the work requirement that there is less certainly regarding break timings where RTC and start ups are concerned.

[32] The Union claims that the applicants were required to work a 12 hour shift without designated meal breaks and accordingly claimed 12 hours pay (because at least one of the meal breaks is required to be paid). The applicants timesheets were amended by McKay who said that compensatory measures were provided in the CA, but for different circumstances where employees worked through their designated meal breaks.

[33] The applicants assert, at least for present purposes, that they are a labour resource actually managed in practice by OJI not by McKay and that they are required to be available to attend to service requests over the full span of a 12-hour shift while undertaking RTC and start ups including during periods that would otherwise be designated meal breaks.

[34] The Union says that OJI planners issue work plans and schedules covering the events in question, which include 24-hour RTC and start up cover fixing the hours of work and shifts for these events. That may be what happens in practice between OJI and McKay, but OJI are not a party to the CA and are not the employer of the applicants. This point is also important for the union's claim that the payment of two meal breaks

arises in accordance with the service contract between McKay and OJI, but the service contract is not the contract that covers the work of the applicants.⁸

[35] Clause 3.5.4 provides for meal breaks as do other parts of the CA. I do not therefore accept that the applicants were required to work without designated meal breaks in principle. Although as I have said above, issues as to the taking and timing of such breaks can arise. I further note that clause 3.1.4 of the CA does specifically enable variation in the timing of rest and meal breaks for day employees.

[36] Mr Grainger said that if there is a need for start up cover or the like and for employees to work more than their ordinary hours OJI will contact the McKay area supervisor and request that McKay supply a certain number of staff to undertake the work. Mr Grainger further said that OJI would send McKay an advance of a planned shutdown or other relevant work event setting out what they require including how many staff might be required. It is then up to the McKay supervisor to instruct and direct staff. Although Mr Grainger also said that for after 20.00 hours, personnel from OJI might contact McKay staff directly and liaise with them as to what tasks needed to be undertaken to complete the specific work needs. In the present case however, the issue pertains to day shift workers working RTC and start ups between the hours of 08.00 and 20.00.

[37] OJI may have the right to specify the availability of the labour component from McKay under a commercial contract between them, and indeed this seems to be contemplated with the provision contained within clause 3.5.4 where hours for RTC and start ups may be specified by the client, but it is McKay that must manage this in practice with its employees and in accordance with what is specified in the CA.

[38] The Union also says that payments under clause 3.5.4 were made to employees on a routine basis for some 5 or 6 years with the full 12 hours pay, being 11 hours work and two paid 30 minute meal breaks. The Union also referred to custom and practice being past performance that should be applied when interpreting clause 3.5.4, a clause that both parties agree is ambiguous. Specifically, the Union says that because the clause is ambiguous custom and practice should be applied to determine the correct interpretation and application.

⁸ Employment Relations Act 2000 s 56 (1)

[39] As applied to collective agreements the starting point is that for a custom or practice to be implied in a collective agreement, it must be reasonable, certain, and notorious or universal. That is, it must be so well known and established in the workplace that both parties can reasonably be taken to have intended it to form part of the agreement. This inquiry is also highly fact dependent.⁹

[40] In *National Union of Public Employees Inc v Canterbury District Health Board*, the Authority held that custom and practice is a mechanism for implying terms into a contract not expressly stated, but the evidence must be sufficiently clear to satisfy the rigorous test for reasonableness, certainty, and notoriety.¹⁰

[41] In *Rail and Maritime Transport Union Inc v Northland Port Corporation Ltd* the Employment Court set out a four part test for incorporating custom and practice into an employment contract. Specifically, the custom (or practice) must be reasonable, both parties must know of its existence, it must not be inconsistent with the written contract and it must not be inconsistent with any express provisions of the agreement.¹¹

[42] Mr Grainger said that there are some occasions when timesheets need to be adjusted, including where employees had under recorded time and or entitlements. The Union took no issue with McKay's review and approval process per se.

[43] McKay also accepts that there have been occasions when the RTC provisions have been incorrectly applied and payments approved and made in error that should not have been. I also note that throughout 2023 early on after the CA had commenced and into 2024 that the parties exchanged correspondence over the issue and indeed may do so again in bargaining for future collective agreements. These factors count against any custom or practice of the universal payment of two meal breaks for day employees completing RTC or start up work.

[44] In conclusion, while custom and practice can be relevant to interpreting collective employment agreements, it is only used under strict conditions and cannot contradict express provisions of the agreement. I do not consider that this evidence has been produced by the applicants to satisfy these tests in this case.

⁹ *Edminstin v Sanford Ltd* [2017] NZEmpC 70 at [43] and [44]

¹⁰ *National Union of Public Employees Inc v Canterbury District Health Board* [2014] NZERA 114

¹¹ *Rail and Maritime Transport Union Inc v Northland Port Corporation Ltd* [1997] EMHNZ 431

Section 69 ZEB

[45] The Union also says that the matter is about the application of s69 ZEB of the Act that relates to compensatory measures where an employer and employee are unable to reach agreement under s69ZEA (4) of the Act.

[46] The Union interprets the remuneration aspects of clause 3.5.4 of the CA as satisfying s69ZEB of the Act because the applicants claim that when they cannot take their meal breaks clause 3.5.4 enters in to provide compensation.

[47] I do not agree that s69ZEB of the Act applies to this issue.

[48] Section 69 ZEB applies where an employer and employee are unable to reach agreement under s69ZEA (4) to the entitlement to rest and meal breaks that are specified in s69ZD of the Act.

[49] Section 69ZEB provides that an employee is entitled to, and the employee's employer must provide, the employee with compensatory measures, but only if s 69ZEA (4) applies. Section 69ZEB is therefore a cross reference to s 69ZEA (4), which contemplates an agreement where rest and meal breaks are to be provided in a different manner than that specified in the Act.

[50] Section 69ZEA (4) is clear that 69ZEB only arises if either of s 69ZEA ss (2) and (3) apply, which relates to a range of specified situations where the employer would incur unreasonable costs in replacing employees during specified rest and meal breaks. The situations specified in s 69ZEA (2) and (3) include employers engaged in national security, public safety and essential services.

[51] Apart from saying that s 69ZEB is an implied term of the CA that covers the work of the applicants, the Union does not say which part of s 69ZEA ss (2) and (3) applies and how in order for the requirement to try and reach an agreement under s 69ZEA (4) to arise.

[52] The Act's requirement to provide rest and meal breaks applies to the CA, but neither party has put forward any grounds that McKay is an exempt employer from the requirement to provide rest breaks and meal breaks in accordance with section 69ZD

(1) thereby triggering a requirement to reach agreement on a different manner to provide breaks or, failing that, compensatory measures under s 69ZEB.

[53] Section 69ZEA does not operate as a generic means for employers to ‘cash up’ rest and meal breaks.¹²

[54] The Act does however permit employers and employees to agree on the timing of meal breaks.¹³ This is also clearly stated at clause 3.5.8 of the CA for day employees. It is also well established that employees are able to self-manage the timing of their breaks.¹⁴

[55] There is also no strict requirement for employees to actually take their breaks, but the employer must at least enable them to be taken. Conversely, if employees do not take breaks because they are needed to work then arguably the employer might be in breach of the Act and subject to a penalty. If the employee does end up working instead of taking a break then of course the employee is required to be paid at their applicable work rate.¹⁵

Conclusions on the interpretation and application of clause 3.5.4

[56] When reviewed in the context of the overall CA I consider that the express terms of the CA are sufficiently clear enough to conclude that:

- (a) clause 3.5.4 introduces and provides for one regime for remunerating employees when they undertake RTC or Start up cover work.
- (b) RTC or Start up cover work is where there is a need for such work that is outside normal hours of work.
- (c) work between the hours of 08.00am and 20.00 is considered within normal hours of work.
- (d) normal hours of work for day employees are 40 hours per week between the hours of 08.00 and 18.00 Monday to Friday (Clause 3.1.1).
- (e) day employees are entitled to two meal breaks of 30 minutes each, the first is paid and the second is unpaid (Clause 3.1.4)

¹² *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 495

¹³ Employment Relations Act 2000 s69ZE (1)

¹⁴ See *Wei v Lanquan Ltd* [2025] NZERA 491 at [96] – [99].

¹⁵ Above n 12 at [23]

- (f) RTC or start up cover is generally between the hours of 08.00 and 20.00 but could also be other hours as specified by the client (OJI).
- (g) RTC entitlements do not apply to employees working between 08.00 and 20.00 Monday to Friday.
- (h) Any day employees working on Monday to Friday between the hours of 08.00 and 20.00 should receive the following remuneration:
- 8 hours paid at normal time.
 - 3.5 hours paid at the applicable overtime rate.
 - any allowances such as for any step up in accordance with the CA.
 - one 30 minute paid meal break and one 30 minute unpaid meal break.
 - McKay must ensure both meal breaks are provided for in accordance with Clause 3.1.4, the timing of which may vary.
 - If the second meal break is not provided for then the employee is required to be paid for their time (as work time) at the applicable rate.

[57] The Union's position on the interpretation of clause 3.5.4 is not made out. McKay's interpretation is consistent with the provisions of the CA, but if the second meal break is not taken because employees are required to attend to work during RTC and start ups then applicable employees must be paid for their time as work time.

[58] Having made these findings, no compliance order is required to be made.

Costs

[59] 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.¹⁶

¹⁶ Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Tamiami, February 2024, page 5 at [6].

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

Alyn Higgins
Member of the Employment Relations Authority