IN THE EMPLOYMENT COURT
WELLINGTON

[2016] NZEmpC 100
EMPC 122/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SECRETARY FOR EDUCATION Plaintiff
AND	NEW ZEALAND EDUCATIONAL INSTITUTE TE RIU ROA Defendant

Hearing:	4 August 2016 (heard at Wellington)
Appearances:	R Schmidt-McCleave and E Lay, counsel for the plaintiff P Cranney, counsel for the defendant
Judgment:	18 August 2016

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves a dispute as to the interpretation of particular clauses in a collective agreement which regulate a process known as "annualisation". The issue is whether annualised pay should be paid over 27 fortnights rather than 26.

[2] The Support Staff in Schools' Collective Agreement (2006-2007) (the collective agreement) covers administrative support staff and teacher-aids who commonly work only during term time. They are known as Term Time Only (TTO) employees and are paid an hourly rate. Under the collective agreement, TTO employees can agree with their individual employers (the Boards of Trustees of the school at which they work) to have their pay "annualised". This is the process whereby their earnings (comprising weekly hours of work, annual holiday

entitlements and public holidays) for the calendar year are projected across an entire year, with the amount being paid in equal fortnightly instalments over periods which are described in the agreement as a "12-month period" or "annualisation year".

[3] In effect, annualisation takes the payments an employee would normally receive in the course of a calendar year (from approximately late January to the end of the school year which is between mid December and Christmas Day) and spreads those payments equally between pay periods which are defined with regard to the tax (PAYE) year, 1 April to 31 March. Pay Period 1 is always the fortnight before the first pay day in April. In most tax years, there will accordingly be 26 pay days; that is 26 pay periods of 14 days.

[4] The Secretary for Education (the Secretary) says that the reality of the Gregorian calendar is that one year does not divide evenly into 26 fortnights of 14 days (that is 364 days). She asserts that there will always be an extra day a year or, in a leap year, an extra two days.

[5] At the heart of the Secretary's case is the contention that every 10 to 12 years' Pay Period 27 becomes inevitable, if Pay Period 1 is to align to the beginning of the tax year, and Pay Period 23 is to remain at the commencement of the school year. Otherwise the pay periods will advance incrementally; without a resetting, Pay Period 23 would in time be positioned in the year prior to the calendar year to which it relates.

[6] Because 2016 is a Leap Year, it was decided that the 2015/2016 tax year should include a 27th pay period. This additional pay period was to take account of the extra days which had accumulated during the previous years when 26 fortnights had been used. The 27th pay period was from 16 March 2016 to 29 March 2016.

[7] The collective agreement contains a provision that any period of annualisation must begin at the start of Pay Period 23 in any year, and run until the end of Pay Period 22 in the following year. Normally, this requirement would ensure payment over 26 fortnights. However, because of the decision to align pay periods with the tax year by introducing an additional pay period, there are in fact

27 fortnights between the beginning of Pay Period 23 for 2016, and the end of Pay Period 22 in 2017.

[8] Accordingly, the issue which has arisen between the parties is whether the relevant terms of the collective agreement mean:

a) That in the unusual current circumstances, the process of payment on an annualised basis to TTOs should be made over 27 fortnights, as the Secretary asserts; or

b) Whether the process of annualisation results in payments being made to TTOs over 26 fortnights, as New Zealand Educational Institute Te Riu Roa (NZEI) asserts.

[9] The proceeding has come before the Court by way of a challenge to a determination of the Employment Relations Authority (the Authority), in which it was held the collective agreement required payments within 12 months, that is, 26 pay periods.[1] Before describing the detail of that determination and then the competing submissions made for the parties, it is necessary to describe the relevant provisions of the collective agreement in more detail, and the relevant context of that agreement.

Collective agreement framework

[10] The Secretary is responsible for negotiating every collective agreement applicable to employees of the Education Service, as if the Secretary were the employer, being a delegation to her under s 23 of that Act.[2]

[11] Pursuant to that delegation, the Secretary entered into a sequence of collective agreements with NZEI, and the Service and Food Workers' Union (SFWU) now known as E Tū (together, the Unions).[3]

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1 *NZEI Te Riu Roa v Secretary for Education* [2016] NZERA Wellington 50.
2 State Sector Act 1988, s 74(1).
3 Although E Tū was not a party to the proceeding, the Court is advised that formal notification of the proceeding has been given to that entity, and it has not taken any steps with regard to the proceeding, such as asking to be joined as a party.

[12] The term of the current agreement is 6 June 2014 to 5 December 2016. There were previous collective agreements between these parties which, for present purposes, contained identical provisions as to the process of annualisation.

[13] The collective agreement is binding on all Boards of Trustees of State and Integrated Schools who are employers of applicable employees, that is support staff.

[14] The Court is advised that there are approximately 9,600 employees bound by the collective agreement, with approximately 18,600 support staff on individual employment agreements (IEAs) that mirror the collective agreement. Of these staff, 6,200 chose to annualise their earnings in the 2016 year; approximately half of these are bound by the collective agreement with the remainder being employed on IEAs. The latter are not represented in this proceeding.

The collective agreement

[15] I turn now to the key provisions referred to by counsel in their submissions. In the agreement itself, cl 3.15 is relevant and states:

> **3.15 Annualisation**
>
> 3.15.1 Annualisation of pay shall mean that the employee's projected earnings for a twelve month period shall be paid in equal fortnightly instalments throughout that twelve month period.
>
> 3.15.2 Permanent employees
>
> (a) Where a permanently employed employee is in paid employment with an employer for less than 52 weeks of the year (inclusive of paid leave), that employee may seek the agreement of the employer to have his/her annual earnings annualised. In such circumstances, nothing shall prevent agreement being reached between that employee and her/his employer to enable that employee to have her/his annual earnings annualised. Any such agreement shall be subject to compliance with all of the provisions set out at Appendix D http://www.education.govt.nz/school/working-in-a-school/other-staff/support-staff/
>
> (b) Any agreement entered into under clause 3.15.2(a) above shall be in writing and shall be signed by the employer and employee and will clearly detail the individual elements of that agreement as required as detailed at http://www.education.govt.nz/school/working-in-a-school/other-staff/support-staff/.
>
> (c) Annualisation is intended to provide a mechanism to enable employees to access regular payments throughout the year in circumstances where the employee's employment includes

periods of time when that employee does not have paid work available with the employer (as per clause 3.12).

(d) For the purposes of this provision, "weekly earnings" in relation to:
  (i) clause 10.2.12 (a) or
  (ii) in relation to any paid parental leave entitlement in accordance with section 71T of the Parental Leave and Employment Protection Act 1987; or
  (iii) in relation to any entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001

shall mean the employee's hourly rate multiplied by the employee's actual (i.e. non-annualised) weekly hours.

(e) An employee who agrees with her/his employer to have their yearly earnings annualised is not considered to be a salaried employee.

[16] Clause 3.15.2(a) refers to Appendix D, which sets out the process by which projected annual earnings are to be annualised. The Appendix is lengthy, but counsels' submissions focused on the following provisions:

1. The provisions in this appendix shall apply only to those employees who are covered by clause 3.13[4] of this Collective Agreement.

2. Process for annualisation of projected annual earnings
  (a) Annualisation of projected annual earnings (hereafter referred to as annualisation) is only available to:
    (i) permanently employed support staff employees covered by the collective agreement

    From the start of 2011:

    (ii) support staff employees, covered by the collective agreement, on a fixed term agreement which specifies that they are to be employed from or before the pay period that is the commencement of the annualisation year defined in (c)(ii) below and for that entire school year.
  (b) Access to the option of annualisation requires the agreement of an employee and his/her employer. This agreement will be recorded in the template annualisation form which will require the signature of the employee and the authorised representative of the employer.
  (c) Initial commencement of annualisation
    (i) The template annualisation form must be completed by the employer and employee and submitted with the applicable Payroll Start of Year forms (due to Payroll centres by approximately 1 December each year).
    (ii) Any period of annualisation must begin at the start of pay period 23 (i.e. the pay period that begins closest to February 1st) in any year and run until the end of pay period 22 in the following year (12 months).
    (iii) Other than where there is agreement to discontinue the arrangement, once a period of annualisation has commenced it shall continue for the full twelve month period.

[4] Counsel are agreed that this should be a reference to cl 3.15.

(iv) At the beginning of term 2 the employer and the employee shall meet to review the annualisation arrangement to ensure that both parties are satisfied that the annualisation calculation is accurate and to ensure that any variations have been addressed.

(d) Prior to the parties completing the Payroll Start of Year forms (approximately 1 December) in a year when pay has been annualised the employer and employee will meet to discuss whether they agree to continue the annualisation arrangements for the following year.

(e) Renewal of annualisation arrangements

(i) The continuation of an annualisation arrangement from year to year will require the continued agreement of the employer and employee. The process outlined in clause 2(b) – 2(c)(i) above will be repeated to determine whether the annualisation arrangement will be continued for the ensuring twelve month pay period.

(ii) Where the process for determining that the annualisation arrangement will be renewed is not followed in accordance with these provisions, the default position shall be that the employee's pay will not be annualised for the following year.

(f) In the event that an employee believes there to be a discrepancy in the annualisation calculation he/she may request his/her employer to check the calculation.

(g) Where an employee commences employment during the year, he/she will not have access to the option of annualisation of projected annual earnings until the following year, at the commencement of the pay period specified in cl 2(c)(ii) above.

3. Definitions

(a) 'Actual weekly hours' shall mean the hours per week an employee is normally employed for.

(b) 'Projected annual earnings' shall mean:

(i) the employee's hourly rate multiplied by the employee's actual weekly hours multiplied by the number of weeks in the ensuing calendar year for which the employee shall be employed; plus,

(ii) the annual leave to which the employee is entitled; plus

(iii) payment of relevant daily pay for the public holidays and additional paid holidays during the ensuring calendar year which are observed on days of the week on which the employee normally works. Note: For clarity this includes any public holidays that are observed during term breaks and which fall on a day of the week on which the employee normally works. The parties acknowledge that payment of public holidays at the annualised rate as part of the arrangements described in this appendix is not a breach of the Holidays Act 2003.

(c) 'Annualisation year' shall mean the twelve month period commencing on the date established for the commencement of a period of annualisation in accordance with clause 2(c)(ii) of this appendix.

4. Calculation and payment of annualised fortnightly rate

(a) The annualised fortnightly rate shall be calculated by dividing the projected annual earnings, as described in clause 3 (b) above, by the number of fortnights in the ensuring twelve month period.
(b) The annualised fortnightly rate shall be paid each fortnight throughout the twelve month period commencing from the commencement date of the period of annualisation as described in clause 2 (c)(ii) above.

The Authority's determination

[17] Ms Schmidt-McCleave, counsel for the Secretary, focused on four aspects of the Authority's determination, which she submitted were in error.

[18] The first was the Authority's conclusion that there is nothing in either the provisions of the collective agreement, or in Appendix D, which refers specifically to the possible occurrence of "annualised" payments being made to staff over 27 fortnights.[5]

[19] Then the Authority found that cl 2(c)(ii) of Appendix D referred specifically to the length of time by months that a period of annualisation lasts; and that was a reference to a period of 12 months.[6]

[20] The Authority next observed that on the face of it, for the period 2016/2017, the Secretary had proceeded on the basis of a literal application of cl 2(c)(ii), by beginning the period of annualisation at the start of Pay Period 23 (in 2016) and running it until the end of Pay Period 22 (in 2017) – that is over 27 fortnights. However, the Authority held that "the difficulty is that the provision then goes on to use the words in parenthesis, 12 months".[7]

[21] The ultimate conclusion of the Authority was that annualisation over 27 pay periods was longer than 12 months, and therefore inconsistent with the reference to 12 months in cl 2(c)(ii) of Appendix D.[8]

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5 *NZEI v Secretary for Education*, above n 1, at [23] and [28].
6 At [29].
7 At [32].
8 At [30].

Evidence as to context

[22] I have already summarised the essence of the evidence which was given by the two witnesses called at the hearing of the challenge – Mr J Warner, Chief Adviser in Education Payroll at the Ministry of Education who was called for the Secretary, and Mr A Casidy, General Manager for Operations of NZEI who was called for that Union.

[23] Beyond that, however, each of them referred to matters which it is asserted were relevant to context.

[24] Mr Warner produced evidence of the original claim made by NZEI and SFWU (as it then was) in 2006, which raised the possibility of an annualisation process for the first time. The Union proposed that there be an "enabling clause" which would allow annualisation subject to mutual agreement between the employer and the employee. The proposal referred expressly to projected earnings being paid for a 12-month period by way of equal instalments "for 26 pay periods in each such year". The terms of settlement, however, which were entered into between the parties on 9 February 2007 resulted in the provisions set out earlier in this judgment; cl 3.15.1 did not contain an express reference to payment by way of equal instalments for 26 pay periods in each year. However, I regard this evidence as neutral for present purposes, because it does not refer to the possibility of payment by way of 27 pay periods either.

[25] Mr Warner confirmed that he was not involved in the bargaining for the 2007 agreement. He said that although he was aware of the 27 pay period issue, no one else was.

[26] Mr Warner said that in mid 2007 he met with Union officials to discuss the design of the annualisation process, templates, FAQs and so on after the agreement had been entered into. In that context there was a discussion as to the possibility of 27 pay periods being appropriate every 11 to 12 years. He said it was agreed this would be a very rare situation. As a result, the design of the annualisation process in which he was involved allowed an employee to make an informed decision each year

to annualise on the basis of what the fortnightly pay would be. As mentioned, this discussion occurred after the first of the relevant collective agreements had been entered into. Furthermore, there is no evidence that it was agreed such a rare situation was already provided for in the collective agreement, or that it would apply in such circumstances.

[27] Mr Warner also referred to an email he had sent earlier to a colleague at the Ministry, who was responsible for designing the annualisation calculator which would be used by an employee who wished to enter into an annualisation agreement. He said that in that email he referred to the phenomena that once every 11 to 12 years, there would necessarily be payments spread over 27 fortnights. Although she was asked to forward the email to the Union, there is no evidence as to what Mr Warner's colleague did with that information. Mr Casidy stated that there is no record of the email being forwarded to the Union. That an email was sent by Mr Warner to another person at the Ministry on this topic does not provide reliable evidence as to the parties' intentions as to the terms of their agreement.

[28] Mr Warner confirmed that TTO employees have a choice as to how their wages would be paid. For those employees who choose to be paid during term time only, they are paid on the basis of:

a) A fortnightly payment between February and December, excluding time not worked during a term break (except for any public holiday that may fall within that break, although such are not normally a working day in any event); and

b) Their annual leave entitlement and the pay for the majority of public holidays are paid in a lump sum at the end of the school year under the closedown provisions of the Holidays Act 2003.

[29] Mr Warner went on to say that generally these payments occurred between Pay Period 23 (that is, a pay day which is in early to mid February) and Pay Period 19 (that is, a pay day which is in early to mid December) in each year.

[30] By contrast, annualisation works by calculating total annual earnings and then spreading these across the available pay periods (Pay Period 23 to Pay Period 22) so that the employee will receive equal fortnightly payments across the period of payment.

[31] Each employee who wishes to receive payments on an annualised basis must enter into an agreement with the school. This is achieved by completing a form which is on Novopay's website. That site also contains information as to who is eligible to annualise their pay and how the process works.

[32] I turn now to a particular aspect of Mr Casidy's evidence. Originally, he filed a brief of evidence which suggested that divisors had been used in the collective agreement to calculate hourly rates which already took into account extra days above 364 in any calendar year. That meant, he said, that there was no need to provide for an extra fortnightly payment, since the mechanism of "catch up" was already in place in the rates.

[33] Mr Warner gave evidence-in-reply on this topic. After explaining how the divisors which are used for the calculation of hourly rates in the collective agreement were calculated, he said that their use was not relevant to the calculation carried out when annualised payments are calculated. I accept this evidence because it is now common ground that the issue is not whether the affected employees should receive additional pay on a catch-up basis – as was apparently argued for the Union previously; rather it relates only to the period during which the regular payments should be made.

Submissions for the Secretary

[34] Ms Schmidt-McCleave submitted for the Secretary in summary that while some of the terminology used in the collective agreement with respect to annualisation creates some confusion, the way it is intended to work is expressly stated, and is as follows:

a) Annualisation of pay means the TTO employees' projected earnings "for a 12-month period" (that is, the earnings of a TTO employee for

the calendar year), are paid in "equal fortnightly instalments" throughout the annualisation year as provided in cl 3.15.1.

b) The annualisation year is stated to be the 12-month period commencing on the date established for the commencement of a period of annualisation in accordance with cl 2(c)(ii) of Appendix D.

c) The annualisation year is required to begin at the start of Pay Period 23; although this is stated to be the pay period that begins closest to 1 February, this is not always the case in practice. That period runs until the end of Pay Period 22 in the following year. This is in accordance with cl 2(c)(ii) of Appendix D. Ms Schmidt-McCleave submitted that the reference to "12 months" in that clause must be interpreted to mean "12 annualisation months". This was necessary for the remainder of the clause to make sense, and to enable the express intention of annualisation as expressed at cl 3.15(2)(c) to be achieved. She said that the intent of that sub-clause is to enable employees to access regular payments throughout the year.

d) Turning to cl 3(b) of Appendix D, Ms Schmidt-McCleave said that "projected annual earnings" are to be calculated over a calendar year; the delivery of those earnings may, however, take place over an annualisation year which is longer than a calendar year. It was submitted that the quantum of earnings do not change, just the way in which the payment of these are delivered.

e) Thus, the annualised fortnightly rate is calculated by dividing the projected annual earnings (calculated by reference to the calendar year) by the number of fortnights in the ensuing "12-month" period, as required by cl 4(a) of Appendix D.

f) Strict application of the meaning of "12 months" and "calendar year" was inconsistent with the specific language of cl 2(c)(ii) of Appendix D, which set the start and end of the annualisation period. Ms Schmidt-McCleave submitted that for the clause to work when it set the annualisation period, "12 months" must be interpreted as

"12 annualisation months" which each 10 to 12 years would equate to 54 weeks or 27 fortnights. If applied in this way, TTO employees would receive their correct entitlement for the calendar year without having to skip a fortnight's pay.

g) The introduction of an extra fortnight from time to time also avoids the perpetual advancing of the start of an annualised year; without a resetting of Pay Period 1 from time to time, that period would eventually retreat to the previous year, which would create unacceptable difficulties for Boards of Trustees.

Submissions for NZEI

[35] Mr Cranney, counsel for the defendant, explained the background to the dispute and submitted:

a) The key clause was cl 3.15.1 of the agreement, which unequivocally referred to payment of the projected earnings for a 12-month period to be paid in "equal fortnightly instalments throughout *that* 12 month period".[9]

b) The start date of the period for payment was identified in cl 2(c)(i) of Appendix D; it was the beginning of Pay Period 23. However, it was submitted there was then an ambiguity in the clause which arose through the reference on the one hand to "the end of Pay Period 22" and the reference on the other hand to "12 months". Mr Cranney said this was a latent ambiguity rather than a patent one, because the ambiguity would only ever arise infrequently.

c) Mr Cranney then referred to multiple references in cl 3.15 of the agreement, and in Appendix D which made it clear that the parties clearly intended the annualisation payments to be made within the confines of a 12 month period.

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[9] Emphasis added.

d) Next, Mr Cranney turned to the topic of "annualisation percentages", a matter which had been referred to by Mr Warner. He said that if payment was to be spread across 26 pay periods, a higher annualisation percentage (that is, amount to be paid to each employee each pay period) would be adopted than would be the case if payment was spread across 27 pay periods when a lower annualisation percentage would apply. Mr Cranney accepted that it was not argued that if the correct interpretation mandated 27 pay periods, the higher annualisation percentage would apply to each of those periods. It was not intended that TTO employees would receive more over 27 fortnights than they would over 26 fortnights; this was not a windfall situation.

e) Mr Cranney also accepted that if NZEI's position was held to be correct, the final fortnightly period would be Pay Period 21 which would run from 4 to 17 January 2017, with a final payment on 18 January. If such an employee elected to enter into an annualisation agreement for 2017/2018, the first pay period for that person would be for the period 1 to 14 February 2017, with payment on 15 February. That is, there would be a fortnight during which no payments would be received. This of course contrasts with the Secretary's approach which results in no such gap; the Secretary's approach is that the final pay period for 2016/2017 is 18 to 31 January 2017, with final payment on 1 February.

f) The essence of Mr Cranney's submission is that spreading the annualised payments across 27 fortnights' amounts to, in effect, a wage decrease.

Interpretation principles

[36] It is well accepted in this jurisdiction that this Court should have regard to the judgments of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*,[10] and in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions*

[10] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

Inc.[11] These principles were recently referred to again with approval, in *Air New Zealand Ltd v New Zealand Airline Pilots Association Inc.*[12] For present purposes the following stated in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* summarises the relevant principles:[13]

> In summary, it would appear from *Vector* that the starting point for any contractual interpretation exercises is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is, nevertheless, a valid part of the interpretation exercise for the Court to 'cross-check' its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language used is, on its face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time.

[37] I turn now to consider the merits of the present application on the basis of these principles.

The natural and ordinary meaning

[38] On the face of it, the parties' intentions with regard to the annualisation provisions are clear. A TTO employee who enters into an annualisation agreement with his or her employer is to be paid a series of consecutive payments, so that the employee will receive his or her projected earnings over a 12-month period. This is evident both from the relevant clause of the collective agreement (cl 3.15), and from the detailed provisions in the Appendix to which cl 3.15.2(a) refers.

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[11] *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trades Unions Inc* [2010] NZCA 317, [2010] ERNZ 317 at [36] – [37].

[12] *Air New Zealand Ltd v New Zealand Airline Pilots Assoc Inc* [2016] NZCA 131, [2016] 2 NZLR 829; leave to appeal this decision to the Supreme Court on an issue of jurisdiction has been granted: *New Zealand Airline Pilots Assoc Inc v Air New Zealand Ltd* [2016] NZSC 84.

[13] *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149 at [17] (footnotes omitted).

[39] Clause 3.15.1 contains the primary obligation, which is expressed in these terms:

> Annualisation of pay shall mean that the employee's projected earnings for a twelve month period shall be paid in equal fortnightly instalments throughout that twelve month period.

[40] The next clause provides for the means by which annualisation is to be achieved; the employee is to seek the agreement of the employer, with such an agreement to be in compliance with all of the provisions set out in Appendix D.

[41] Turning momentarily to Appendix D the term "projected annual earnings" is defined in cl 3. It is evident that such a calculation is to be undertaken with regard to the number of weeks worked in the "calendar year for which the employee shall be employed".

[42] Next, it is evident from cl 3.15.1 that the projected earnings are to be paid in equal fortnightly instalments; and such a payment is to be paid over a "twelve month period". The language used in the clause is not entirely happy, because the clause might be thought to require the fortnightly payments to be paid in the same 12-month period to which the projected earnings relate – that is, the 12 months within which the work has been performed. However, it is equally appropriate to conclude that the payments are to be made within the period of annualisation. The clause describes the period for such payments as being "12 months".

[43] I deal now with relevant definitions. Throughout cl 3.15, reference is made to "annualisation". The Oxford English Dictionary definition of this term is:

> Of rates of interest, inflation, etc: calculated on an annual basis, as a projection from figures obtained for a shorter period.

[44] One of the meanings of the related word "annual" is:

> Of or belonging to the year: reckoned, payable, or engaged by the year: yearly.

[45] The plain and ordinary meaning of the word clearly relates to a 12-month or 52-week period; it does not normally relate to a 54-week, or 27-fortnight period.

[46] In Appendix D, the word "annualisation year" is defined as meaning:

> The twelve month period commencing on the date established for the commencement of a period of annualisation in accordance with clause 2(c)(ii) of this appendix.

[47] I find that the word "annualisation" was clearly intended to refer to 12 months, or 52 weeks. There are numerous references to either "12 months",[14] and to "year".[15] There is no evidence within the collective agreement that any of the words just quoted were intended to convey a meaning which could be different from their natural and ordinary meaning.

[48] There are two clauses in Appendix D which deal with the mechanics of payment; they are:

a) Clause 2(c) in Appendix D, which describes the "initial commencement of annualisation". It states that the period of annualisation must begin at the start of Pay Period 23 in any year. It then provides that the period will run until the end of Pay Period 22 in the following year. Then appears the bracketed word "12 months". On the face of it, the plain and ordinary language describes a 12-month process. In most years, the payment period will indeed span 12 calendar months, and no difficulties will arise. But it is contended that this is not the case for 2016/2017, and that for the current year the clause is ambiguous. Whether the clause itself is ambiguous in its context is a topic to which I shall return.

b) Clause 4 of Appendix D, which deals with the calculation and payment of an annualisation fortnightly rate. The second of those topics is dealt with by sub-clause (b), which expressly provides that fortnightly payments are to be made "throughout the twelve month period", the commencement of which was defined in cl 2(c)(ii). This language can only be understood as referring to a 12 calendar months, or 52 weeks.

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[14] In the collective agreement, cl 3.15.1, and in Appendix D, cls 2(c)(ii), cl 4(a) and cl 4(b).
[15] In the collective agreement, cl 3.15.2(c), and in Appendix D, cls 2(d), 2(e)(i) and (ii), cl 2(g).

[49] To this point, the plain and ordinary language of these detailed provisions is unequivocal; the parties obviously intended that any annualisation agreement entered into would result in payment over 12 months, or 52 weeks.

The objects clause

[50] Ms Schmidt-McCleave submitted that the purpose of annualisation is set out in cl 3.15(2)(c). That clause records that annualisation was intended to provide a mechanism to enable employees to access regular payments "throughout the year" where the employee's employment includes periods of time when that person does not have paid work available to him or her from the employer.

[51] Later, it was submitted that the interpretation advocated by the Secretary, that is payment over 27 fortnights, meant that there would be no break in payment for a person who entered into annualisation agreements for each of the school years in 2016 and 2017.

[52] However, I regard this clause as being neutral for the purposes of the present dispute. What is confirmed by the sub-clause is that consecutive payments will be made throughout the payment year in question. The clause says nothing about an interface with payments to be made in the next year, if the employee chooses to enter into a relevant agreement with his or her employer. If anything, it supports the construction of payment over 26 fortnights rather than 27, with its reference to regular payments throughout "the year".

Ambiguity?

[53] Mr Cranney submitted that in a year where a decision is made to introduce an extra pay period as has occurred in the present case, cl 2(c)(ii) is ambiguous. As indicated earlier, he said this was a latent ambiguity, a description with which Ms Schmidt-McCleave agreed during her submissions in reply. Their point was that for all but the eleventh or twelfth year, there was no difficulty with the application of the clause. It is only when a "catch-up" pay period is introduced that any problem arises.

[54] As explained earlier, the language used by the parties in their agreement is clear and consistent. Interpreting the language used on a plain and ordinary basis there is no ambiguity. But is this one of those rare situations where evidence of context establishes a fact or circumstance which demonstrates objectively that the parties intended their words to bear a different meaning, so that there is for that reason an ambiguity in cl 2(c)(ii), once every 11 to 12 years? [16]

[55] Turning to the contextual evidence, I have already found that the claim made by the Union in bargaining, and its outcome, is not significant for present purposes since there is no reference in the key provision, cl 3.15.1, to either 26 or 27 fortnights.

[56] I have also found that apart from Mr Warner, no one was aware of this issue; and there is no evidence that consideration was given by the parties to this problem when they entered into their agreement. Furthermore, although it might have been possible for the parties to address this issue when later collective agreements were entered into, this did not occur.

[57] For completeness, I consider the issue of post-contract evidence; that is, Mr Warner's conversation with Union officials. As to this class of evidence, Tipping J said in *Vector Gas* that such evidence would be of assistance:[17]

> … if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both or all parties intended their words to bear.

[58] Mr Warner's discussion with Union representatives does not lead to a conclusion that objectively assessed the terms of the collective agreement were intended by the parties to deal with the unusual situation which has now arisen. There is no evidence to suggest when that the conversation was conducted, it was accepted that the parties had already dealt with this issue in the collective agreement, or that the parties had agreed or did agree how it would apply in the rare situation of an additional pay period being added.

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16 *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*, above n 13, at [15].

17 *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n [10] at [31].

[59] I find that reference to contextual evidence establishes only that the parties failed to consider the possible need to modify their arrangements in those unusual years when an additional pay period was introduced as an administrative step to reset the period across which pay would be delivered.

[60] Evidence as to Mr Warner's concerns when designing the annualisation form does no more than establish that he continued to be concerned about the issue, but there is no evidence that anybody else held such concerns at the time.

[61] In short, a cross-check does not lead to a conclusion that cl 2(c)(ii) is ambiguous when considered against the context which existed when the parties entered into their agreement.

[62] There are several additional points which were raised by Ms Schmidt-McCleave, which need to be addressed.

[63] The first is her submission that an approach should be adopted which would be consistent "in an annualisation year which naturally has 27 pay fortnights". I do not accept that the difficulty which has arisen in the current year is a "natural" phenomenon. It results from an administrative decision to reset pay periods so as to achieve alignment with the tax year. As I have found, there is no evidence that the parties considered this possibility and intended the relevant provision to mean that payment would occur over 27 fortnights, either when they negotiated the 2007 collective agreement, or indeed when they entered into any subsequent collective agreement.

[64] Ms Schmidt-McCleave submitted that the word "annualised" should be read into both cl 3.15(2)(c) of the collective agreement; and that the bracketed words in cl 2(c)(iii) should be understood as referring to "twelve annualised months".

[65] This submission was founded on the proposition that a literal meaning should apply to the latter clause, even where an additional pay period had been added administratively. Thus, Pay Period 23, 2016 to Pay Period 22, 2017 would extend over 27 fortnights, and this should be regarded as an "annualised year".

[66] In my view, such an interpretation conflicts with the definition of that term in cl 3(c) which refers to a 12-month period; but even if these words were to take their flavour from the surrounding words of the sub-clause, this amounts to implication of language.

[67] The effect of Ms Schmidt-McCleave's submission is that implication is necessary because the addition of a pay period is inevitable, and this must have been what the parties intended when considered against the relevant background. I do not accept that such language should be introduced as a matter of interpretation. This collective agreement was intended to apply to a very substantial workforce. On the face of it, the parties went to some lengths to define the issue of annualisation in a well described and prescriptive fashion. It is apparent that the parties wanted the terms and conditions to be clear for the thousands of employees who would be affected by them, as well as the multiple Boards of Trustees who would employ those persons. The agreed terms as to annualisation are clear as to how the process would operate. Given that context, I am not persuaded that words should now be implied when interpreting the collective agreement – particularly with regard to an issue which was not considered by the parties at the time. This would amount to the Court attempting to improve the document, which it does not have the power to do.[18] I also note that the Court does not have before it a cause of action in rectification, or mistake under the Contractual Mistakes Act 1977.

[68] Next, Ms Schmidt-McCleave submitted that there was no workable alternative. First she argued that employees being paid over 27 fortnights would receive a windfall. However, Mr Cranney accepted at the hearing that any TTO employee electing to be paid under an annualised payment agreement should not receive a windfall, and should receive only the same amount as a person who did not enter into such an agreement.

[69] Ms Schmidt-McCleave also submitted that if annualised TTO employees were to be paid over 26 pay days, they would have to sustain one fortnight with no pay; or the start of the annualised year for 2017 would have to be moved.

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[18] *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [16] per Lord Hoffmann.

[70] There is nothing in the collective agreement which indicates that a purpose of the annualisation process is to ensure there should be consecutive payments between years, however desirable that may be. The reality is that the introduction, administratively, of an additional pay period has caused an unforeseen problem.

[71] The agreement is not unworkable in its present form; but it has given rise to a consequence which the parties did not address. This factor is not one which persuades me that the Court should sanction an interpretation which does not arise from the terms of the parties' agreement.

Relief

[72] The foregoing findings are sufficient to dispose of the challenge, because I have reached the same conclusion as did the Authority. The decision to pay annualised payments over 27 pay periods does not comply with the relevant provisions of the collective agreement, which requires such payments to be undertaken over 12 months, that is 26 pay periods.

[73] The Secretary, in her amended statement of claim, sought an additional remedy by way of relief. It was pleaded on her behalf that if the Court were to determine that the Authority had not erred, then the Secretary sought "a declaration as to the nature of the correct implementation of the annualisation arrangement for the 2016 year".

[74] In his evidence, Mr Warner considered possible options from a payroll perspective. In the event, however, two only of these require comment:

a) The first was that if the Authority's determination was upheld, then earnings should be paid at a higher annualisation rate for 26 fortnights, rather than the lower annualisation rate which had been implemented for 27 pay periods. This approach would ensure annualised and non-annualised TTO staff would receive the same earnings for the current school year. But it would result in a fortnight in late January 2017 when annualised TTO employees would receive no pay. Mr Warner advised that the option of returning employees to 26 pay

periods would involve a correcting payment to take account of the use of the lower annualisation percentage to this point and then payment at the higher annualised percentage thereafter. This could be effected providing relevant payroll staff were instructed to do so by 7 September 2016.

b) The second relevant option would arise if there was no such method of implementing annualisation in the circumstances which have now arisen. In that event all TTO employees would need to be returned to term time payments only. Processing such a change would create a debt owing from an employee to schools as a result of the spreading of the employee's pay. The Court was advised that if there was no other viable alternative, notice of the need to implement this outcome would have to be given by 11 August 2016.

[75] Mr Cranney submitted that the first of these options would be appropriate, were the challenge to be dismissed. There is accordingly common ground between the Secretary on the one hand, and those TTO employees who are bound by the collective agreement on the other, as represented by Mr Cranney. The position of affected employees, for instance under individual IEAs which mirror the collective agreement is not known. The Court is advised that there are in excess of 3,000 such employees.

[76] I referred earlier to evidence that a deliberative process was undertaken when TTO employees were offered the possibility of entering into annualised agreements. The form of the agreement referred to the fact that there would be 27 pay periods spread over 54 weeks. The various explanations on the Novopay website as to annualisation for 2016/2017 confirmed that the relevant period would extend from Pay Period 23 on 20 January 2016 to Pay Period 22 on 30 January 2017. Employees entered into agreements on that basis.

[77] Whilst it is the case that the Union sought a declaration as to the correct interpretation of the agreement, from which I infer that the particular members of that Union who are affected by this issue wish the position to be corrected, the Court

has no information regarding other persons who are not members of that Union. The Court does not know whether they wish to be paid over 26 pay periods, with the potential for a gap for one fortnightly period before the next annualisation agreement commences; or whether they have now arranged their affairs on the basis of the agreements they entered into.

[78] Whilst I have concluded in effect that the annualisation agreements entered into are not consistent with the relevant provisions of the collective agreement, I am not prepared in the circumstances I have just described to declare at this stage that the Secretary should adopt the option which she and the Union agree should be applied in light of that finding. That is a matter which will now need to be the subject of further discussions. It may well be that those discussions will require consideration as to when and how any annualisation agreements for 2017/2018 could operate. But that is not at present a matter for the Court.

[79] Mr Cranney suggested that the assistance of the Court may be required on issues relating to the 2017/2018 period. Whether such an issue could be properly considered within the context of the current challenge is a matter on which I express no view.

[80] However, I agree that it is appropriate for leave to be reserved to either party to seek further directions.

Disposition

[81] I agree with the conclusion as to the interpretation reached by the Authority.

[82] At this stage I will not formally dismiss the challenge, in case there are matters which require the further assistance of the Court. I reserve leave to either party to seek directions from the Court within two months, on 21 days notice.

[83] I direct the Registrar to fix a telephone directions conference with counsel for a date which is two months after the date of this judgment. If no further step has been taken by either party in this proceeding by that stage, I will consider the question of whether the challenge should then be dismissed, and will deal with any issues as to costs.

B A Corkill
Judge

Judgment signed on 18 August 2016 at 11.30 am