IN THE COURT OF APPEAL OF NEW ZEALAND

CA629/2015
[2016] NZCA 495

BETWEEN	LEAN MEATS OAMARU LIMITED Appellant
AND	NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INCORPORATED Respondent

Hearing:	21 September 2016
Court:	Miller, Winkelmann and Asher JJ
Counsel:	M F Quigg and J L Bates for Appellant P B Churchman QC and C M Kenworthy for Respondent
Judgment:	12 October 2016 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed. The Employment Court did not err in deciding that the relevant provisions in pt 6D of the Employment Relations Act 2000 required rest breaks to be paid at the same rate for which the employee would be paid to work.

B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] This appeal concerns the meaning of the phrase "paid rest breaks" in s 69ZD of the Employment Relations Act 2000 (the ERA). In the Employment Court Judge Corkill found the section required rest breaks to be paid "at the same rate for which the employee would be paid to work".[1]

[2] The appellant, Lean Meats Oamaru Ltd (Lean Meats) challenges that finding in this appeal. It claims the Court has rewritten the section. It contends that the ERA permits an employer to pay different rates for different types of work and to include different rates in collective agreements. It is not bound to pay rest breaks at the current work rate, and it is open to the parties to agree a special rate.

[3] This Court granted Lean Meats leave to appeal on the following question of law:[2]

> Did the Employment Court err in deciding that the relevant provisions in Part 6D of the Employment Relations Act 2000 required rest breaks to be paid at the same rate for which the employee would be paid to work?

Background

[4] The issue before us arose out of the negotiation of a new collective agreement between Lean Meats, which operates a meat works in Oamaru, and the respondent, the New Zealand Meat Workers and Related Trades Union Inc (the Union), whose members are employed at the Oamaru site.

[5] The new collective employment agreement they negotiated in 2013 contained a rest and meal breaks clause that provided:

> **8. REST PERIODS AND MEAL BREAK**
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> a. Employees will be allowed three breaks during any one day, two fifteen minute breaks and a half hour lunch break. The timing of the breaks shall be scheduled to suit operational needs.

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1 *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2015] NZEmpC 176 [Employment Court decision] at [69].

2 *Lean Meats Oamaru Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2016] NZCA 137.

b. A daily recovery payment of $7.00 will be paid to cover the two ten minute breaks. If a short day occurs and there has only been one break taken the full payment of $7.00 will be paid.

c. On Saturday processing only one break will be paid.

[6] Lean Meats paid affected employees a rest break allowance initially of $6.87 per day, increased to $7 per day from 1 July 2013. The Union claimed that this clause in the collective employment agreement (which it never signed) did not comply with s 69ZD of pt 6D of the ERA.[3]

[7] The claim came before the Employment Relations Authority, and the Union succeeded in its claim for payments at a higher rate than those paid by Lean Meats.[4] Lean Meats then unsuccessfully challenged the Authority's determination in the Employment Court.

[8] Judge Corkill in his decision separately addressed the periods from 1 March 2013 to 5 March 2015 and from 6 March 2015 onwards. This is because there had been an amendment to s 69ZD. In his decision, he focused on the words in the section statute and the other provisions in pt 6D. The Judge noted that pt 6D did not provide for payments being agreed or made at a rate lower than the rate paid for work but did in contrast provide for the possibility of additional or enhanced breaks.[5] There were no alternative options for the payment of rest breaks expressed.[6] He considered the purpose of the provisions, which was to provide for the wellbeing of employees by requiring rest breaks during work and considered that being paid at the lesser rate could thwart this statutory purpose.[7] He concluded that Parliament's intention was for rest breaks to be paid at the same rates for which the employee would be paid for work.[8]

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3 The contractual status of the collective employment agreement was argued and determined in the Employment Court but it is not an issue on this appeal.

4 *New Zealand Meat Workers & Related Trades Union Inc v Lean Meats Oamaru Ltd* [2015] NZERA Christchurch 57.

5 Employment Court decision, above n 1, at [65] and [67].

6 At [66].

7 At [68], citing *Jetstar Airways Ltd v Greenslade* [2015] NZCA 432, [2015] ERNZ 71 at [35].

8 At [69].

Provisions of the Employment Relations Act 2000

[9] For the period from 1 March 2013 to 5 March 2015, s 69ZD provided:

> **69ZD Entitlement to rest breaks and meal breaks**
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> (1) An employee is entitled to, and the employer must provide the employee with, rest breaks and meal breaks in accordance with this Part.
>
> (2) If an employee's work period is 2 hours or more but not more than 4 hours, the employee is entitled to one 10-minute paid rest break.
>
> (3) If an employee's work period is more than 4 hours but not more than 6 hours, the employee is entitled to—
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> (a) one 10-minute *paid* rest break; and
>
> (b) one 30-minute meal break.
>
> (4) If an employee's work period is more than 6 hours but not more than 8 hours, the employee is entitled to—
>
> (a) two 10-minute *paid* rest breaks; and
>
> (b) one 30-minute meal break.
>
> (5) If an employee's work period is more than 8 hours, the employee is entitled to—
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> (a) the same breaks as specified in subsection (4); and
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> (b) the breaks as specified in subsections (2) and (3) as if the employee's work period had started at the end of the eighth hour.
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> (Emphasis added).

[10] This provision for breaks at specified times was replaced by a more flexible formula, which came into force on 6 March 2015. That new section, after setting out a more flexible provision for the taking of breaks, provided in subs (3) that "An employee's entitlement to rest breaks under this section is to *paid* rest breaks."[9] Judge Corkill considered that the same reasoning and conclusion applied to the phrase "paid rest breaks" in both sections.[10]

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9 (Emphasis added).
10 At [73].

Our analysis

[11] Text and purpose are the key drivers of statutory interpretation.[11] The Court must have regard to both the immediate words, and the context of the words in the section and the section in the Act. The Court will strive to discern the purpose behind the words from the Act itself, and from any other relevant materials that led to its enactment.[12]

[12] We turn first to consider whether there is a clear meaning for the words of s 69ZD. The text of s 69ZD[13] indicates nothing more than a payment being made for the 10-minute rest break. The word "paid" is not qualified or explained. Theoretically a payment of one cent could meet the requirement as there would be a sum "paid".[14] Obviously that is not the intended meaning. On the other hand the section concerns the "employee's work period". The entitlement for a "paid rest break" arises when an employee has been working for more than a certain period of time. Given that the required "break" is from the employee's "work" and it is to be "paid", a natural inference is that what is to be paid for the break is that which is being paid for the work at the time. The worker is paid through the break as if it had not been taken.

[13] Mr Quigg for Lean Meats resists such an interpretation. As the submissions developed before us, he submitted that "paid" could be seen as meaning "paid at the amount agreed between the parties". He argued this construction would be consistent with the principle of freedom of contract. He also pointed to there being a detailed formula for payment of employment relations education leave at s 79 of the ERA and also descriptive formulas in the Holidays Act 2003.[15] So Mr Quigg submits Parliament has chosen not to prescribe any rate in s 69ZD, leaving it open for parties to agree on an appropriate rate.

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11 Interpretation Act 1999, s 5(1).

12 *Commerce Commission v Fonterra Co-operative Group* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

13 In this part of the judgment we are dealing with the words of s 69ZD as it applied for the period 1 March 2013 to 5 March 2015.

14 There was an exchange with counsel about whether the minimum wage would apply to the rate of payment for rest breaks, but the point was not actively pursued by counsel and there was some doubt as to whether it would apply: see Minimum Wage Act 1983, s 6.

15 Holidays Act 2003, ss 21–25, 33–34, 49–50, 60 and 71.

[14] The meaning of the text must always be cross-checked against the purpose, and it is necessary to consider the conflicting interpretations against the wider context of the ERA.[16] Before s 69ZD was enacted the position was that employees had no statutory right to rest breaks at all, and certainly no right to be paid for them. The explanatory note that accompanied the Bill that led to the enactment of s 69ZD stated:[17]

> The objective of these amendments is to create minimum standards for a modern workforce in respect of … the provision of rest and meal breaks. Further, these amendments support government policy concerning the choices of employees, particularly regarding their work-life balance and caring responsibilities.

[15] The purpose of creating a statutory requirement for rest breaks was considered by this Court in *Jetstar Airways Ltd v Greenslade*.[18] It was stated:

> … pt 6D of the ERA is concerned solely with requirements for rest and meal breaks for employees during work periods as defined. It creates specific entitlements for employees where none existed before under the ERA. It applies to all employees irrespective of who their employers may be or the industries in which they may be employed.

[16] As the Court noted, the purpose of the new minimum standards for rest and meal breaks was to benefit employees by providing for a better work-life balance.[19] Parliament's intention was to provide for the wellbeing of employees by requiring them to take specified rest and meal breaks during work periods.[20] Parties are not permitted to contract out of the entitlement.[21]

[17] Employees may not benefit if employers have an unrestricted choice of what rate they will pay for rest breaks. If employers pay employees less than the amount they would otherwise be paid for the break period, employees will lose money, and may choose to take no break at all (there is no requirement for employees to take

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16 *Commerce Commission v Fonterra Co-operative Group*, above n 12, at [22].

17 Employment Relations (Breaks and Infant Feeding) Amendment Bill 2008 (205-1) (explanatory note) at 1.

18 *Jetstar Airways Ltd v Greenslade*, above n 7, at [21]. The Supreme Court declined an application for leave to appeal: *Jetstar Airways Ltd v Greenslade* [2015] NZSC 187.

19 At [28].

20 At [35].

21 Employment Relations Act 2000, s 238.

their rest breaks).[22] If employees do not take their rest breaks, the purpose of improving their work-life balance is defeated. The purpose of this part of the Act is only met if employees are not penalised for taking a break.

[18] It was initially submitted by Lean Meats that the correct way to consider the section was that the parties could agree the rate to be paid. However, when faced with the question of what would happen if they could not agree, Mr Quigg proposed that under the section they must agree. Such a surprising requirement would be inconsistent with the recognition in the Act of the inequality of bargaining power between employer and employee.[23] It assumes a freedom of contract that in relation to minimum entitlements the Act does not. Further, it is not indicated by the words or context of the section, and would require implying additional words.

[19] The concept of a rate depending on the agreement of parties would leave a potential lacuna if they could not agree. At that moment the section would be unworkable. In contrast, the section works well without straining the language or the practical realities, if the interpretation of "paid" as paid at the rate the employee would be paid to work at that time, applies. The basic rate of pay remains open to negotiation between the parties. The same reasoning applies to the wording of s 69ZD after the 6 March 2015 amendment.

[20] Mr Quigg argued that this interpretation involved Judge Corkill unnecessarily rewriting the section by reading in words that are not there. We see this as a straw man. There is no need to add words to s 69ZD, as the meaning derives from the use of the word "paid" as we have outlined. Reading the word in its context, it can only mean paid at the existing rate.

[21] We are also unconvinced by Mr Quigg's submission that the Employment Court's interpretation could lead to practical problems in calculating rest break payments for employees who could be on rates of pay that varied through the day. We accept Mr Churchman QC's submission that in most cases, where a single rate is being paid, there will be no difficulty at all in making the calculation. Even when

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22 Under s 69ZD employees have an *entitlement* to minimum rest breaks and employers a commensurate *obligation* to provide them.

23 Section 3(a)(ii).

there are variable rates, employees will have been receiving a rate of pay at the time of the break and we have no doubt that a payable rate could be discerned.

[22] In the course of his argument Mr Quigg sought to rely on statements in the affidavit of Mr Craig Hickson filed in support of the leave to appeal application. Ultimately the request was not pursued. We record that it is unlikely that we would have admitted any such evidence. Affidavits in support of an application for leave to appeal can be used for that purpose only and are not a back door for the admission of new evidence on the substantive appeal.

Result

[23] We conclude that the Employment Court did not err in its finding. Indeed we agree with Judge Corkill's reasoning. The relevant provisions of pt 6D of the ERA required rest breaks to be paid at the same rate for which the employee would be paid to work.

[24] The appeal is dismissed.

[25] We discussed costs with counsel. In this case they must follow the event. The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Brown and Bates Ltd, Napier for Appellant
Peter Sara Lawyer, Dunedin for Respondent