

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 135
ARC 9/11**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN NZ AMALGAMATED ENGINEERING
PRINTING & MANUFACTURING
UNION INC
Plaintiff

AND AMCOR PACKAGING (NEW
ZEALAND) LIMITED
Defendant

Hearing: 14 July 2011
(Heard at Auckland)

Appearances: Greg Lloyd, counsel for the plaintiff
Richard Harrison, counsel for the defendant

Judgment: 21 October 2011

JUDGMENT OF JUDGE A D FORD

The issue

[1] The plaintiff (the union) has challenged in this Court the whole of a determination¹ of the Employment Relations Authority (the Authority) dated 11 January 2011, which dealt with the interpretation of a provision in a collective employment agreement relating to overtime. The clause in the collective agreement defined overtime as time worked in excess of 40 hours per week. The short point at issue between the parties was whether authorised absences from work counted as hours worked for the purposes of calculating the 40 hours per week.

¹ [2011] NZERA Auckland 7.

[2] The union contended that under the clause in question authorised absences from work are deemed to be time actually worked. The defendant argued to the contrary, submitting that the union's interpretation required the Court to rewrite the agreement because the clause did not say that authorised absences are to be treated as actual hours worked for the purposes of calculating overtime.

[3] The Authority upheld the defendant's approach. After noting that the relevant provision in the collective agreement drew a distinction between authorised and unauthorised absences, it concluded that authorised absences were not to be counted as time worked for the purposes of calculating overtime as they did not constitute actual hours worked.

Background

[4] The Court was told that the defendant (Amcor) manufactures Coke drink cans and the 'pop-up tops' for such cans. The company is based in Wiri and has a workforce of approximately 65. The workers' terms and conditions of employment are covered by the Amcor Beverage Cans Australasia Employees Collective Agreement (the collective agreement) which came into force on 25 November 2009 and operates until 24 November 2011.

[5] The dispute in the present case centres around cl 10 of the collective agreement which I set out in full:

10. OVERTIME - DAY EMPLOYEES

10.1 DEFINITION

Overtime is defined as:

- Time worked in excess of 40 hours per week.
- Time worked in excess of the agreed ordinary hours of work provided in **clause 9**.

10.2 Overtime shall be calculated on a daily basis subject to 40 actual hours being worked by an employee between Monday and Friday. Unauthorised absences shall not be counted as actual hours worked for the purposes of calculating overtime. Any hours of unauthorised absence shall be deducted from the total hours in any one week. Following any such deduction, overtime shall remain payable for hours worked in excess of 40 actual hours.

Authorised absences are as provided for in this agreement. Authorised unpaid leave may be granted by arrangement between an employee and the company.

Authorised absences shall not be deemed as default for the purposes of overtime calculation.

10.3 Overtime shall be paid at the rate of time and a half for the first 8 hours and double time thereafter. Provided that double time is paid for working after 10.00pm, before 6.00am and all day Sunday.

...

[6] There is another provision in the collective agreement (cl 14.5) which deals with the calculation of overtime for shift workers as opposed to the “day employees” covered by cl 10. Clauses 14.5.1, 14.5.2 and 14.5.3 are virtually identical to cls 10.1, 10.2 and 10.3 with two exceptions. First under cl 14.5.1 there is a third bullet point which does not appear in its counterpart, cl 10.1, which reads: “Time worked on any rostered day off.” Secondly, the words, “Authorised unpaid leave may be granted by arrangement between an employee and the company” which appear in cl 10.2 do not appear in its counterpart, cl 14.5.2. Some reference was made in the evidence to the clauses dealing with overtime for shift workers but the pleadings confine the issue in this case to the calculation of overtime for day employees.

[7] There appeared to be some conflict in the evidence as to how the dispute first arose. The company’s evidence indicated that the issue first came to its attention about April 2009 when it was raised by an employee through his union organiser. The worker had indicated that his view of the situation was that if he took a day’s absence from work then, for the purposes of determining his overtime entitlement, his eight hour absence still counted towards his 40 hours per week. Amcor obtained legal advice on the clause in question in May 2009 and it then became one of a number of issues included in the negotiations which commenced in September 2009 for the new collective agreement. Privilege was waived by Amcor and a copy of the legal opinion was made available to the union. The union’s evidence was that the overtime issue arose in the context of discussions with the company regarding relevant daily pay. In all events, the parties were not able to reach agreement on the overtime point, nor was it resolved through mediation. Eventually the union gave notice of dispute and commenced proceedings in the Authority.

[8] The Authority held that in terms of cl 10.2 of the collective agreement, absences, whether authorised or unauthorised, did not count as actual hours worked. In summarising its conclusions, the Authority stated:

[20] Authorised absences are not to be counted as time worked for the purpose of calculating overtime. They do not constitute actual hours worked.

[21] Unauthorised absences are to be deducted from the hours actually worked. If a person has had a four hour absence, four hours will be deducted from the hours that person has actually worked.

[9] Before me, Mr Harrison, counsel for Amcor, contended that the Authority had correctly applied the natural and ordinary meaning of the words and phrases within cl 10.2. Mr Harrison submitted:

10. The purpose of the overtime calculation is reasonably self-evident; it is intended to require employees to put in 40 actual hours of work before being paid at a higher overtime rate of pay. It is to incentivise attendance and penalise unauthorised absences.

[10] Counsel for the plaintiff, Mr Lloyd, submitted that the Authority determination was wrong and was at odds with the plain meaning of the words in question. Mr Lloyd submitted:

14. Clause 10.2 provides that overtime shall be calculated on a daily basis subject to 40 actual hours being worked. In isolation those words could be taken to mean an employee must be present and carry out their duties before such hours can be counted for the purpose of calculating overtime.

15. However those words cannot be viewed in isolation. They can only be given meaning by examining clause 10 as a whole. Clause 10 goes on to further define the meaning of those words by referring to what is excluded in that definition, namely *unauthorised absences*. It does not exclude authorised absences. Had it been the intention of the parties to exclude both authorised and unauthorised absences the agreement could easily have reflected that.

16. In such circumstances the principle of *expressio unius est exclusio alterius* should apply.

17. The fact that the agreement only excludes unauthorised absences in the calculation of overtime must, by implication, mean authorised absences are included. ...

[11] The contentions advanced by both counsel have merit. The clause in question appears to be capable of more than one meaning and so, on the face of it, there is an ambiguity in the wording which must now be clarified by this Court.

Interpretation of collective agreements

[12] The leading authority on contract interpretation in this country is the decision of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.² That decision related to the construction of a commercial contract but the Court of Appeal in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*³ made it clear that the principles of interpretation prescribed in *Vector* had equal application to employment agreements.⁴ The court is required to apply a principled approach to the interpretation of employment agreements and disputes as to meanings must be determined objectively. *Vector* highlighted the significance of the awareness of context as a necessary ingredient in ascertaining the meaning of contractual words emphasising commercial substance and purpose over semantics and the syntactical analysis of words.

[13] In *Vector*, Justice McGrath at [61] summarised and adopted the five principles of interpretation fashioned by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*:⁵

In summary, Lord Hoffmann said that interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.

[14] In the same case, Justice Tipping set out the relevant legal principles of interpretation in these terms:

² [2010] NZSC 5, [2010] 2 NZLR 444.

³ [2010] NZCA 317.

⁴ See [36]-[37].

⁵ [1998] 1 WLR 896 at 912-912.

[19] The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. In order to be admissible, extrinsic evidence must be relevant to that question. The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. 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 the negotiating stance was at any particular time.

[15] Later in his judgment, Justice Tipping noted that, “generally speaking, issues of contractual interpretation arise in three circumstances: mistake; ambiguity; and special meaning.”⁶ Relevantly, in this context His Honour stated:⁷

An ambiguity arises when the language used is capable of more than one meaning, either on its face or in context, and the court must decide which of the possible meanings the parties intended their words to bear.

[16] Justice Tipping analysed the situations when extrinsic evidence is admissible as an aid to interpretation confirming its legitimate availability in supplying context to the contract⁸ and clarifying the meaning of words which would otherwise be ambiguous:

[31] ... The key point is that extrinsic evidence is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both or all parties intended their words to bear. Extrinsic evidence is also admissible if it tends to establish an estoppel or an agreement as to meaning. Such an agreement can demonstrate a special (private dictionary) meaning or an accepted meaning of words which would otherwise be ambiguous. I should expand a little on the latter proposition.

[32] If the parties have reached agreement on what meaning an otherwise ambiguous word or phrase should have for their purposes, that definitional agreement is itself an objectively determinable fact. When the issue is which of two possible meanings is objectively the more probable, the existence of a definitional agreement is obviously relevant, indeed it should be decisive. There is no logic in ascribing a

⁶ At [33].

⁷ At [33].

⁸ At [23].

meaning to the parties if it is objectively apparent they have agreed what that meaning should be.

The evidence

[17] The first witness for the union, Mr Stuart Hurst, has been an organiser employed by the union for 15 years. He produced to the Court a separate agreement which he identified as the 1991 Metal and Manufacturing Industries Collective Agreement (the Metals Agreement). He said that the Metals Agreement applied to approximately 100 employers and he had been associated with the renegotiating of that agreement since 2002. Mr Hurst described the overtime clause in the Metals Agreement (which had first been introduced in 1992) as identical to the wording of the collective agreement in the present case and he said that the overtime provision had first been included in the Amcor collective agreement in 2001. The witness explained that under the Metals Agreement authorised absences are not deducted from total hours worked when calculating the entitlement to overtime rates of pay but unauthorised absences are different because they are not added to the total hours for the week.

[18] In cross-examination, Mr Hurst conceded that there were some differences between the overtime provisions in the collective agreement and the Metals Agreement. Mr Harrison objected to Mr Hurst's evidence on the grounds of relevance, stressing that the Metals Agreement did not involve Amcor and that the evidence of the witness' involvement in the negotiations of that agreement was evidence of subjective intent only.

[19] The second witness for the union was Mr Leslie Bell. Mr Bell had worked for Amcor for approximately 14 and a half years and had been a union delegate for seven years. Mr Bell gave evidence as to how the overtime provisions operated in practice:

10. If you have a sick day, on Friday, and you have sick leave owing to you then your sick leave goes to make up the 40 hours and then you go on to time and a half. If you have no sick pay available then you only get 32 hours for that week and the overtime would revert back to ordinary time to make the 40 hours.
11. So you work Monday and Tuesday at 8 hours each, then take Wednesday off sick but you have no sick pay, you will be paid nothing

for that day. It is treated as an unauthorised absence. If you work 8 hours on Thursday and Friday, you have only worked 32 hours and any overtime worked on Saturday will be paid at T1 rate until such time as you complete 40 hours. And Sunday is T2 anyway regardless.

12. But if you had sick leave available, that Wednesday would be paid at 8 hours and any overtime worked on the Saturday will be paid at T1.5 rate.
13. Authorised absence is when you say you have to go and see the doctor and they say it is okay for you to go. Then it is an authorised absence and you are paid for that absence. The same applies if you take annual leave or bereavement leave. But if you just take the time off without permission then it is unauthorised absence and you would be paid nothing for those hours. As I said that is how it has always worked and seems consistent with the wording of the collective agreement.
14. The company now says that they are entitled to change the way they deal with both authorised and unauthorised absences for the purpose of calculating and paying overtime. They now say that authorised absence such as paid sick leave does not count toward hours worked for the purpose of overtime. And they are also now saying that workers are punished twice for unauthorised absences. Not only are any such hours not counted towards the calculation of overtime but are actually deducted from the hours worked.

[20] Mr Bell's evidence was significant. What it appeared to establish was that Amcor had never applied the overtime provision in the way that it is now seeking to establish through the present proceeding. Despite the wording of cl 10.2 of the collective agreement, hours of unauthorised absences from work have never been deducted from the total hours worked in any one week. Rather, these hours are simply not paid. In relation to authorised absences, a distinction is clearly made in practice between authorised absences on pay and authorised absences without pay. Leave on pay counts towards the 40 hours per week for the purposes of defining overtime whereas leave without pay does not count towards the 40 hours per week figure. Mr Bell was not challenged on his analysis of how the overtime provision had, in fact, been applied by Amcor over the years.

[21] Only one witness was called on behalf of Amcor. Mr Nabil Askari, who is currently the site manager at Amcor, has held that position since 1 May 2009, having commenced working for the company in September 2007. Mr Askari said that he had no knowledge of the Metals Agreement referred to by Mr Hurst. Significantly, Mr Askari agreed with the evidence that had been given by Mr Bell as to how the overtime provisions operated in practice. He stated:

7. Leslie Bell is correct that the approach taken has been to count authorised absences in the overtime calculation. However, I am not so confident they have actually been [deducted] as unauthorised absences, and the approach to the relevant daily pay question has been more generous than that provided by the agreement. This is a dispute that was instigated by the Union and not the company, it has always been our preference to resolve this and other differences around the collective agreement by way of consultation and discussion.

[22] In answer to a question from the Court, Mr Askari indicated that he could only recall two unauthorised absences during the four years he had been with the company. He also confirmed that the company had never deducted unauthorised leave for overtime purposes. Mr Askari confirmed that although the determination of the Authority found in the company's favour, Amcor had not taken any steps to change its practice in relation to the overtime provision. When asked by the Court to explain what would be involved in changing the system to accommodate the Authority's findings, Mr Askari said:

Honestly Your Honour I would be speculating because again we would sit down with the staff and the union and work out a reasonable agreement of one sort or the other. I honestly could not say one way or the other because again there is in a direct way I am not the only decision maker in this issue so we will consult, I will consult with my management as well, reach an agreement as to how that agreement or how that change would look like. I haven't formed an opinion either way to be honest.

Discussion

[23] First, I uphold Mr Harrison's objection to the relevance of the evidence relating to the Metals Agreement. Mr Lloyd claimed that the document was relevant in that, "the way the leading manufacturing union and 100 employers apply the clause must form part of the factual matrix or surrounding circumstances." I do not accept that submission. Interpretation issues can only be addressed on an objective basis. There was no evidence that Amcor was ever a party to the Metals Agreement or had any knowledge about the application of its overtime provisions. At its highest, the evidence in relation to the Metals Agreement does no more than tend to prove that perhaps the union negotiators to the Amcor collective agreement intended the overtime clause to carry the meaning of its counterpart provisions in the Metals Agreement. As noted in [14] above, however: "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 the negotiating stance was at any particular time."

[24] Putting the present litigation to one side, it is clear from the evidence that, notwithstanding the obvious ambiguities in the overtime clause, since 2001 the parties have proceeded on a common understanding as to its meaning and how it would be applied in practice (see [20] and [21] above). That common understanding carried through each renewal of the collective agreement and only became an issue when Amcor obtained a legal opinion in May 2009, which suggested that the clause might have a different meaning from that which the parties had operated under.

[25] The law recognises that parties may reach agreement between themselves as to the meaning of an otherwise ambiguous contractual word or phrase and evidence of the existence of such a “definitional agreement” is not only relevant but “should be decisive”.⁹ A party seeking to assert that the words of the contract should carry some meaning other than the commonly understood meaning may be estopped by convention from doing so.

[26] In the present case, the definitional agreement reached between the parties has little in common with the actual wording of cl 10 of the collective agreement. Thus, cl 10.2 requires hours of unauthorised absence to be deducted from the total hours in any one week but the evidence was that no such deductions had ever been made. The definitional agreement also provided that authorised absences on pay would count as actual hours worked for the purposes of calculating the 40 hours per week threshold figure before overtime rates of pay became applicable but authorised absences without pay would not count. Again, cl 10 of the collective agreement does not make any such distinction nor does it contain any direct stipulation that would suggest authorised absences in any form could count as actual hours worked for the purposes of calculating a worker’s overtime entitlement.

[27] The doctrine of estoppel by convention was explained in detail in *Vector*; indeed it formed the basis of the judgments of Justices Tipping, McGrath and Wilson. Justice McGrath stated:

[68] The essence of estoppel by convention and its distinguishing characteristic is that there is mutual assent or a common assumption as to the relevant fact:¹⁰

⁹ See above at [16].

¹⁰ *National Westminster Finance New Zealand Ltd v National Bank of New Zealand Ltd ...* at p 24 per Tipping J for the Court, partially reported as [1996] 1 NZLR 548.

...both parties are thinking the same; they both know that the other is thinking the same and each expressly or implicitly agrees that the basis of their thinking shall be the basis of the contract.

[69] The effect of the estoppel is to prevent a party from going back on the mutual assumption if it would be unjust to allow him to do so.

[28] Justice Wilson in *Vector* dealt with estoppel by convention in the context of it being one of the three exceptions to the general principle that the words of a commercial contract should be given their ordinary meaning in the context in which they appear:

[124] The third exception is that a party asserting that the words of the contract should carry their ordinary meaning may be estopped by convention from doing so, if that would be a departure from the parties' common understanding (the "convention") that the words were not to carry their ordinary meaning. ...

[125] As Professor David McLauchlan said in a note on *Air New Zealand*:

...there can be no objection in principle to the parties to a written contract being able to choose their own private code or convention as to the meaning of the terms of the contract.

[29] The fact that the definitional agreement reached between the parties in the present case bore little resemblance to the actual provisions in cl 10 of the collective agreement does not affect the application of the estoppel principle. As Justice Tipping noted in *Vector*, estoppel will usually arise from the adoption of a special meaning and a special meaning amounting to a definitional agreement can take many forms and even "bear a meaning which is linguistically impossible (for example, black means white)."¹¹

[30] In the present case, estoppel by convention was neither pleaded nor advanced in argument. It should have been. But a similar situation existed in *Vector*. Estoppel had not been pleaded in that case nor had it been contended for until after the hearing of the Supreme Court appeal. Justice McGrath observed:

[85] While estoppel by convention should also be pleaded in such litigation I see no unfairness in this Court addressing that issue. ...

Likewise, in terms of this Court's equity and good conscience jurisdiction, I see no unfairness in applying the estoppel by convention principle notwithstanding its

¹¹ At [33].

omission from the pleadings or argument. There can be no question of surprise or prejudice. The application of the estoppel by convention principle simply gives effect to how both parties have interpreted and applied the relevant provision in the collective agreement over the years.

Conclusions

[31] In all the circumstances it would be unconscionable, in my view, to now seek to ascribe a different meaning to the overtime provision in the current collective agreement from the meaning that has been applied to it through the definitional agreement I have described.

[32] The defendant is estopped from contending (without the consent of the union) that the overtime provision in cl 10 of the current collective agreement should be interpreted in any way that differs from the manner in which the provision has been interpreted and applied under previous collective agreements as described at [26].

[33] The Authority's determination dated 11 January 2011 is hereby set aside pursuant to s 183(2) of the Employment Relations Act 2000 and this judgment now stands in its place.

[34] Responsibly, as the issue in the case involved a dispute over the interpretation of a collective agreement, costs were not sought by the defendant in the Authority and the plaintiff has not sought costs in this proceeding.

A D Ford
Judge

Judgment signed at 9.00 am on 21 October 2011