**IN THE EMPLOYMENT COURT**
**CHRISTCHURCH**

**[2015] NZEmpC 176**
**EMPC 134/2015**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | LEAN MEATS OAMARU LIMITED<br>Plaintiff |
| AND | NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INCORPORATED<br>Defendant |

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| Hearing: | 3 September 2015<br>(heard at Christchurch) |
| Appearances: | J L Bates, counsel for the plaintiff<br>P Churchman QC, counsel for the defendant |
| Judgment: | 6 October 2015 |

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**JUDGMENT OF JUDGE B A CORKILL**

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## Introduction

[1] New Zealand Meat Workers and Related Trades Union Incorporated (the Union) raised a claim against Lean Meats Oamaru Limited (Lean Meats) for unpaid rest breaks for its members when working at an abattoir at Oamaru. It was alleged there was non-compliance with the relevant provisions of Part 6D of the Employment Relations Act 2000 (the Act), which took effect on 1 April 2009. It also alleged that because there had not been compliance with the statutory provisions for paid rest breaks, there was a consequential claim for overtime.

[2] The Employment Relations Authority (the Authority) in its determination of 8 May 2015 concluded:[1]

> a. Lean Meats did not pay affected employees represented by the applicant union for rest breaks in accordance with the requirements of the Act between 1 April 2009 and 1 March 2013;
>
> b. Lean Meats has not paid affected employees represented by the applicant union an adequate amount for rest breaks since 1 March 2013; and
>
> c. Lean Meats has not paid affected employees represented by the applicant union overtime that should have been paid as a result of the failure to pay rest breaks since 1 April 2009.

[3] Lean Meats challenged the determination. It contends that rest breaks were paid for in accordance with the legislation. Lean Meats says that on a proper construction of the relevant collective employment agreements (CEAs), the parties included compensation for rest breaks when they agreed the amounts which hourly workers and piece workers would be paid at the abattoir. Consequently, it asserts the Authority erred in each of its findings. For its part, the Union says that the Authority's determination was correct.

## Key facts

[4] The Oamaru Borough Council established a local abattoir which was subsequently acquired by ABCO Meats Limited (ABCO). In late 2004, ABCO entered into a collective employment agreement (the 2004 CEA) with the Union. It covered work relating to the slaughter and primary processing of animals at the abattoir. Clause 7 of this CEA dealt with rest breaks in the following terms:

> 7. **SMOKO**
>
> Employees shall be allowed 2 breaks of half-hour during any one day – one of which shall be paid and one shall be unpaid. The paid break shall only be paid where an employee has completed 4 hours actual work and work is to continue after the break. The timing of the breaks shall be scheduled to suit operational needs.

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[1] *New Zealand Meat Workers & Related Trade Union Inc v Lean Meats Oamaru Ltd* [2015] NZERA Christchurch 57 at [25].

[5] Rates of remuneration for the relevant positions were described in a schedule which confirmed that in some instances workers were paid on an hourly basis, and in other instances they were paid according to a piece rate.

[6] In early 2006, ABCO was placed in receivership. Lean Meats, a Hastings-based farmer cooperative, acquired the facility from the receivers of ABCO later that year, with workers being retained on the same terms and conditions as applied previously.

[7] In December 2006, Lean Meats and the Union entered into a memorandum of understanding (MOU) in the context of an upgrade of the boning room and a move towards the exporting of processed product. The MOU recorded arrangements which would be trialled for departments including the boning room, mutton and lamb slaughter, and beef slaughter. The number of animals which would be processed daily would increase and smoko breaks would continue as described in the 2004 CEA.

[8] The evidence establishes that under this trial, the daily tally increased from 770 units to 1,200 units per day; as a result of the increased throughput, the number of workers increased, and their earnings also increased by an average of two to three dollars per hour.

[9] The parties then bargained for a new CEA, which ultimately took effect on 28 May 2007 (the 2007 CEA). It contained a similar coverage clause as had been contained in the 2004 CEA. The rest breaks clause, however, was different. It provided:

> 7. **SMOKO**
>
> Employees will be allowed three breaks during any one day, two fifteen minute breaks and a half hour lunch break. No payment will be made in respect of Piece or Hourly Workers (smoko payment inclusive). The timing of the breaks shall be scheduled to suit operational needs.

[10] Again, rates of remuneration were incorporated in a schedule to the CEA, with reference, in some instances, being made to "old" piece rates and to "new" piece rates. I shall discuss these provisions more fully later.

[11] In December 2007, a further trial to increase tallies to 2,000 units per day was implemented. This again resulted in the number of workers being increased, and additional earnings were obtained by slaughter-board labourers. The evidence establishes that on average, hourly pay rates increased by one dollar from those which had applied 12 months previously.

[12] A succession of three further CEAs followed, that is for 2008 to 2009 (the 2008 CEA), 2009 to 2010 (the 2009 CEA) and 2010 to 2011 (the 2010 CEA), each of which included a smoko clause in the same terms as had been contained in the 2007 CEA. The documentation which the Union holds for the purposes of the bargaining undertaken for the first two CEAs contains no reference to the subject of paid rest breaks, or increased hourly rates being compensation for unpaid breaks. The Union raised this issue in 2010.

[13] The Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008 (the Amendment Act) introduced Part 6D[2] to the Act. Those provisions took effect from 1 April 2009[3] and will be analysed below. At that time,[4] s 69ZD of the Act provided that if an employee's work period was more than four hours but not more than six hours, the employee was entitled to one 10-minute paid rest break and one 30-minute meal break; and if the work period was more than six hours but not more than eight hours, the employee was entitled to two 10-minute paid rest breaks and one 30-minute meal break.

[14] Against that background, the topic of payment for rest breaks arose during bargaining in 2010. Mr Carran, President of the Otago Southland Branch of the Union recorded in his notes prepared for bargaining purposes: "plant workers. No smoko". Mr Carran explained that this referred to the issue of paid rest breaks which was raised as a counter-offer to one of Lean Meats' claims during bargaining. Mr Carran said that the Union wanted rest breaks to be paid, but this did not result in any alteration to the smoko clause which had applied previously; Mr Carran said

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2 The Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008, s 6.

3 The Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act, s 2(2).

4 This section was replaced on 6 March 2015 by s 50 of the Employment Relations Amendment Act 2014.

Lean Meats' response was that it was not a good time to raise the issue. The clause was incorporated unaltered in the 2010 CEA which was signed by the Union in January 2011 and by Lean Meats in March 2011. Mr Carran also said that the Union had never accepted that payment for rest breaks had been incorporated in 2007 in hourly and piece rates.

[15] Bargaining again occurred for the purposes of the next CEA, which was intended to take effect from April 2011. The smoko clause was incorporated in its previous form. However, the CEA was unsigned because the parties were unable to agree to all aspects of it although the parties worked to it.

[16] In 2012, the Union raised the matter of paid breaks with a Labour Inspector from the Ministry of Business, Innovation and Employment. The correspondence relating to the Labour Inspector's consideration of this issue was placed before the Court. The Labour Inspector expressed the view that the smoko clause which had hitherto been adopted did not comply with s 69ZD in its then form, because "an increased hourly rate in lieu of a paid break does not compensate employees for any rest break that is not paid". Whilst the referral of this issue to the Labour Inspector is an aspect of the narrative, I place the Labour Inspector's opinion to one side since it relates to the very issue which the Court itself is required to determine.

[17] In 2013, a different provision relating to rest periods and meal break entitlements was incorporated into the CEA which the parties negotiated that year. The Court was informed that the document was ratified but remained unsigned, although its terms have been applied. Mr Carran said that from the Union's perspective, a major stumbling block preventing the document being signed was the issue of rest breaks. The relevant clause stated:

> 8. **REST PERIODS AND MEAL BREAK**
>
> 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.
>
> 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 break will be paid.

[18] Mr Carran stated that from 1 March to 1 July 2013, Lean Meats paid affected employees a rest break allowance of $6.87 per day, which increased to $7 per day on 1 July 2013. This evidence was not contested. Affected employees working less than an eight-hour day, which does not occur often, received the same allowance even if they have stopped work for only one break.

## Submissions

[19] Mr Bates submitted for Lean Meats:

a) In respect of the period 1 April 2009 to 1 March 2013, Lean Meats had complied with both the relevant CEAs and the legislation. Pay was "smoko payment inclusive" meaning that rates paid to hourly and piece workers included smoko break entitlements. It was submitted that the only commercially sensible meaning was that the word "inclusive" referred back to piece and hourly rates. From April 2009, relevant provisions of the Act did not prohibit payment for such breaks being included in an hourly rate, or indeed a salary. Any contrary interpretation would render the bracketed words redundant. There was no statutory impediment to including a rest break payment in an hourly rate. Section 69ZD does not state otherwise. The section is to be contrasted to s 28(1)(c) of the Holidays Act 2003 which proscribes that in certain circumstances the annual holiday pay may be paid as an "identifiable component of the employees' pay". It was also noted that cl 1.3 of each of the CEAs provided that the agreement superseded all previous employment agreements or arrangements between the parties whether expressed or implied, and that the entire agreement should be taken as meaning what it says, in accordance with the principles set out in *PAE (NZ) Limited v Brosnahan*,[5] and in *White v Reserve Bank of New Zealand*.[6] The Court should conclude that Lean Meats' intention was to pay its workers for their breaks. Counsel also referred to *First Union Incorporated v General Distributors Limited*,[7] where the Authority

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5 *PAE (NZ) Ltd v Brosnahan* [2009] NZCA 611.
6 *White v Reserve Bank of New Zealand* [2013] NZCA 663, 2013] ERNZ 367.
7 *First Union Inc v General Distributors Ltd* [2013] NZERA Auckland 61.

considered whether there had been compliance with s 69ZD. It was submitted that the subject clause in the CEA which was considered on that occasion was different, so that the determination was not relevant in the present circumstances. Counsel submitted that the fact that Mr Carran stated he did not notice the insertion of cl 7 in 2007, and that in 2010 he concluded it was not a good time to raise the issue, was irrelevant. The Union agreed to a document which contained cl 7 and any lack of appreciation of the significance of the clause cannot be relevant unless there was an action for rectification, mistake or *non est factum*.

b) With respect to the period from 1 March 2013, Mr Bates submitted that the defendants' contention that the $7 per day allowance was less than most affected employees would have earned according to their hourly or piece rate, was wrong. Mr Bates argued that the provisions of the Act relied on by Lean Meats do not require payment for breaks to be at the same rate as for other hours, providing there was compliance with the Minimum Wage Act 1983 (MWA).

c) In respect of the Union's overtime claim, Mr Bates submitted that the question of whether overtime had been properly paid turned on a proper interpretation of the "hours of work" and "overtime" provisions of the relevant CEAs. The issue centred on s 69ZE(1), which provided that rest breaks and meal breaks were "to be observed during an employee's work period". The question was whether the "work period" was eight hours; the defendant had asserted that if affected workers had paid rest breaks outside of that period, they should be paid overtime. Mr Bates submitted that although the existing ordinary hours of work were 40 hours, being eight hours per day, Monday to Friday, they were to be worked between the hours of 6.00 am and 5.00 pm, which allowed for the hours worked and rest breaks. This was the "work period". Overtime would only be payable outside those hours.

[20] For the Union, Mr Churchman QC submitted:

a) For the period 1 April 2009 to 1 March 2013, the correct interpretation of the smoko clause was that hourly and piece workers were allowed two 15-minute rest breaks and one half-hour lunch break per day, unpaid. The use of the bracketed phrase "Smoko payment inclusive" after the words "No payment will be made …" made it explicit that smoko breaks were not to be paid. The latter phrase reinforced the former phrase. Such an interpretation was consistent with the contextual evidence given by Mr Carran. Furthermore, as a matter of law, rest break payments could not be included in hourly rates, which were a payment for work not rest; or in piece rates, which is a payment for units worked, not rest. Consequently, when the rest break provisions were introduced in 2009,[8] rest breaks of 10-minute duration were to be paid at the same rate as the worker's hourly rate; and no exception was provided with regard to piece work employees. Consequently the smoko clause was not compliant with s 69ZD in its original form. Contracting out of this obligation was prohibited by s 238 of the Act, which provides that the provisions of the Act are to have effect despite any provision to the contrary in any contract or agreement. Section 69ZG(2) was to similar effect, in that an employment agreement could have no effect to the extent that it excludes, restricts or reduces an employee's entitlements under s 69ZD.

b) For the period of 1 March 2013 to the present, the issue was whether cl 8 of the unsigned 2013 CEA complied with the statutory provisions. The clear meaning of the clause was that although workers would be given two 15-minute breaks and one half-hour lunch break during the course of the shift, these would not be paid. Instead, a daily allowance would be paid to cover the two 10-minute breaks. It was accepted that the $7 daily rate should be credited on account of the amount actually due, but for some employees, such an amount would be insufficient – namely those who were paid more than $21 per hour. For employees

[8] The Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act.

earning under that amount, Lean Meats had complied with the statute. It was not possible to contract out of the statutory obligation. For the period from 6 March 2015, when an amended s 69ZD came into effect, there was still a requirement that rest breaks should be paid. There was nothing in the new section that would imply that the appropriate rest break payment would be on the basis of anything other than the normal hourly rate. It was submitted it would be appropriate to interpret the minimum standards for payment of rest break from 6 March 2015 in a manner which was consistent with the requirements for the period prior to that date – that is that employees would be paid at an equivalent hourly rate for their 10-minute breaks. In respect of employees earning more than $21 an hour, Lean Meats had not complied with the Act.

c) The final issue related to overtime. Mr Churchman submitted the threshold for overtime, on a proper interpretation of the agreement, was after eight hours had been worked inclusive of paid rest breaks. Accordingly, the Union sought reimbursement for overtime not paid due to Lean Meats not including the rest breaks in the daily total of hours worked.

## Principles as to interpretation

[21] *Vector Gas Limited v Bay of Plenty Energy Limited*[9] is the leading authority on contract interpretation. It is well established that the principles referred to in that case apply to the interpretation of employment agreements.[10] Judge Ford conveniently summarised the relevant principles in *New Zealand Professional Firefighters Union v The New Zealand Fire Service Commission* where he said:[11]

> [17] In summary it would appear from *Vector* that the starting point for any contractual interpretation exercise 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

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

10 *Silver Fern Farms v New Zealand Meat Workers etc Trade Union* [2010] NZCA 317, [2010] ERNZ 317.

11 *New Zealand Professional Firefighters Union v The New Zealand Fire Service Commission* [2011] NZEmpC 149.

> the contractual text.[12] 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.[13] If the language used is, on its face, ambiguous or floats 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.[14] 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.[15] 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.[16]

[22] Later in the same judgment, Judge Ford referred to another decision which contains statements that are relevant for present purposes:[17]

> [18] Historically, as the Court of Appeal recognised in *Silver Fern Farms*, contextual considerations have always had a particular significance in relation to the interpretation of industrial agreement. At [15] of that case the Court of Appeal noted with approval[18] the approach of Judge Shaw in the Employment Court which had included the following observations from her earlier decision in *New Zealand Merchant Service Guild IUOW Inc v Interisland Line (a division of Tranz Rail Ltd)*:[19]
>
> > … employment agreements are often the product of a history of instruments of varying sorts by which the parties have attempted to define their relationship. The result may be a document which is a mix of new provisions designed to meet changing statutory or industrial requirements grafted onto existing and longstanding provisions.

[23] The foregoing dicta are of assistance when considering the interpretation issues which arise in the present case.

## The legislation

[24] At the material times, Part 6D contained the following provisions:

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12 *Vector Gas*, above n 9, at [80] per McGrath J.
13 *Vector Gas*, above n 9, at [26] per Tipping J.
14 *Vector Gas*, above n 9, at [127] per Wilson J.
15 *Vector Gas*, above n 9, at [31] perTipping J.
16 *Vector Gas*, above n 9, at [19] per Tipping J.
17 *New Zealand Professional Firefighters Union v The New Zealand Fire Service Commission*, above n 11.
18 At [42].
19 *New Zealand Merchant Service Guild IUOW Inc v Interisland Line (a division of Tranz Rail Ltd* [2013] 1 ERNZ 510 at [19].

## Part 6D

## Rest breaks and meal breaks

### 69ZC Interpretation

In this part, unless the context otherwise requires, **work period**–

a. means the period–

(i) beginning with the time when, in accordance with an employee's terms and conditions of employment, an employee starts work; and

(ii) ending with the time when, in accordance with an employee's terms and conditions of employment, an employee finishes work; and

b. to avoid doubt, includes all authorised breaks (whether paid or not) provided to an employee or to which an employee is entitled during the period specified in paragraph (a).

### 69ZD Entitlement to rest breaks and meal breaks

(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–

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–

(a) the same breaks as specified in subsection (4); and

(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.

### 69ZE When employer to provide rest breaks and meal breaks

(1) Rest breaks and meal breaks are to be observed during an employee's work period–

(a) at the times agreed between the employee and his or her employer; but

(b) in the absence of such an agreement, as specified in subsections (2) to (5).

(2) Where section 69ZD(2) applies, an employer must, so far as is reasonable and practicable, provide the employee with the rest break in the middle of the work period.

(3) Where section 69ZD(3) applies, an employer must, so far as is reasonable and practicable, provide the employee with–

(a) the rest break one-third of the way through the work period; and

(b) the meal break two-thirds of the way through the work period.

(4) Where section 69ZD(4) applies, an employer must, so far as is reasonable and practicable, provide the employee with–

(a) the meal break in the middle of the work period; and

(b) a rest break halfway between–

(i) the start of work and the meal break; and

(ii) the meal break and the finish of work.

(5) Where section 69ZD(5) applies, an employer must, so far as is reasonable and practicable, provide the employee with the rest breaks and meal breaks in accordance with the applicable provision in subsections (2) to (4).

…

**69ZG Relationship between Part and employment agreements**

(1) This Part does not prevent an employer providing an employee with enhanced or additional entitlements to rest breaks and meal breaks (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.

(2) An employment agreement that excludes, restricts, or reduces an employee's entitlements under section 69ZD–

(a) has no effect to the extent that it does so; but

(b) is not an illegal contract under the Illegal Contracts Act 1970.

**69ZH Relationship between Part and other enactments**

(1) Where an employee is provided with, or entitled to, rest breaks or meal breaks under another enactment,–

(a) this Part prevails if the breaks provided under this Part are additional or enhanced breaks;

(b) the other enactment prevails if the breaks provided under the other enactment are additional or enhanced breaks.

(2) Despite subsection (1), where an employee is a person who is required to take a rest break by, or under, another enactment, the requirement for a rest break defined by, or under, the other enactment applies instead of the provisions or entitlements for rest breaks or meal breaks provided under this Part.

[25] Amendments were made to some of these provisions, taking effect from 6 March 2015. I will describe the details of these later.

[26] The Court of Appeal recently described the background to the introduction of Part 6D in these terms:[20]

> [28] To the extent that the Bill introduced minimum standards for rest and meal breaks, the evident government purpose was to benefit employees by providing for a better work-life balance. The regulatory impact statement accompanying the Bill noted that while almost 93 per cent of active collective agreements provided for rest and meal breaks, there were some problems regarding the organisation of work in specific sectors which meant that the actual provision of rest and meal breaks might be inadequate. The impact statement added that little was known about whether break provisions were included in individual employment agreements which covered a majority of the work force. The service and manufacturing sectors were identified as appearing to be the most prone to providing less than optimal rest and meal breaks.

[27] Later in the same judgment the Court of Appeal stated:[21]

> … [W]e are satisfied Parliament's intention was to provide for the wellbeing of employees by requiring them to take specified rest and meal breaks during the work period as defined by s 69ZC of the [Act].

[28] I approach the interpretation of Part 6D in light of these statements.

## First issue: period of 1 April 2009 – 1 March 2013

[29] For the purposes of this period it is necessary to determine the correct meaning of cl 7 in the 2009 and 2010 CEAs, which was also incorporated in the unsigned 2011 CEA.

[30] The starting point must be the provisions of the 2007 CEA, since cl 7 was first introduced into that agreement.

[31] That clause contained three elements. The first was that employees would be allowed three breaks during any one day, being two 15-minute breaks and a half-hour lunch break. The second element provided that no payment would be made in respect of piece or hourly workers, with the words "smoko payment

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20 *Jetstar Airways Ltd v Greenslade* [2015] NZCA 432.

21 At [35].

inclusive" being added in brackets. It is this provision which has caused controversy. The third element stated that the timing of the breaks would be scheduled to suit operational needs.

[32] Focusing on the second element, it is evident that the primary statement was that *no payment* for any of the three breaks would be made for those workers who were paid on a piece or hourly basis. The dispute between the parties is as to the effect of the bracketed words. The argument for the Union is that those words reinforce the statement made prior to the bracket; the argument for Lean Meats is that the bracketed words make it clear that a smoko payment for rest breaks only was included in the rates being paid to piece or hourly workers.

[33] That two contrary interpretations have been advanced might suggest that the sentence is ambiguous. However, for three reasons, I consider that the Union's interpretation correctly identifies the agreement of the parties, as objectively determined from the CEA itself.

[34] The first is a linguistic point. On the face of it, the word "payment" as used in the bracketed phrase is a reference to the same word as used in the primary statement of the second sentence. The effect is that no smoko payment will be made for any of the three breaks where the employee is a piece or hourly worker. The grammar is not elegant, but that is not the issue. Rather, the Court must determine what the parties really meant when they used those words.

[35] By contrast the effect of the construction urged for Lean Meats is that the plain and ordinary meaning of the primary statement is rendered nugatory by the bracketed words. On its submission, the primary statement has no meaning because payment is in fact provided in hourly and piece rates, although the extent to which payment was to be made was unclear because this is not defined anywhere in the CEA. To achieve the Lean Meats construction would require additional words to be read in, so that, for example, the sentence would be understood as stating: "No separate payment will be made in respect of piece or hourly work (the rates for which are smoko payment inclusive)."

[36] The second pointer to this conclusion arises from a comparison of clause with the previous position. Clause 7 of the 2004 CEA made it clear that one of the two half-hour breaks would be paid, and one would be unpaid. This provision was carried over by the MOU of late 2006, and it represented the prevailing position at the time the 2007 CEA was agreed. But in 2007, the position changed. Piece and hourly workers would receive no payment for breaks. In my view, the bracketed words reinforced the alteration for the avoidance of doubt. I do not consider that the words are mere surplusage, as was contended for Lean Meats.

[37] The third indicator requires a detailed consideration of the content of sch 2 of the agreement, where rates of payment were described. As I indicated earlier, in respect of a number of positions, (such as slaughter-men/butchers, chain labourers and process labourers) there was a reference to old and new rates per units of animal processed. It is evident that the "old" rates were those which were payable under previous agreements, including the 2004 CEA. "New" rates applied for the term of the CEA. In both instances, an hourly rate was calculated on the basis of throughput – either "880 Ovine" or "1200 Ovine", which I infer is the tally of animals to be processed by those workers during an eight-hour shift. The significance of the calculation of hourly rates for piece workers was apparently to facilitate the calculation of the minimum weekly wage of $414 in cl 9; without such a figure there would, for example, have been no threshold when assessing whether a piece worker had an entitlement to a minimum wage.

[38] Materially for present purposes, the same multiplier was used in respect of both the old and the new units. So, in the case of slaughtermen/butchers the old unit rate of 1.45 meant the labourer was paid $26.58 per hour for 880 units; on a new per unit rate of 1.4935, and applying the same multiplier, the new hourly rate was $27.38. The same observation applies in respect of the rates for such a worker in respect of 1,200 units per eight-hour shift. If the same multiplier has been adopted, the conclusion must be that no provision was made for rest breaks unless such an allowance was factored into the per unit rate, a possibility which is inherently unlikely in the absence of any evidence that this was indeed the parties' agreement. It would not make commercial sense to incorporate payment for time taken for rest

breaks into a piece rate. An approach which factored in payment for rest breaks would more logically be included in the calculation of an hourly rate.

[39] Turning to hourly rates, it is appropriate to compare old and new rates as provided in sch 3, which describes rates of remuneration for the boning room employees. The old hourly rate, for instance, for the boning room employees was $26.07; the new hourly rate was $26.85. If the paid rest break was for 30 minutes – being the agreed period for paid rest breaks under the 2004 CEA – the rate would have increased from $26.07 per hour as it was previously to at least $27.63 per hour in 2007; yet the new rate was fixed at only $26.85 per hour, suggesting no payment for 30 minutes of rest break – or even 20 minutes. There is no evidence that rest breaks were to be paid at a reduced rate. A similar point can be made in respect of the group of workers classified as "Trimmers, Pre-trimmers, System Support, QC".

[40] In summary, at least in respect of those employees whose former rates were included in the 2007 CEA, I conclude that there is no evidence that allowance was made for rest break payments. Such an analysis is not possible from the face of the document in respect of other classes of employee, but it would make no commercial sense to have negotiated paid rest breaks for some hourly and piece workers, and not others. This analysis supports the conclusion that by reference to provisions of the CEA, it is evident the parties did not intend that there would be a paid rest break for those workers who were paid on an hourly rate, or on a piece rate.

[41] A further issue arising from Lean Meats contention relates to the absence of any particulars in schs 2 and 3 as to how payment for rest breaks were calculated. By contrast, the schedules provide a significant level of detail in other respects. There is no confirmation that payment for a break was intended to be on the same basis as before (one half-hour break, and only where the employee has competed four hours actual work and work is to continue after the break); or that there was an agreement as to payment for rest breaks on some other basis. The absence of such details suggests that there was no such agreement.

[42] To this point, the foregoing considerations favour the interpretation advocated for the Union. I next need to cross-check my provisional view of what the words

mean against the contractual context; in doing so I remind myself that this is permissible only to the extent that the extrinsic evidence may establish a fact or circumstance "capable of demonstrating objectively what meaning both or all parties intended their words to bear".[22]

[43] The evidence establishes that there was a focus at the time the 2007 CEA was agreed on increased productivity, achieved by a combination of increased tallies accompanied by pay increases. Mr Carran's evidence was that these factors were reflected in the new rates as introduced to the 2007 CEA, and maintained in the subsequent CEAs.

[44] Mr Green was employed as the General Manager of Lean Meats from May 2006 to November 2010. He said this:

> There were many things that were involved in the negotiation around the payment. I mean there was additional payments made to align ourselves better with the other factories in the South Island, that was a strong negotiating point brought to us from the [U]nion and as a consequence of that, a lot of the lower rate workers were lifted up proportionally more than the higher rate workers, because we were behind [with] what was the practice in the South Island. So there was a part of aligning ourselves with that. Part of it was about increased productivity and part of it was about the inclusion of the smoko breaks.

[45] However, apart from Mr Green's broad assertion that payment was negotiated in respect of rest breaks, the Court has been provided with no evidence as to the form such a negotiation took or as to what the terms of the apparent agreement were; and it is completely denied by Mr Carran who was directly involved. Furthermore, Union documentation regarding bargaining for 2009, 2010 and 2011 contains no reference to paid rest breaks or to increased rates as compensation for unpaid breaks. Commercial commonsense suggests that such an arrangement would need to be renegotiated on each occasion when rates were reviewed. There is no evidence this happened save for the single reference to which I have already referred in April 2010 when the Union bargained unsuccessfully for such a payment for plant workers; that the Union considered it necessary to advance such a claim suggests there was no such existing agreement.

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[22] *Vector Gas*, above n 9 at [31] per Tipping J.

[46] Nor was there any evidence that, after 1 April 2009, different minimal entitlements applied to employees who worked for four to six hours, compared to those who worked six to eight hours.

[47] A document was produced at the hearing, the provenance of which was unclear. It is in the form of proposals to be advanced by Lean Meats for amendment of the 2004 CEA. It included this statement:

> 5. Clause 7. SMOKO Employees working on hourly rate shall be allowed three breaks during any one day; two 15-minute breaks which will be paid and a half-hour break which will be unpaid. No payment will be made in respect of piece workers. "The paid break etc".

[48] Mr Green read his brief of evidence without reference to this document as he had originally intended, appropriately acknowledging that his recollection of the document was unclear. Mr Carran, for his part, said that he did not recall the document in the format in which it was placed before the Court, but he acknowledged that there were extracts in it which were ultimately incorporated in the 2007 CEA; but he did not recall statements relating to smoko breaks. To the extent that the Court was asked to accept that the notes represented Lean Meats' position on smoko breaks during bargaining for the 2007 CEA, the document is of little assistance, since the final version of cl 7 was rather different. The draft clause suggested that workers who were being paid on an hourly rate would receive a smoko payment, but piece workers would not. It does not obviously support an inference that the parties subsequently agreed that payment for rest breaks would be incorporated in both hourly and piece rates.

[49] The result of my consideration of the extrinsic material is that none of it confirms there was an agreement between the parties of the kind asserted by Lean Meats. If anything, the cross-check reinforces the conclusion there was no agreement that hourly rates and piece rates would include rest break payments.

[50] Accordingly, I conclude that there was no provision for the payment of rest breaks in cl 7 as originally incorporated in the 2007 CEA, and repeated in the 2008 CEA, 2009 CEA, 2010 CEA and the unsigned 2011 CEA.

[51] In considering the minimum entitlements for paid rest breaks under the Act, it is necessary to determine the length of the employees' "work period" as defined in s 69ZC(a) since that is what determines the extent of the minimum entitlements provided for in the statute.

[52] Clause 4 of the 2009 CEA (which was the applicable CEA once Part 6D took effect) provided that "existing ordinary hours" would be 40 (per week) being eight hours over five days, Monday to Friday, between the hours of 6.00 am and 5.00 pm. Employees working those ordinary hours fell within the confines of s 69ZD(4), so that they were entitled to two 10-minute paid rest breaks. For those employees who worked between four and six hours, s 69ZD(3) applied, which provided that they were entitled to one 10-minute paid rest break.

[53] I find that since the three CEAs which applied for the period of 1 April 2009 to 1 March 2013 did not make provision for paid rest breaks there was no compliance with s 69ZD of the Act in respect of payment for those breaks. Such a provision was mandatory; an employer and an employee could not contract out of this obligation: s 69ZG(2), and s 238 of the Act.

[54] I can deal shortly with a subsidiary submission which was advanced by Mr Churchman. It was to the effect that the minimum entitlements of the Act in relation to rest breaks would not, as a matter of law, be met even if an allowance for rest breaks had been incorporated in hourly rates or piece rates. The essence of Mr Churchman's submission was that such rates provided remuneration for work, not rest.

[55] In my view, whether an employee has been paid for his or her rest breaks is a question of fact. If such a payment is not identified, whether in an employment agreement or in a payslip (for example), it will be more difficult to conclude that provision for such a payment has been made. But it may be possible to infer that rest breaks are indeed compensated as required by the statute, for instance where an employment agreement provides for remuneration by way of salary.

[56] In this instance, I have found for other reasons that there was no agreement that payment for rest breaks would be included in the payment for work. Had there been express evidence indicating that this was indeed the intention of the parties; there might well have been a different outcome. That, however, was not the case. In those circumstances I do not need to take the Union's alternative argument any further.

[57] Counsel did not raise any issues as to quantum when the matter was argued. Later in this judgment I will discuss the contention as to the appropriate rate of payment for rest breaks. Had there been an issue as to quantum for the purposes of the period 1 April 2009 to 1 March 2013, I would have considered that the same reasoning should apply for this period as I explain later should apply for the latter period: the rest break rate should be the same as the work rate.

[58] On the basis of the foregoing findings, I anticipate the parties will be able to calculate the amount due for unpaid rest breaks from 1 April 2009.

**Second issue: 1 March 2013 to 5 March 2015**

[59] The second issue requires consideration of the meaning of cl 8 of the unsigned CEA which related to the period 2013/2015. The significance of the latter date is that on 6 March 2015, s 69ZD was amended. I consider the terms of that amendment below.

[60] As mentioned earlier, Mr Carran stated that between 1 March 2013 and 1 July 2013, a daily allowance of $6.87 was paid, and from 1 July 2013 a daily allowance of $7 was paid, for rest breaks taken by employees.

[61] The issue which arises is whether, on either rate, the quantum of the payment paid by Lean Meats was sufficient to cover the two 10-minute breaks for which payment must be made under the Act.

[62] The Union's case was that employees were legally entitled to payments for rest breaks based on their hourly wage. If the sum of $7, for example, was to equate to 20 minutes of work time, the rate for the full hour would be $21. All workers

were not paid $21 per hour or less. The payslip for a particular employee was produced – he was paid $31.71 an hour. Mr Carran stated that 20 minutes for a paid break would equate to $10.39 per day, but the evidence established the employee was paid $7 per day. Provisional calculations were produced for numerous other employees who worked at the abattoir, in support of the proposition that they too worked to rates of more than $21 per hour. That said, as the Union does not have complete access to the wage records, final calculations could not be produced.

[63] The response for Lean Meats was that there was no difficulty in workers being paid different rates for different aspects of the day – subject only to the minimum requirements prescribed by the MWA. Mr Bates submitted that a rate for rest was a matter for agreement between the parties.

[64] Mr Churchman submitted in response that there was a necessary implication that the "paid rest break" should be at the "normal rate" applying for that employee; otherwise there would not be a "proper" rate. He argued that if a minimum entitlement for payment of rest was provided only by the MWA, all employers would adopt this thereby penalising employees who were legitimately entitled to receive wages at a higher rate.

[65] The analysis of this issue must focus on the language used in the statute. It does not state that the parties are at liberty to agree a rest break at a rate which is lower than the rate paid for work, subject only to the requirements of the MWA. Nor does it provide that the rest rate may be different from the work rate.

[66] A relevant factor is that rest breaks must take place within the "work period" as defined in s 69ZC. That period begins with the time when the employee starts work, and ends with the time when the employee finishes work. When breaks – whether rest breaks or a meal break – were to be observed within that period was described by s 69ZE. Those breaks were to be at times agreed between the parties, but in the absence of such an agreement according to the formula contained in the section. By contrast, in s 69ZD, there was no such detail indicating alternative options for the payment of rest breaks.

[67] Parliament deliberately contemplated the possibility of additional or enhanced breaks being agreed. Thus in s 69ZG(1), the possibility of superior entitlements being agreed is permitted; and in s 69ZH, if superior entitlements arise under another enactment, then the other enactment may prevail. By contrast, the possibility of payment for rest breaks being paid at a rate which was less than the employee's normal rate of payment for work was not specified.

[68] Since the purpose of these provisions "was to provide for the well being of employees by requiring them to take specified rest and meal breaks during the work period" it is appropriate to conclude that compulsory rest is assumed to be an essential aspect of the undertaking of work.[23] By being paid at a rate which was less than the rate of payment for work, the statutory purpose would potentially be thwarted in that an employee would be penalised for taking a compulsory break. I do not consider Parliament intended such an unreasonable outcome.

[69] I conclude that having regard to the language used and the purpose of the provisions Parliament intended rest breaks to be paid at the same rate for which the employee would be paid to work.

[70] Mr Churchman advised that the Union accepts that the fixed daily rate will amount to compliance for some employees; that is those earning $21 per hour or less. I find that for those employees working under the 2013 CEA who earned more than $20.61 per hour for the period between 1 March 2013 and 1 July 2013, and $21 per hour from that date to 5 March 2015 a further payment by way of adjustment will need to be made. I anticipate the parties will now be able to undertake the necessary calculations.

## Third issue: position from 6 March 2015

[71] Section 69ZD, as amended from 6 March 2015 states:

> **69ZD Employee's entitlements to rest breaks and meal breaks**
>
> (1) An employee is entitled to, and an employer must provide the employee with, rest breaks and meal breaks that–

[23] *Jetstar Airways Ltd v Greenslade*, above n 20, at [35].

a. provide the employee with a reasonable opportunity, during the employee's work period, for rest, refreshment, and attention to personal matters; and

b. are appropriate for the duration of the employee's work period.

(2) The employee's entitlement to rest breaks and meal breaks may be subject to restrictions, but only if the restrictions–

(a) are–

(i) reasonable and necessary, having regard to the nature of the employee's work; or

(ii) if subparagraph (i) does not apply, reasonable and agreed to by the employer and employee (whether in an employment agreement or otherwise); and

(b) relate to 1 or more of the following:

(i) the employee continuing to be aware of his or her work duties or, if required, continuing to perform some of his or her work duties, during the break;

(ii) the circumstances when an employee's break may be interrupted;

(iii) the employee taking his or her break in the workplace or at a specified place within the workplace.

(3) An employee's entitlements to rest breaks under this section is to paid rest breaks.

[72] Thus, the position as from 6 March 2015 is that an employee must be provided with a reasonable opportunity during the work period for rest breaks and meal breaks for rest, refreshment and attention to personal matters, and which are appropriate for the duration of the work period. Those entitlements may be subject to restrictions in certain instances. Rest breaks under the section are to be "paid rest breaks" – the same language as was used prior to the amendment of the section.

[73] As regards quantum of payment, I consider the same reasoning as applied to the period 1 March 2013 to 5 March 2015, continues to apply – namely that the minimum an employee is entitled to for a rest break is the rate which that employee receives for work. This finding should enable the parties to undertake any necessary calculations, having regard to the daily rate which Lean Meats have paid.

## Fourth issue: overtime

[74] The final issue relates to the question of whether Lean Meats has paid its employees overtime under each of the CEAs which have applied since 2009.

[75] This issue is connected to the foregoing issues, because Lean Meats has required its employees to take their rest breaks in addition to physically working eight hours. If the work period within which rest breaks were included was eight hours, then to the extent that work spanned more than eight hours, overtime should have been paid.

[76] This issue requires a consideration of the relevant provision as to hours of work. Clause 4 of the 2009 CEA states as to hours of work:

> 4. **HOURS OF WORK**
>
> a. The existing ordinary hours of work shall consist of 40 hours, eight hours to be worked on five days of the week Monday to Friday inclusive between the hours of 6.00 am and 5.00 pm. By agreement between the parties the ordinary hours of work may be altered to suit notwithstanding the start time shall not be earlier than 5.00 am. It is recognised that a normal day's processing commences either 6.00 am and finishes at 2.45 pm or 7.00 am and finishes at 4.10 pm.

[77] Each CEA also contains an overtime clause in these terms:

> 5. **OVERTIME**
>
> a. Except as stated elsewhere in this agreement all hours worked outside the hours mentioned in clause (4), Monday to Friday or any work performed on a Saturday or Sunday will be paid at overtime rates. For the purpose of this document unless elsewhere specified overtime shall be time and one half the employee's ordinary rate.
>
> b. It is agreed by the parties that reasonable overtime shall be worked as and when required by the employer and at all times employees shall work the hours required to complete the stock provided by the employer taking into account the needs of the employee, given that 8 hours has already been worked on the slaughter contracts …
>
> …
>
> f. Where overtime is required beyond the normal finish times as specified in clause 4, notice is to be provided by 12.00 on that day.

[78] In the 2013 CEA, which the parties have worked under, the following additional clause appears:

> g. Penal rates will only apply after 8 hours of the [employee's] normal work has been completed. All ancillary work will not contribute to the 8 hours.

[79] Mr Bates argued that the threshold in each overtime provision, to the effect that overtime would be paid where employees had "worked outside the hours mentioned in clause (4) Monday to Friday or any work performed on a Saturday …", was a reference to the description of hours defined in the previous clause which ran from 6.00 am to 5.00 pm. He argued that it could not be a reference either to the eight-hour day, or the 40-hour week, because such a construction would require the overtime clause to refer to "outside or in *excess* of the hours specified ..." in the previous clause. He submitted this construction was reinforced by sub-clause f. of the overtime provision which stated that notice was to be provided by noon on those days where overtime would be required beyond the "normal finish times as specified" in the previous clause.

[80] Mr Churchman submitted that by requiring affected workers to have their paid rest breaks in addition to the work period, workers have to work overtime for the amount of their rest break entitlement (usually 20 minutes per day) for which they have not been properly compensated at the rate of time and a half.

[81] The uncontested evidence given by Mr Carran was that Lean Meats did not treat the legal entitlement of two 10-minute breaks as part of the working day, so that workers were losing 20 minutes of overtime to which they were contractually entitled.

[82] The issue is not as to the provision of breaks. These were provided on the basis that workers could take two 15-minute breaks, and a half-hour lunch break, in the course of an eight-hour shift. The Union accepts that the half-hour lunch break, and five minutes of each of the two other breaks are in excess of the legal requirements, and they do not contribute to the working day for the purposes of calculating the overtime payments.

[83] There are two interconnected issues which must be considered when dealing with this problem. The first requires a consideration of when a rest or meal break must be taken. Those breaks must be taken within a "work period", as defined in s 69ZC. As already noted, they must be taken in the time between when the employee starts work, and when the employee finishes work. That requirement, however, simply defines the limits of the period within which rest breaks must be taken. It does not define when an entitlement to overtime arises.

[84] That entitlement is provided by the relevant CEAs. It is clear from both the hours of work and the overtime provisions that an employee is required to work 40 hours, being eight hours per day. I find that overtime is to apply once the employee has worked the specified eight hours per day, on a Monday to Friday, or where the employee works on a Saturday or a Sunday. Furthermore, the "normal finish time" in cl 6 f. is the time when the employee has worked for eight hours.

[85] The scheme which has been adopted is in accordance with s 11B(1) of the MWA; whilst s 11B(2) allows for the possibility that the maximum number of hours (exclusive of overtime) fixed by an employment agreement in any week may be agreed at a number greater than 40, such an agreement was not made by these parties.

[86] However, within the span of the eight hours worked each day, employees were entitled to two paid rest breaks. The CEAs provide no evidence that such breaks are included in the required period of work for each day. In fact, it is evident that they fall outside the hours of work, since they take place within the normal day's processing, either 6.00 am to 2.45 pm, or 7.00 am to 4.10 pm.

[87] It follows that if an employee is paid for their rest break, and that employee has worked for 8 hours, 20 minutes of the time spent working should have been paid at the overtime rate of time and a half.

[88] Again, I anticipate this finding will be sufficient for the parties to undertake the necessary calculations where such payments have not been made and should have been.

## Conclusion

[89] I have reached the same conclusions as were reached by the Authority. However, in dealing with this matter, it has been necessary to comment on issues relevant to quantum. I take the view, therefore, that s 183(2) of the Act operates to replace the determination of the Authority, so that this decision stands in its place. Accordingly, I direct that the parties should attempt to resolve quantum issues directly. If that does not prove possible, leave is reserved for either party to apply for directions. Counsel are to advise the Registrar by memoranda filed by 16 December 2015 whether such an application may need to be made. If so, I shall hold a telephone directions conference with counsel.

## Costs

[90] The Union is entitled to costs. If agreement on this topic cannot be reached directly between the parties, the Union may apply for costs by memorandum supported by any necessary evidence within 21 days. Lean Meats may respond by memorandum and any necessary evidence within 21 days thereafter. I shall deal with any issue of costs arising from the interlocutory application as to admissibility of evidence[24] under the same timetable.

B A Corkill
Judge

Judgment signed at 3.20 pm on 6 October 2015

[24] See *Lean Meats Oamaru Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2015] NZEmpC 148.