IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2023] NZEmpC 90
EMPC 299/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	FIRE AND EMERGENCY NEW ZEALAND Plaintiff
AND	NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION Defendant

Hearing:	9 May 2023 (Heard at Wellington)
Appearances:	G Davenport, counsel for plaintiff P Cranney and K Gawe, counsel for defendant
Judgment:	19 June 2023

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Certain sections of the Holidays Act 2003 (the Holidays Act) establish a regime for minimum entitlements on public holidays. At issue in this case is whether the parties implemented the regime correctly in a detailed agreement they concluded in 2013 and in subsequent employment agreements.

[2] In particular, does the rate for any overtime worked on a public holiday meet the statutory requirement of a 50 per cent uplift on the overtime pay that would otherwise be paid for that day?

[3] The issue is one of interpretation – both of the various agreements that were entered into and of the applicable provisions of the Holidays Act.

[4] The Employment Relations Authority accepted the argument raised by the New Zealand Professional Firefighters Union (the Union) that the agreed provisions were not compliant.[1] Fire and Emergency New Zealand (FENZ) now challenges that conclusion on a de novo basis.[2]

[5] The Court received detailed evidence as to the genesis of the agreements. However, Mr Cranney, counsel for the Union, acknowledged that the history is not disputed either as to the terms that were agreed in 2013 or as to the reliance on those provisions by both parties until the present dispute arose in 2019.

The agreements

[6] The parties entered into a Record of Agreement on 10 September 2013 (the 2013 Agreement). In its preamble, it was recorded that a new remuneration structure had been agreed and that the parties intended there would be a transitional introduction of rates over a six-year period, so as to manage the fiscal implications of those structures and rates and to support the achievement of key milestones relating to reductions in absenteeism and increased uptake of newly introduced relieving worker positions.

[7] The 2013 Agreement stated that these transitional arrangements would occur over a longer timeframe than the span of the concurrent collective employment agreement (CEA). For that reason, the parties recorded their agreement separately so that its provisions would be maintained after the expiry of the current CEA.

[8] It was also made clear that both parties wished the agreements to be regarded as final, binding and enforceable.

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1 *New Zealand Professional Firefighters Union v Fire and Emergency New Zealand* [2022] NZERA 374 (Member Loftus).

2 Holidays Act 2003, s 54(4).

[9] The parties acknowledged that the intention was to transition to overtime rates that were 1.5 times the standard hourly rate, regardless of when overtime was worked. The calculations of the standard hourly rate would be the total weekly wage divided by 42, being the average number of hours worked in a seven-day period.

[10] The document recorded that the parties would monitor progress towards sick leave and relieving worker targets monthly.

[11] By way of an example, on 1 July 2013, overtime rates would be as follows for firefighters:

> Rate 1: 1.1 times the standard hourly rate for the first three hours of all overtime worked on a weekday, and before 12 pm on a Saturday.
>
> Rate 2: 1.33 times the standard hourly rate for all overtime worked in excess of the first three hours, and all overtime worked after 12 pm on a Saturday, or at any time on a Sunday.
>
> Rate 3: 1.5 times the standard hourly rate for all overtime worked on a public holiday.

[12] The document went on to describe target milestones and then overtime rates for each year from 1 July 2014 to 1 July 2019. By the last date, overtime rates would be 1.5 times the standard hourly rate for all overtime worked – that is for each of Rates 1, 2 and 3.

[13] The Court has been provided with a full copy of the CEA for 1 July 2013 to 30 June 2015, extracts of the CEA for 1 July 2018 to 30 June 2021, and a full copy of the CEA for 1 July 2021 to 30 June 2024.

[14] The methodology set out in the 2013 Agreement was reflected in each of these CEAs. Two particular clauses should be mentioned. The first is in a section entitled "Payment for working on public holidays" and says:

> 2.6.2.8 Where an Employee works an overtime shift or overtime hours on a public holiday, that employee will be paid at the rate specified in the tables in Part 5 of this Agreement for working on a public holiday, which already includes 0.5 extra for working on a public holiday.

[15] The second is in a section entitled "Overtime", and in respect of "Extended Shift" says:

> 2.6.10 All time worked by shift workers outside their usual rostered shifts and Yellow and Black Watch workers outside of their usual daily hours shall be paid for at the rates specified in the relevant Tables in Part 5 of this Agreement. In computing overtime, payment shall be made for each one-quarter hour or part thereof.

[16] The reference to Yellow and Black Watch workers relates to groups of employees working day or night shifts under particular rostering arrangements, all as described in detail in Part 2 of the CEAs.

[17] Part 5 of the CEAs contained a set of detailed tables. The format of these has changed over time. In the first relevant CEA, 11 tables were presented which applied to all employees, except for those whose specific rates were described in six subsequent tables.

[18] Whilst both parties had accepted the terms of these agreements until 2019, the position changed in that year under new leadership of the Union. After initial exchanges between the parties, legal advice was taken on both sides. In summary, the Union's legal advice was that the agreements have not complied with the terms of the Holidays Act; FENZ's legal advice was that this was incorrect and that the understanding held by the parties to that point was correct.

[19] By the time the current CEA was agreed, the rates for each of Rates 1, 2 and 3 were equal. Thus the amount payable to a non-driver firefighter was the same for the periods described in each of those rates – that is $39.58 per hour.

[20] Because of the dispute that had arisen, the parties included the following agreed statement at the commencement of Part 5 in which the tables appeared:

FINAL RATES FOR PART FIVE OF THE CEA

For Firefighters and Officers

BASED ON ANNUAL FIGURES AGREED, REFLECTED IN TERMS OF SETTLEMENT

As per current methodology

- The total weekly wage rates are 1/52 of the annualised rate agreed in the Terms of settlement
- The hourly rate is 1/42 of the total weekly wage rate
- The overtime rate is T1.5
- The overtime shift rate is:
  - Day shift overtime rate is 10 hours multiplied by T1.5
  - Night shift overtime is 14 hours multiplied by T1.5
  - Yellow Watch overtime shift is 10.5 hours multiplied by T1.5

NOTE: Ongoing litigation continues relating to overtime on a Public Holiday but the rates in this document reflect the CEA provisions and will be changed by the Parties if required as an outcome of the litigation and will be published accordingly.

Relevant provisions of the Holidays Act

[21] The dispute between the parties involved a number of interlocking provisions of the Holidays Act. For ease of reference, I reproduce these as follows:

> **6 Relationship between Act and employment agreements**
>
> (1) Each entitlement provided to an employee by this Act is a minimum entitlement.
>
> (2) This Act does not prevent an employer from providing an employee with enhanced or additional entitlements (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.
>
> (3) However, an employment agreement that excludes, restricts, or reduces an employee's entitlements under this Act—
>
> (a) has no effect to the extent that it does so; but
>
> (b) is not an illegal contract under subpart 5 of Part 2 of the Contract and Commercial Law Act 2017.
>
> **9 Meaning of relevant daily pay**
>
> (1) In this Act, unless the context otherwise requires, relevant daily pay, for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, bereavement leave, or family violence leave,—
>
> (a) means the amount of pay that the employee would have received had the employee worked on the day concerned; and
>
> (b) includes—

(i) productivity or incentive-based payments (including commission) if those payments would have otherwise been received had the employee worked on the day concerned:

(ii) payments for overtime if those payments would have otherwise been received had the employee worked on the day concerned:

(iii) the cash value of any board or lodgings provided by the employer to the employee; but

(c) excludes any payment of any employer contribution to a superannuation scheme for the benefit of the employee.

(2) However, an employment agreement may specify a special rate of relevant daily pay for the purpose of calculating payment for a public holiday, an alternative holiday, sick leave, bereavement leave, or family violence leave if the rate is equal to, or greater than, the rate that would otherwise be calculated under subsection (1).

(3) To avoid doubt, if subsection (1)(a) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half.

52 New employment agreements must include provision that complies with section 50

(1) This section applies to an employment agreement that is entered into after 1 April 2004.

(2) The employment agreement must include a provision that confirms the right of the employee to be paid in accordance with section 50 for working on a public holiday.

(3) To avoid doubt, the employment agreement may not state that the relevant daily pay or average daily pay of the employee already includes an amount that is calculated to comply with section 50.

Submissions

[22] The essence of the case presented for FENZ is that the various agreements reflect a very carefully framed transitional regime, which governed the parties' approach to remuneration in respect of public holidays for 2013 onwards until the interpretation issue was raised in 2017.

[23] Mr Davenport, counsel for FENZ, submitted that it is clear the parties understood and implied the statutory requirements of the Holidays Act when considering overtime worked on a public holiday. He said:

(a) The agreements reflect a correct understanding of "relevant daily pay" as described in s 9 of the Holidays Act – that is the amount of pay that

the employee would have received had he or she worked on the day concerned, including for overtime if such payments would have been received if the employee worked on the day concerned. Emphasis was placed on the words "received" and "on the day concerned". The parties agreed that the relevant daily pay for working on a public holiday is the standard hourly rate. The Holidays Act did not preclude parties from agreeing a different relevant daily rate for different situations, including an increased hourly or base rate.

(b) As required by s 50 of the Holidays Act, the parties had applied a multiplier of 1.5 to that starting point.

(c) With regard to the requirements of s 52(3) of the Holidays Act, the employment agreement did not state that the relevant daily pay already included in the amount that was calculated to comply with s 50. It was obvious on analysis that the employment agreements contained payment provisions which complied with s 50, so that it could not be said that the amount stipulated for Rate 3 in the relevant tables reflected an impermissible approach.

[24] Mr Davenport argued, in summary, that s 6 of the Holidays Act, which provides that an employment agreement cannot exclude, restrict or reduce an employee's entitlement under the Holidays Act, does not apply.

[25] For the Union, Mr Cranney said, in essence, that the parties did not satisfy the requirements of the Holidays Act. They had a common, but erroneous, understanding of the minimum entitlements involved until the Union took legal advice on the issue in 2020.

[26] He said that on a proper analysis of the provisions, s 50 of the Holidays Act had not been approached correctly. The uplift was not made on the basis of the payment which would otherwise be received by the subject workers for overtime if they had worked on the day concerned. He argued that, by basing the calculations on a standard hourly rate, the overtime component which would have otherwise

applied "had been deleted" before the multiplier was used. Consequently, the minimum entitlements provided for in that section were not correctly stated. He also submitted that s 52(3) was engaged because Rate 3 was regarded as stipulating a relevant day pay rate that included the s 50 uplift.

[27] Thus, s 6 applied because the minimum entitlement had not been provided. The fact that the parties acted on an erroneous understanding of their agreement was not a relevant consideration when assessing whether the agreed terms were compliant.

Discussion

[28] As a preliminary point, I note that s 54(4) of the Holidays Act provides that a dispute about whether an employer is complying, or has complied, with a range of sections, including ss 50 and 52, is an employment relationship problem for the purposes of the Holidays Act. Accordingly, there is no issue as to jurisdiction.

[29] A second preliminary point relates to the correct interpretive approach, first for the agreements in question, and secondly for the applicable statutory provisions.

[30] It is now well established that the principles articulated by the Supreme Court in *Firm PI Ltd v Zurich Australian Insurance Ltd* apply to interpretation of an employment agreement.[3] An objective approach is to be undertaken:[4]

> … to ascertain 'the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract'. … While there is no conceptual limit on what can be regarded as 'background', it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

[31] In *Bathurst Resources Ltd v L & M Coal Holdings Ltd,* it was confirmed that evidence of prior negotiations and subsequent conduct may be considered, albeit the

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3 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.
4 At [60] (footnotes omitted).

filters of ss 7 and 8 of the Evidence Act 2006 should apply.[5] Evidence of such must assist in the task of proving something relevant to the notional reasonable person.

[32] The principles relevant to statutory interpretation are equally well known. The meaning of statutory provisions must be ascertained from their text in light of purpose and context.[6] The oft-repeated dicta of *Commerce Commission v Fonterra Co-operative Group Ltd* continues to apply.[7]

[33] The rationale of the transitional arrangements in the 2013 Agreement was to support milestones relating to reductions in absenteeism and increased uptake of newly introduced relieving workers' positions. For that, the employer agreed to what is described as "substantial increases to current overtime rates". The rates were to increase and did increase over time.

[34] These objectives are not in issue. The controversy relates to the methodology that was agreed to implement them and whether it complies with the Holidays Act.

[35] In *The New Zealand Fire Service Commission v The New Zealand Professional Firefighters Union*, a full Court summarised the applicable provisions in this way:[8]

> [28] In summary, the relevant rights and obligations of an employer under the Holidays Act in relation to payment for work on a public holiday are:
>
> 1. The required payment is based on the employee's relevant daily pay, being the amount of pay the employee would have received for working on the day (s 9), less any penal rates (s 50(1)(a)).
>
> 2. The employer must pay the employee the relevant daily pay plus half that amount again (s 50(1)(a)).
>
> 3. Employment agreements must confirm the right of an employee to be paid in accordance with s 50 (ss 52(2) and 53(2)) but must not state that the relevant daily pay already includes an amount calculated to comply with s 50 (ss 52(3) and 53(3)).

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5 *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [75].

6 Legislation Act 2019, s 10(1).

7 *CSN v Royal District Nursing Service New Zealand Ltd* [2022] NZEmpC 123, [2022] ERNZ 491 at [53]; and *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

8 *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2007] ERNZ 405 (EmpC).

4. Payment for a public holiday must be made in the pay that relates to the pay period in which the holiday occurs (s 55).

5. Employees' entitlements under the Act are minimum entitlements (s 6(1)).

6. An employer may provide its employees with agreed enhanced or additional entitlements (s 6(2)).

[36] I respectfully adopt this analysis.

[37] I also note the dicta of the Court of Appeal in *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd*, which discussed the purpose of the Holidays Act in these terms:[9]

> [27] The plain intention of the Act was to provide to employees who had not worked on a public holiday or while taking bereavement or sick leave, a statutory entitlement to a minimum daily sum based on the pay the employee would otherwise have received if he or she had worked on the day or days concerned. …
> …
> [29] The calculation of relevant daily pay is necessarily a notional exercise. It is to be undertaken retrospectively on the basis of what would have been earned if the employee had worked on the relevant holiday or leave day. …
> …
> [32] Section 9 must be interpreted in such a way as to make the legislation work in a practical manner. …

[38] Subsequent authorities have emphasised that the question which arises under s 9 as to what the employee receives on "the day" is intensely fact specific;[10] or, as the Court of Appeal put it, "fact intensive".[11]

[39] It is also necessary to spell out what compliance with s 52 means. This was an issue resolved by the full Court in *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union*. The Court noted:[12]

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9 *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2012] NZCA 481, [2013] 1 NZLR 66. The Supreme Court dismissed an application for leave to appeal this decision: *New Zealand Post Ltd v Postal Workers Union of Aotearoa Inc* [2013] NZSC 15.

10 *New Zealand Airline Pilots' Assoc Inc v Mt Cook Airlines Ltd* [2012] NZEmpC 218, (2012) 10 NZELR 566 at [41]; and *McPherson v Carter Holt Harvey Ltd* [2017] NZEmpC 103 at [42].

11 *New Zealand Airline Pilots' Assoc Inc v Mt Cook Airlines Ltd* [2013] NZCA 174 at [15] and [18].

12 *New Zealand Fire Service Commission,* above n 8, at [35]–[36].

> Section 52 of the Holidays Act is open to two alternative interpretations. One is that it requires every employment agreement to contain a provision that specifically refers to the requirements of s 50 and expressly confirms the employee's right to be paid for work on a public holiday in accordance with those requirements. … The alternative is that s 52 will be satisfied if the employment agreement contains payment provisions which themselves comply with s 50.

[40] In essence, the full Court found that the first interpretation would conflict with other provisions, including ss 6 and 54 of the Holidays Act. Accordingly, the second construction was preferred.[13]

[41] I begin my analysis by focusing on the particular provisions of the various agreements which illustrate how the parties dealt with the standard hourly rate on the one hand and public holiday rates on the other.

[42] As noted, the 2013 Agreement stated that relevant calculations were to be based on the standard hourly rate. That rate would be the basis of the calculation of overtime rates for each of the three scenarios which the parties were catering for.

[43] This approach was followed in the various CEAs. Two examples will suffice.

[44] The first can be seen in Table 3 of Part 5 of the 2013–2015 CEA. For a firefighter who is a non-driver, it records:

> Rate 1: $21.19
>
> Rate 2: $25.62
>
> Rate 3: $28.90[14]

[45] A reasonable reader would note that, in light of the multiplier described in cl 3(f) of the 2013 Agreement, the standard hourly rate was $19.26. Such a reader

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13 At [37]–[38].

14 The description of Rates 1, 2 and 3 are recorded at [11] above.

would conclude that the standard hourly rate had then been multiplied by l.1 to obtain $21.19 for the purposes of Rate 1 in Table 3, by 1.33 to obtain $25.62 for the purposes of Rate 2, and 1.5 to obtain the figure of $28.90 for the purposes of Rate 3. The same standard hourly rate was used for each rate. The public holiday rate was based on a standard hourly rate, and not on an overtime rate.

[46] A second example is evident from the current CEA by considering the hourly rates for firefighters as described in Table 8A. The hourly rate for a non-driver firefighter is $26.39. Table 3A records the overtime hourly rates for Rates 1, 2 and 3 for such a firefighter. For each overtime/public holiday rate the figure of $39.58 is recorded, which means a multiplier of 1.5 has been applied in each instance to the same standard hourly rate. The base rate per hour was not altered for public holiday purposes. The 2013 Agreement did not allow for such a possibility.

[47] A cross-check of the evidence given by the FENZ witnesses confirms that this is what they decided to do.

[48] However, this methodology does not, for a public holiday, reflect the correct position under s 9. As already noted, the assessment must be based on the amount the employee would have received had he or she worked on the day concerned, which includes payments for overtime if these would otherwise have been received. If overtime is worked on a public holiday, s 9 requires the starting point to be the applicable overtime rate. Under s 50, a multiplier of 1.5 must then be applied.

[49] Under the 2021–2024 CEA, where overtime is worked on a public holiday, either Rates 1 or 2 ought to have been used as a starting point to reflect the amount the worker would have received on the day in question. For Rate 3, that starting point ought to have been increased by half again because there is a public holiday in issue. The CEAs were in error because they did not proceed in this way.

[50] The net effect of the parties' erroneous agreement resulted in the reduction of a minimum entitlement. This is contrary to the scheme of the Holidays Act, as

explained in the *New Zealand Fire Service Commission* case,[15] and is thus impermissible under s 6 of the Holidays Act.

Result

[51] The correct approach is to assess the relevant daily pay under s 9, so as to include the applicable overtime rate, and then to apply the multiplier of 1.5 under s 50. Where overtime is worked, the multiplier must be applied to the overtime rate which the employee would have received if he or she had worked on the day concerned.

[52] The challenge is dismissed.

[53] The Court understands that the parties will now be able to resolve issues that have arisen but if not, I reserve leave to apply on reasonable notice.

Costs

[54] If costs are in issue, I will receive memoranda.

B A Corkill
Judge

Judgment signed at 12.45 pm on 19 June 2023

[15] *New Zealand Fire Service Commission,* above n 8.