**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2018] NZEmpC 70**
**EMPC 303/2017**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | ASUREQUALITY LIMITED<br>Plaintiff |
| AND | NEW ZEALAND PUBLIC SERVICE ASSOCIATION INC<br>Defendant |

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| Hearing: | 21 March 2018<br>(Heard at Auckland) |
| Appearances: | R Towner and R Compson, counsel for plaintiff<br>P Cranney and C Mayston, counsel for defendant |
| Judgment: | 22 June 2018 |

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**JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS**

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## Introduction

[1] AsureQuality Ltd (Asure) challenges a determination of the Employment Relations Authority.[1] The challenge is pursued on a de novo basis. Two issues arise:

(a) The correct interpretation of cl 10.4 of the parties' collective employment agreement; and

(b) whether the New Zealand Public Service Association Inc (PSA) is estopped from asserting its interpretation of cl 10.4 in the particular circumstances.

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1 *The New Zealand Public Service Assoc Inc v AsureQuality Ltd* [2017] NZERA Auckland 284.

[2] The interpretation issue is a narrow one: what does the phrase "All work by an employee on Saturdays and Sundays" in cl 10.4(b) of the collective agreement mean? The defendant says that the answer is obvious – all work done on a Saturday or Sunday includes any work done on those days. The plaintiff says that, in order to understand the meaning of the phrase, it is necessary to view the collective agreement in context, including having regard to the parties' dealings over time, the origins of the clause and the circumstances in which it was said to be agreed between the parties. In particular, the plaintiff submits that payment for work which began on a Friday but which finished in the early hours of Saturday was not discussed as part of bargaining for the 2006 collective agreement, would be at odds with the parties' understanding of non-normal and normal rostered hours of work, and was not identified as an issue until some nine years later.

[3] On the plaintiff's analysis, a worker in a Monday to Friday meat processing plant whose shift carries over from Friday night into Saturday morning is not entitled to be paid at time and a half (T1.5) rates for what I will call the 'hang-over' period. On the defendant's analysis, the hang-over period comprises work done by the employee on a Saturday and must therefore be paid at the increased rate.

[4] Asure also argues that if cl 10.4(b) bears the meaning contended for by the defendant, the defendant is nevertheless estopped from asserting that meaning in the circumstances. Boiled down, those circumstances are that the PSA has sat on its hands for a number of years before seeking to assert the correct meaning of the clause. This silence, it is said, has impacted detrimentally on the company.

## Analysis

[5] The principles relating to contractual interpretation, including in the context of collective employment agreements, are well settled and do not need to be restated.[2] The starting point is the meaning of the language in the contract itself.

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[2] See, for example, *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19]-[33] per Tipping J; and *New Zealand Air Line Pilots' Association v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 at [71], citing *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].

[6] Hours of work at the plaintiff's plants are set out in Hours of Work Agreements made under the collective agreement ("HOW Agreements"). The HOW Agreements set the start and end times for work. Clause 8.10 provides for payment for hours of work, distinguishing between "Monday to Friday Plants" and "Other Plants (including 7 days per week plants)". In relation to the former, cl 8.10(a)(iii) provides that:

> Saturday and Sunday hours worked are always paid in addition to the base 40 hours per week Monday to Friday, regardless of whether 40 hours were worked Monday to Friday. Saturdays and Sundays are paid under clause 10.4.

[7] Clause 10.4 provides:

> **10.4 Penal Rates**
>
> The following penal rates will apply for permanent full time and permanent seasonal meat inspector employees:
>
> (a) Where an employee has already completed or will complete their roster for a week, and they are required to work on a day that they were not previously included on the plant roster and/or shift patterns to work, including days where they are required to work under clause 8.3, the employee will be paid T1.5 for all hours worked on that day. This clause applies to employees who commence and return from approved leave. This clause does not apply to:
>
> - PFTs on TOIL during partial plant closure, nor to
> - PFTs who return to work from TOIL during complete plant closure.
>
> (b) *All work by an employee on Saturdays and Sundays at Monday to Friday plants will be paid at T1.5.*
>
> (c) T1.5 will be paid when the employee works greater than their own weekly/normal applicable hours. Applicable means hours as reflected in their plant HOW and does not include increases due to extended kill and increased hours notified under clause 8.3. T1.5 will be paid for hours worked above normal hours on a daily basis when all core meat inspector positions are operating/working.
>
> The following do not count:
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> - Hours not worked but paid under clauses 8.3 or 8.10(a)(iv)
> - Walk time in an HOW Agreement and travel time
>
> (d) T2 will be paid for working statutory holidays, plus employees will receive a paid day in lieu.
>
> (e) AsureQuality is not restricted from using reserve and/or casual employees to meet labour supply requirements.

(f) Where T1.5 is paid under clauses 10.4(a), (b) or (c) or T2 is paid under clause 10.4(d), employees will not also receive the unsociable hours payments in clause 10.3.

(g) Refer to Schedules 8 & 9 for casual employee entitlements to penal rates.

(h) T1.5 and T2 payments for PSs are calculated on their base hourly rate excluding annual leave and allowances.

(i) Reserves receive payments under clauses 10.4(b) and (d), but not under 10.4(a) or (c).

(j) Volunteers receive payments under clauses 10.4(b), (c) and (d), but not under 10.4(a).

(k) Relieving meat inspectors will receive T1.5 for those hours above their base plant's ordinary (normal) weekly applicable hours. Relievers will also not be disadvantaged if they work less hours at the plant they are relieving at.

(l) Where staff are notified under 8.3 on the day all additional hours above normal hours will be paid at T1.5 rounded up to the nearest 15 minutes on a daily basis.

(emphasis added)

[8] Clause 10.4 is, as its title suggests, directed at the circumstances in which penal rates will apply. The circumstances differ, including where an employee has completed their roster for a week and is then required to work on a day at a plant over the current daily hours of work (cl 10.4(c)), for working statutory holidays (cl 10.4(d)) and (under cl 10.4(b)) for work on Saturdays and Sundays at Monday to Friday plants. The collective agreement differentiates such plants from "Other plants", including seven days per week plants (see cl 8.10).[3] Clause 10.4 also sets out the penal rates that will apply in each of the circumstances identified in the clause – T1.5 (under cl 10.4(a)); T1.5 (under cl 10.4(b)); T1.5 (under cl 10.4(c)); and T2 (under cl 10.4(d)).

[9] Clause 10.4 makes it clear that where a penal payment is made under cl 10.4(a)-(d), no entitlement to receive the unsociable hours payment provided in cl 10.3 arises.[4] Clause 10.4 also excludes, or varies, the rates at which payments under cl 10.4(a)-(d) will apply. So, for example, volunteers receive payments under cl 10.4(b), (c) and (d) but not under cl 10.4(a).[5]

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3 Although the terms "Monday to Friday plants" and "Other plants" are not defined in the collective agreement.

4 See cl 10.4(f).

5 See cl 10.4(j).

[10] On its face, cl 10.4(b) provides for a penal rate of T1.5 for "All work" by an employee on a Saturday and/or a Sunday, provided it is at a "Monday to Friday" plant. The ordinary and natural meaning of the phrase is that if a shift worker at a Monday to Friday plant finishes their work some time past midnight on the Friday night and accordingly spends some time working on the Saturday they will be entitled to a payment for that hang-over period calculated on the basis of T1.5. That meaning emerges from cl 10.4(b) when read in isolation and within the context of cl 10.4 as a whole.

[11] Mr Towner, counsel for the plaintiff, submitted that the reference to "penal rates" in the heading to cl 10 signifies that the applicable rates are directed at penalising the employer where it requires employees to work outside 'normal' hours of work. It follows, it is said, that if normal hours go into a Saturday and/or a Sunday, they are not hours paid at the penal rate of T1.5 because there is nothing to penalise. If that is correct it is difficult to see what utility cl 10.4(b) serves, given cl 10.4(a) and (c) are directed at the scenario identified. Rather, the reference to 'penal' in the heading to cl 10 may simply be to penalising the employer for requiring an employee to work weekend hours, whether part of normal hours or not.

[12] It is necessary to look to other provisions of the collective agreement which may cast some light on the meaning (assessed objectively) that the parties intended the clause to bear. In this regard I understood Mr Towner to submit that, when viewed in context, the phrase "all work by an employee on Saturdays and Sundays" in cl 10.4(b), refers to work which *starts* on a Saturday or Sunday; it does not apply to work which begins on a Friday and ends in the early hours of a Saturday; and that the word "day" as defined in the agreement must be read as applying to more than a midnight-to-midnight 24-hour period, because to do otherwise would lead to detrimental consequences for employees. That is because the Monday to Friday work would be reclassified as "Other plants" and the circumstances when employees would qualify for T1.5 would be more limited. The interpretation advanced is, it is said, reinforced by the introductory words to cl 6 ("Definitions"), namely: "unless the context otherwise requires". In the alternative, Mr Towner submitted that a plant which operates a roster which includes the early hours of Saturday cannot be described as a Monday to Friday plant.

[13] While much was made of the definition of "day" in cl 6 of the collective agreement, I do not see that as assisting the plaintiff's argument. Clause 10.4(b) does not refer to a "day". Rather, it refers to "Saturdays", "Sundays", "Monday" and "Friday". Saturday, Sunday, Monday and Friday are days of the week and it is perfectly clear what they relate to (namely the 24-hour period each of them spans). That is reinforced by the definition of "day" as meaning "the period from midnight to the next succeeding midnight".

[14] Rosters are not built on a midnight to midnight system – hence the difficulty identified by Mr Towner. Mr Towner suggests that for the weekend hours regime in the collective agreement to operate, the shift must have begun on a Saturday or Sunday. Monday to Friday shifts are categorised that way because they begin on a Monday to Friday. The stumbling point is, however, use of the word "All" in cl 10.4(b), making it clear that all (as in any) work done on a Saturday or a Sunday by an employee at a Monday to Friday plant is caught by the higher T1.5 rate. Nor can it be correct that reference is *just* to the start of the roster period. If that were the case, almost the whole of a shift that began at five minutes to midnight on a Friday would be classed as Monday to Friday work. Conversely, a shift beginning at five to midnight on a Sunday would be classed as weekend work at the T1.5 rate.

[15] It seems to me that calculation of pay at ordinary pay or at T1.5 is more logically arrived at according to what day each part of the rostered hours falls into, rather than the categorisation of the plant. Payment for hours which are completed on Monday to Friday are calculated as ordinary time (absent application of the "unsociable hours" allowance); and payment for hours completed on the weekend are T1.5, unless they are paid at the "unsociable hours rate" (see cl 10.3).

[16] All of this is reinforced by provisions in the collective agreement which clearly contemplate Monday to Friday shifts working into weekend hours. Clause 8.10 is entitled "Payment for HOW". Clause 8.10(a)(iii) provides (under "Payment for [Hours of Work] Monday to Friday plants") that: "Saturday and Sunday hours worked are always paid in addition to the base 40 hours … regardless of whether 40 hours were worked Monday to Friday." And cl 8.10(iii) refers to payment under cl 10.4, expressly stating that: "Saturdays and Sundays are paid under clause 10.4."

[17] Clause 10.4 provides that: "All work by an employee on Saturdays and Sundays at Monday to Friday plants will be paid at T1.5." If plants that went into Saturday/Sunday hours were not Monday to Friday plants, cls 8.10(a)(iii) and 10.4 would appear to serve no useful purpose. This undermines the plaintiff's alternative argument.

[18] The plaintiff referred to discussions leading to the 2006 collective agreement, and the way in which the parties had previously regarded work undertaken at a plant on Saturdays and/or Sundays, and as reflected in the HOW Agreements. This was said to inform a proper interpretation of cl 10.4(b) and what the parties intended it to cover.

[19] Mr Robson (who was involved in the 2006 bargaining on behalf of the company) could not recall the hang-over issue being raised during bargaining. Rather, he recalled the PSA's primary focus being on a claim that all non-normal rostered days and rostered days off be paid at T1.5. Some support for that emerges from internal memoranda at the time, although pre-dating finalisation of the agreement.

[20] I did not draw any real assistance, in terms of the interpretative exercise, from a review of the extraneous material. Mr Robson was party to only some of the discussions and accepted that it was difficult to recall the details of the discussions he was party to. It is apparent that bargaining for the 2006 collective agreement was long and difficult. The detail of what was discussed was unclear. What is clear, however, is that penal rates were to be increased, including by way of introduction of "*a new* T1.5 payment for weekend work at Monday to Friday plants". This is reflected in the letter of offer from the company to the PSA dated 13 March 2006. As a consequence, cl 10 was replaced, and what is now cl 10.4(b) was incorporated into the collective agreement from this time.

[21] While it is possible to argue, including having regard to the way normal hours were rostered, that "All work" in new cl 10.4(b) was intended to be solely directed at non-normal rostered hours, I am not persuaded that the background material is as helpful as the plaintiff suggests; or that it warrants departure from the ordinary and

natural meaning of the phrase. The plaintiff's interpretation effectively requires a number of qualifying words to be read in to cl 10.4(b) which the parties chose not to include when recording their agreement, and for cl 8.10 to be read subject to similar modifications.

[22] The plaintiff also sought to rely on post-contractual conduct in support of its position, in particular the fact that while the PSA brought proceedings in relation to the company's interpretation of cl 10.4(c) shortly after the clause was introduced, it took no such steps in relation to cl 10.4(b).[6] I return to this issue below. Suffice to say at this point that I do not share the plaintiff's view of the significance of this "omission". While subsequent conduct can, in some circumstances, clarify what meaning the parties originally intended, it does not assist in the present case, including having regard to the fact that one of the plaintiff's own sites adopted the defendant's interpretation from the outset.

[23] I conclude that the ordinary and natural meaning of cl 10.4 is clear. The wider context does not point in any other direction and this is not a case in which any ambiguity or uncertainty or established special meaning arises. Nor would the ordinary and natural meaning lead to a nonsensical result; simply a result that the company would prefer to avoid. Clause 10.4 requires payment of T1.5 for all work done on a Saturday and/or Sunday which includes any hang-over time from a Friday shift.

*Estoppel*

[24] As Mr Towner pointed out, the Employment Court has upheld a defence of estoppel in two cases in this Court, namely *Schollum v Corporate Consumables Ltd* and *Singh v Trustees of Wellington Rudolf Steiner Kindergarten Trust*.[7] Mr Towner argued that the defence of estoppel applied in the present case.

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6 *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277 at [52]-[53]. See too *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] NZLR 444 at [31].

7 *Schollum v Corporate Consumables Ltd* [2017] NZEmpC 115 at [166]; *Singh v Trustees of Wellington Rudolf Steiner Kindergarten Trust* [2017] NZEmpC 47 at [24]-[25].

[25] There are four key elements that must be established to found an estoppel:[8]

(a) A belief or expectation must have been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged;

(b) the party relying on the estoppel must establish that the belief or expectation has been reasonably relied upon by that party alleging the estoppel;

(c) detriment will be suffered if the belief or expectation is departed from; and

(d) it must be unconscionable for the party against whom the estoppel is alleged to depart from that belief or expectation.

[26] The plaintiff's estoppel argument faces difficulties at each stage of the analysis.

*Step 1 - belief or expectation created or encouraged*

[27] What was the belief or expectation relied on? The company submits that the union accepted, on behalf of its members, that the hang-over provision would not apply to those on a Monday to Friday shift. The evidence is not clear as to what position both parties took in relation to the application of penal rates for hang-over work, and I am unable to draw any useful conclusions from it. What is clear is that such payments were made at one of the company's plants, although they ceased when the defendant filed its claim in the Authority. It appears that the PSA pursued the interpretation point when the issue was drawn to its attention by a local union delegate. The company then took some time to respond.

[28] What was the relevant action, representation or omission relied on? The company essentially submits that the union's failure to act to draw the fact that it had

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[8] *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [42]; *Harris v TSNZ Pulp and Paper Maintenance Ltd* [2015] NZEmpC 43, [2015] ERNZ 580 at [75]-[76].

a different interpretation of cl 10.4 to its attention at an earlier stage, triggers the estoppel defence.

[29] Was the belief or expectation created or encouraged by the union's silence? It is true, as Mr Towner submits, that silence may sometimes found an estoppel.[9] Not every silence will suffice and the silence must be coupled with a duty to speak. This reflects the fact that, at its heart, estoppel is based on protection against unconscionable acts.

[30] Would a reasonable person expect the union, acting honestly and reasonably, to bring the correct interpretation of cl 10.4 to the attention of the company knowing that the company was under a mistake as to its respective rights and obligations?[10] No. First, the union could not reasonably be expected to speak about something it was unaware of. When it did become aware of the issue, it raised it with the company. Second, the company itself was making payments in accordance with the interpretation advanced by the defendant at one of its plants from the outset.

*Step 2 - belief or expectation reasonably relied upon*

[31] Even if the company could meet the requirements of step 1, which I do not accept, the asserted belief or expectation was not reasonably relied on by it. That is because the point at issue, and one which the PSA said nothing about (until concerns about it were drawn to its attention by a local delegate), is one of legal contractual interpretation which the company was well placed to satisfy itself about without relying on the union to raise it.

*Step 3 - detriment suffered if the belief or expectation departed from*

[32] Mr Towner submitted that the delay in raising the interpretation issue has detrimentally affected Asure because it lost the opportunity to seek to deal with the issue at an earlier date, for example by way of a proposed variation or otherwise during the course of bargaining for subsequent collective agreements (or,

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9 Andrew Butler (ed) *Equity and Trusts in NZ* (Thomson Reuters Wellington, 2007) at 631.

10 *Bank of Nova Scotia v Hellenic Mutual War Risks Assoc (Bermuda) Ltd, The Good Luck* (CA Div) [1990] LRC (Comm) 94 at 133-134; see too the discussion in *Equity and Trusts in NZ* at 632 in respect of estoppel by silence.

presumably, by seeking to rejig roster finish times, to minimise the incidence of any hang-over periods). However, this is not the sort of detriment required to found an estoppel.[11] Nor is detriment suffered by the company in terms of deferred liability (in not having to meet certain financial obligations to employees working into Saturday mornings for a period of time). By contrast the affected employees, who were entitled to such payments as and when they arose, have been out of pocket during the intervening period.

*Step 4 - unconscionability*

[33] Nor am I satisfied that the company is otherwise able to overcome the fourth hurdle presented by its claim of estoppel. Unconscionability relates to the party against whom the estoppel is asserted. It is not directed at some general assessment of impact on the company.[12] Such impact will always be suffered (to a greater or lesser extent) by an employer where an employee has delayed (for whatever reason) in pursuing their legal entitlements, such as correct payments under the Holidays Act 2003 or, by way of an example identified by Mr Gutsell in evidence, correct overtime payments under the collective agreement.

[34] In a nutshell, the plaintiff's arguments as to estoppel fail – the union's silence was benign; there was no information that was known to only one party and withheld; there was no question of detriment in the harmful sense required; and there was no hint of unconscionability in the union asserting a different interpretation of the contract.

[35] For completeness, a further argument was identified as to whether it would be unconscionable for the workers to whom the collective agreement applies to seek to depart from a belief or expectation caused by their union. Resolution of this issue would no doubt involve an analysis of the extent to which representations made by a union on behalf of its individual members could bind them as if made individually. Because of the findings I have reached in relation to the other grounds of the estoppel defence I do not need to reach a concluded view on this interesting issue,

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11 *Smith v Wadland* (2007) 26 FRNZ (HC) at [134].

12 See, for example, *Grundt v Great Boulder Pty Gold Mines Ltd* [1937] HCA 58, (1937) 59 CLR 641 at 675-676.

which was not fully developed in argument and does not appear to have been previously decided.

## Conclusion

[36] The plaintiff's claim fails. Clause 10.4(b) requires payment at T1.5 for all work undertaken on a Saturday and/or Sunday at a Monday to Friday plant which includes any work undertaken at the conclusion of a Friday shift which goes into a Saturday or Sunday.

[37] The effect of this judgment is to set aside the determination of the Authority, although I have reached the same overarching conclusion as the Authority member did in this case for similar reasons.

[38] Costs are reserved. The parties are encouraged to agree costs. If that does not prove possible the defendant may file a memorandum and any supporting documentation within 20 working days of the date of this judgment; the plaintiff may file any material within a further 15 working days; and the defendant may file anything strictly in response within a further five working days.

Christina Inglis
Chief Judge

Judgment signed at 12.45 pm on 22 June 2018