IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2022] NZEmpC 48
EMPC 295/2019

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
BETWEEN	E TŪ INCORPORATED Plaintiff
AND	MOUNT COOK AIRLINE LIMITED Defendant

Hearing:	26 May 2021 and further submissions filed on 29 November 2021 and 7 December 2021 (Heard at Christchurch)
Appearances:	P Cranney, counsel for plaintiff K Thompson, counsel for defendant
Judgment:	18 March 2022

JUDGMENT OF JUDGE K G SMITH

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[1] E Tū Incorporated and Mount Cook Airline Ltd are parties to a collective agreement for cabin crew staff employed by the company to fly domestic airline routes.

[2] There are two disputes between the union and company. The first is whether part-time cabin crew, who are required to be away from home overnight, are working during that time and, therefore, entitled to pay under the Minimum Wage Act 1983 (the Act).

[3] The second dispute is whether the salary for part-time cabin crew in the collective agreement complies with s 6 of the Act and the relevant Minimum Wage Orders.

[4] The proceeding was removed to the Court by the Employment Relations Authority without an investigation meeting.[1]

[5] The parties provided an agreed statement of facts. Mount Cook also relied on evidence from two witnesses; Paul Crooke, who was its former Senior Business Partner Regional Airlines and Maia Denham, its former Cabin Crew Manager.

[6] Mount Cook operates airline services within New Zealand. It employs full-time, part-time, temporary and casual cabin crew. At the time the agreed statement of facts was prepared it employed 250 full-time, 15 part-time and 8 casual cabin crew employees. Cabin crew are based in Christchurch, Auckland, Wellington, Tauranga, Napier and Nelson.

[7] The role of part-time cabin crew was introduced into the collective agreement in 2011. From that time onwards the company has employed part-time cabin crew employees who are paid a salary for their work.

[8] Full-time cabin crew are rostered to work for nine days in each 14-day roster period. Part-time cabin crew are rostered to work six days in each 14-day roster period. Aside from the rostered number of work days the duties and responsibilities of all cabin crew are the same.

[9] The roster contains some flexibility. Staff can:

(a) have access to 10 "Golden Days" each year which, under the collective agreement, enables employees to request a particular day as a guaranteed day off;

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1 *E Tū Incorporated v Mount Cook Airline Ltd* 3053012, 30 August 2019 (Minute of Member van Keulen).

(b) bid for duties to be rostered, or for days off, using a bid system where 90 per cent of requests are granted;

(c) make ad hoc requests for a specific day or days free of duty which are granted wherever possible;

(d) swap duties with another employee; and

(e) request annual leave dates using a leave ballot system.

[10] The roster can result in a part-time cabin crew employee finishing work for the day at a location other than that person's home base. When that happens the employee must stay overnight away from home. The next working day for that employee starts from that other location and finishes when his or her home base is reached at the end of that working day.

[11] Mount Cook is prohibited by the collective agreement from contacting employees who are away from home overnight and off duty other than in exceptional circumstances. One of them is where there has been a flight cancellation or delay.

[12] Under the collective agreement allowances are to be paid to a part-time cabin crew employee away from home overnight. The company provides, and pays for, accommodation and transport to and from the airport. Additionally, the employee is paid overnight and meal allowances.

[13] The collective agreement also provides part-time cabin crew with allowances for discharging certain responsibilities (generally connected with training), grooming, transport and a payment towards annual telephone rental.

[14] Mr Crooke was Senior HR Business Partner Regional Airlines for Mount Cook. For approximately 22 years he was involved in bargaining for cabin crew collective agreements. He explained that the subject of part-time cabin crew employees was discussed by the company and the union's predecessor from about 2006. Initially the drive to introduce part-time work came from the union to satisfy a desire for an alternative to a full-time role.

[15] Agreement in principle to introduce a part-time role into the collective agreement was made in late 2010. A memorandum of understanding was developed in early 2011 before a formal bargaining claim was made.

[16] Mr Crooke explained that the union insisted on part-time cabin crew employees being paid a salary pro-rated from the salary paid to full-time cabin crew employees. The only other effective alternative, he said, would have been to pay by the hour, or by the day, which was not wanted because the union was adamant that a day of rostered work should have equal status for part-time and full-time employees.

[17] Ms Denham explained that on average the work of part-time cabin crew employees equates to about seven hours each working day. The length of the day, however, could vary depending on the number of flights in the rostered duty.

[18] Ms Denham said that where the roster required cabin crew to be away from home overnight there are no restrictions on them although she acknowledged the possibility for personal inconvenience. There is a prohibition on drinking alcohol within 10 hours of any duty beginning, but she explained that it applies in all circumstances, not just when cabin crew are away from home overnight. The only other potential restriction was the contractual rest Ms Denham mentioned, for at least 10 hours between the end of one working day and the beginning of the next day.

Are overnight stopovers work?

[19] The first issue is whether part-time cabin crew employees required by Mount Cook's roster to stay overnight at a location other than that person's home base are working during that time within the meaning of s 6 of the Act.

[20] Section 6 reads:

> Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[21] The Act does not define what is meant by work in s 6, but it was discussed in *Idea Services Ltd v Dickson*.[2] In that case the issue was whether a community service worker was working during a sleepover at a community home. In an approach that the Court of Appeal subsequently approved of, this Court held that what is involved is a factual inquiry which can be assisted by assessing three factors:[3]

(a) Constraints placed on the employee.

(b) Responsibilities of the employee.

(c) The benefit to the employer.

[22] In considering those factors the Court held that the greater the degree of constraint placed on the employee during the relevant time the more likely it would be that the period was work.[4] In *Idea Services* the community service worker was under a significant constraint during the sleepover. He could not leave the community house without permission, had to be available to be woken if he was needed by a resident, could not drink alcohol, could not have visitors without prior permission and was not to disturb the residents during the night. During the sleepover he could only engage in a limited range of other activities and his privacy was limited. The Court considered that those constraints pointed towards the sleepover being work.

[23] The other two factors assessed by the Court also supported the conclusion that the sleepover was work. The Court considered that the more extensive the responsibilities during the relevant period the more likely it was work.[5] The community services worker had significant and continuous responsibilities during the sleepover which continued until another staff member took over the following morning. Those responsibilities pointed towards the sleepover being work.

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2 *Idea Services Ltd v Dickson* [2009] ERNZ 116 (EmpC).

3 At [64]. See also *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2007] 2 NZLR 356, [2006] ERNZ 1109 (CA), where the Court of Appeal held, in the different context of a holiday assessment, that determining a working day is an intensely practical exercise.

4 *Idea Services*, above n 2, at [65].

5 At [66].

[24] Finally, the Court held that there was a benefit to the employer arising from the sleepover. Without the presence of the community services worker throughout the night, its services and funding were jeopardised.[6]

[25] The Court decided that the sleepover was work within the meaning of s 6. The Court of Appeal agreed with that conclusion and the approach of using the three assessment factors to assist in reaching a decision. It held:[7]

> …What the [Employment] Court did do was offer some guidance as to what factors will ordinarily be relevant in deciding whether a person is working. The Court's approach appropriately reflects, we think, the wide variety of work that can be undertaken and the circumstances in which it may take place. It also acknowledges the fact that what people ordinarily consider to be "work" has changed and will change over time. Parliament no doubt enacted the legislation with these points in mind.

[26] *Idea Services* was applied in *Law v Board of Trustees of Woodford House*.[8] In that case employees responsible for school boarding hostels, and who engaged in sleepovers, were held to be working during them. The tasks required during the sleepovers placed significant constraints on their freedom during that time. They performed duties from the early evening on one day until school began the following day and at weekends.

[27] During the sleepover the employees were responsible for the safety and wellbeing of the boarding-house residents. The Court described the expectations on the employees as high and onerous.

[28] The sleepovers benefited the schools. Without the immediate availability of a responsible adult in the hostels at night the schools could not have lawfully and practically maintained the boarding establishment. The continued existence of the schools was closely tied to the maintenance of the boarding facilities.

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6 At [69].

7 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522, [2011] ERNZ 192 at [9] (footnotes omitted).

8 *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576 at [185]–[187].

[29] Compliance with s 6 of the Act was considered again, in the context of on-call responsibilities, in *South Canterbury District Health Board v Sanderson*.[9] That case applied the assessment factors from *Idea Services* to on-call duties for anaesthetic technicians. They were required by the terms of their employment agreement to be on-call, and to attend the hospital, within a few minutes of being called back to perform theatre duties. The provision of free accommodation at which the technicians could stay enabled a quick response. The assessment factors were held to apply and the technicians were found to be working while on call because, among other things, of the constraints placed on them.

[30] The last decision referred to by counsel was *Labour Inspector v Smiths City Group Ltd*.[10] In that case the Court agreed that determining whether an activity is work within the meaning of s 6 is a case-specific factual inquiry. While the assessment factors from *Idea Services* were considered to be helpful in such an analysis the Court cautioned that they need not be, and ought not to be, slavishly applied. Some cases called for a more nuanced analysis.

[31] Mr Cranney, counsel for E Tū, argued that part-time cabin crew employees away from home overnight were working within the meaning of s 6. Relying on the assessment factors from *Idea Services* he submitted that there was a constraint on the employees. It arose because they were required by the roster to travel to a location dictated by the airline and remain there until work resumed on the next scheduled flight. Plainly, they could not return home between the rostered duty times.

[32] As well as being away from home restrictions on the cabin crew were said to arise from what could and could not be done while away. There were obvious limitations on an employees' ability to pursue personal activities compounded by the contractual rest time imposed on them. The example Mr Cranney mentioned was that while off duty they could not take up secondary employment.

[33] Mount Cook was said to benefit by having employees in the company's chosen location enabling the operation of its preferred flight schedule. As a result it could

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9 *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127, [2017] ERNZ 749.
10 *Labour Inspector v Smiths City Group Ltd* [2018] NZEmpC 43, [2018] ERNZ 124 at [56]–[57].

schedule flights to begin the following day to satisfy its expectations rather than wait for employees to be transported to that location to begin work.

[34] Mr Thompson, counsel for Mount Cook, acknowledged that part-time cabin crew away from home may be inconvenienced at times but did not accept that situation reached the level of a constraint as described and applied in *Idea Services*. He drew support for this argument by contrasting the present case with *Sanderson* and from the flexibility in the rostering system. He was referring, in particular, to the relative freedom enjoyed by cabin crew employees including the ability to request roster allocations that enabled them to be away from home for personal reasons.

[35] The contractual rest period was said not to be a constraint in the way that was persuasive in *Idea Services*, because it arose from the collective agreement and applied to all cabin crew employees not just those away from home overnight.

[36] Mr Thompson accepted that the prohibition on consuming alcohol was a restriction but argued that it applied to all cabin crew employees regardless of location, so that it was not properly linked to the employee's absence from home. The obvious point that the crew members were not responsible to the company between duty times was made. It was reinforced by the collective agreement stating that no work was to be performed for the company between rostered shifts and crew members were not to be contacted.

Analysis

[37] This is a case where the three factors from *Idea Services* assist in determining if the time away from home is work within the meaning of s 6.

[38] I accept that when a part-time cabin crew employee is away from home overnight that person might be inconvenienced. It is difficult to say more than that because the agreed statement of facts did not explore the circumstances of individual employees and what impact, if any, being away might have had on them. That left the assessment drawing on only those inferences which could reasonably arise from the fact that an employee is away from home, against which the company pointed out that

there were occasions where the opportunity to travel was requested for an employee's own reasons.

[39] What is clear is that after one duty day ends and before the next one begins the employees are free to do as they please. Unlike the examples provided by *Idea Services*, and *Law*, absolutely nothing is required of them during that time. The fact that the employees are away from home is not enough by itself to amount to a constraint of the sort that was persuasive in those earlier cases.

[40] Mr Cranney relied, at least partly, on arguing that there were constraints because the employees could not undertake anything they might have been free to do while at home, such as preferred recreation or secondary employment, and there was the further restriction in the prohibition on drinking alcohol. Those factors are not persuasive largely because of the freedoms which the employees have while away. The prohibition on alcohol consumption applies to all cabin crew employees, which means it does not stand out as persuasive in this assessment.

[41] The absence of any constraints on the employees points away from concluding that this time is work within the meaning of s 6.

[42] The next factor to assess is whether an employee away from home overnight has any duties or responsibilities to discharge for Mount Cook. Once the flight is "on blocks", that is, the aircraft is at the airport terminal that is the final destination for the day and passengers have disembarked, cabin crew members have no responsibilities or duties to perform.

[43] The collective agreement reinforces the absence of responsibilities or duties by stipulating that the employees are not to be contacted except in limited circumstances. This factor points away from a finding that part-time employees are working while away from home overnight.

[44] The third assessment factor to consider is if there is a benefit to Mount Cook from this work arrangement. There is a benefit to the company. By stationing crew in its chosen location the company has staff available to begin duty the next day to suit its preferred flight schedule. Otherwise the company may be forced to operate a flight

schedule taking into account the need to transport crew from their home base to the other location to take up duties from there. This factor points towards the employee being at work within the meaning of s 6.

[45] When all of these assessment factors are weighed up the absence of any constraints on the employees, in combination with them having no responsibilities or duties to perform, are extremely persuasive. They are qualitatively different from the circumstances that were described in *Idea Services*, *Law*, and *Sanderson*. That difference far outweighs the only factor that might support a conclusion that the time is work which is the benefit to Mount Cook.

[46] I find that part-time cabin crew members who are away from home overnight are not working within the meaning of s 6 of the Act. This part of the union's claim is unsuccessful.

Compliance with the Minimum Wage Act?

[47] The second issue is whether the salary paid to part-time cabin crew in the collective agreement complies with s 6 of the Act. The dispute lies in how the collective agreement calculates that salary as two-thirds of the salary of a full-time cabin crew employee on the equivalent salary step under that agreement.

[48] Both E Tū and Mount Cook sought declarations. The union sought a declaration that each part-time cabin crew employee was entitled to receive from Mount Cook payment for his or her work at not less than the minimum rate specified by cl 4(d) of the relevant minimum wage order. A related application was for a declaration that the salary for a part-time cabin crew employee in the collective agreement is insufficient to meet s 6 of the Act and cl 4(d).

[49] Mount Cook sought a declaration that the salary for a part-time employee provided for in the collective agreement satisfied the Act and relevant order.

[50] No other relief was sought by either party. It is important to note that the collective agreement contains a mechanism for further bargaining if it transpires that the part-time salary does not comply.

[51] To place these competing applications into context it is necessary to describe the collective agreement in more detail.

The collective agreement

[52] Since at least 2011 the company and the union have bargained for collective agreements dealing with part-time employees. The current collective agreement expires in mid-May 2022.[11] The agreement differentiates between full-time and part-time cabin crew in a limited way by recognising that part-time employees work for fewer days in a fortnight than full-time employees.

[53] The agreement acknowledges that the nature of the industry means it is necessary to provide a service over seven days. A week is defined as seven consecutive days beginning at 00:01 hrs Monday and ending at 23:59 hrs Sunday. In the agreement a day is a period of 24 consecutive hours from midnight on one day until midnight the following day.

[54] Cabin crew duties are rostered over a minimum of 14 days. Under clause 9.3.4 a part-time employee is normally rostered for six days duty in each two weekly roster period. The same clause provides for remuneration for the "above six days rostered duty". By agreement a part-time employee may work additional days. There is also a mechanism in the agreement allowing Mount Cook to roster a part-time employee for up to four, 14-day roster periods of full-time duties each calendar year.

[55] Part-time cabin crew employees also receive reimbursement for a portion of telephone rental, and allowances for grooming and transport.

[56] The salary payable to part-time employees is provided by a table in Part 9 of the collective agreement. The table has five steps the highest of which is step 5. In addition to a salary a part-time cabin crew employee is eligible to receive the same responsibility allowances as a trainer, CRN/ground trainer, or line assessor as a full-time employee.

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[11] Now subject to Epidemic Preparedness (Employment Relations Act 2000 – Collective Bargaining) Immediate Modification Order 2020. See also *Idea Services Ltd v Attorney-General* [2022] NZHC 308.

[57] The relationship between the salary paid to full-time and part-time cabin crew is proportionate. The part-time salary is calculated as two-thirds of the full-time salary.[12] E Tu's claim was that the salary ranges payable to part-time cabin crew employees were:

Date Range	Per Annum	Paid Per Fortnight
From 14 May 2019	$25,304 to $28,742	$973.23 to $1,105.46
From 14 May 2020	$26,746 to $29,604	$1,028.69 to $1,138.62
From 14 May 2021	$27,281 to $30,197	$1,049.27 to $1,161.42

[58] The union acknowledged in its claim that the salary payable depended on service.

[59] The union's claim was that those salary amounts when paid on a fortnightly basis were less than the amount payable under cl 4(d) of the relevant minimum wage order.[13]

[60] Mount Cook accepted the union's statement of the salary ranges and amounts payable but also argued they were subject to adjustment upward in the event that more than six days in a fortnight were worked. There are also issues arising as to how to treat allowances payable to the employees.

[61] The disagreement turns on the meaning of cl 4(d) in the minimum wage order.

The Minimum Wage Order

[62] The Minimum Wage Order 2021 provides in cl 4 the following:[14]

> **4 Minimum adult rates**
>
> The following rates are the minimum rates of wages payable to an adult worker:
>
> (a) for an adult worker paid by the hour or by piecework, $20 per hour:

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12 6 days / 9 days, 6/9 = 2/3.

13 At the time the pleading was started the 2019 order and the fortnightly rate was $1,416.

14 At the time the proceeding was filed the 2019 order applied but there is no material difference in the wording between cl 4(d) in each version other than the minimum amounts payable.

(b) for an adult worker paid by the day,—

(i) $160 per day; and

(ii) $20 per hour for each hour exceeding 8 hours worked on a day:

(c) for an adult worker paid by the week,—

(i) $800 per week; and

(ii) $20 per hour for each hour exceeding 40 hours worked in a week:

(d) in all other cases,—

(i) $1,600 per fortnight; and

(ii) $20 per hour for each hour exceeding 80 hours worked in a fortnight.

[63] Mr Cranney described the union's argument as simple. It is that part-time cabin crew employees fall within the group or class covered by cl 4(d). They are within the "all other cases" category because they are not paid by any of the methods in cl 4(a)-(c) inclusive. There is nothing in the collective agreement from which the employees could be said to be hourly, daily or weekly workers. The part-time salary was not calculated, for example, by assessing an hourly or daily rate and expressing it in the collective agreement as a salary. Consequently, the only available conclusion was that part-time employees' remuneration must be captured by the all-encompassing words of cl 4(d).

[64] Support for this analysis was taken from the history of minimum wage legislation. Mr Cranney began by referring to s 3 of the Industrial Conciliation and Arbitration Act 1936. Under that legislation the Arbitration Court was required to fix the rate of pay for male and female adult workers. He said that a fixed weekly sum was payable for time worked up to 40 hours in factories and shops and up to 50 hours on farms. Penal rates applied after the maximum hours were reached.[15]

[65] That was followed by the first Minimum Wage Act which was passed in 1945. Under that legislation an employee became entitled to receive pay for work at not less than the prescribed rate in three categories:[16]

(a) payment by the hour or piece rate;

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15 The rate was time and a half.

16 Under ss 2(2) and (3). Different rates of pay applied to men and women but the classifications were the same.

(b) payment by the day; and

(c) payment in "all other cases".

[66] The statutory minimum rates of pay increased with the Minimum Wage Amendment Act 1947 and three further amendments in 1949, 1950 and 1951. Each amendment used the same three categories as the 1945 Act.

[67] An important shift occurred in 1952. That year fixing minimum wages was transferred from passing amending legislation to regulations in the form of minimum wage orders. From 1952 until 1990 the orders used the same categories as in the 1945 Act. That is, they prescribed minimum rates of pay for work by the hour or piecework, by the day, and in "all other cases".

[68] The next important change Mr Cranney relied on was in 1990, by including payment for additional hours of work. Where the employee was paid by the day there was a specified rate per day. A further payment per hour was required for each hour in excess of eight worked in a day. For those employees within the "all other cases" category, an additional payment was required for each hour worked in excess of 40 in each week.[17] Mr Cranney described this change as "another important new right" because previously the sum payable was the same no matter how many hours were worked.

[69] Another change was introduced in 2015. The order made in that year had four categories expanded from three previously. The addition was payment by the week. That meant the order dealt with payment by the hour or piecework, by the day, by the week and "in all other cases".

[70] Mr Cranney submitted that the consequence of this addition was that employees in the "in all other cases" category were no longer entitled to a weekly sum and an extra payment for overtime, but to a minimum fortnightly sum and an extra payment for each hour worked over 80 in a fortnight.

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[17] Referring to the Minimum Wage Order 1990, cl 2(c).

[71] As applied to the agreed summary of facts, the argument was that the fortnightly dollar amount paid to part-time workers was less than the dollar amount prescribed by the then current cl 4(d) and the difference had to be paid. Mr Cranney submitted it was not an answer to the union's complaint to say that the collective agreement was the product of bargaining or that, because the salary paid to full-time staff complied, pro-rating it for part-time employees meant that the salary payable to them also complied.

[72] In Mr Cranney's submissions there was no direct relationship between hours actually worked in a fortnight and the sum to be paid. He pointed out that it was common ground that not all rostered days are the same length. Whether the amount paid represents two-thirds of a full-time employee's hours worked in a fortnight will depend, therefore, on what days are rostered and the length of those days in a particular fortnight.

[73] The conclusion invited was that, because the collective agreement dealt with work based on a fortnightly roster without any other method of calculation, the part-time employees must be paid not less than the minimum wage specified in cl 4(d). If the salary paid to a part-time cabin crew member did not satisfy cl 4(d), the order, and the Act, were breached.

[74] Mr Thompson submitted that the text of the minimum wage order, in light of its purpose, showed that the salary for part-time employees complied.[18] He made two introductory points. The first one was that in *Idea Services v Dickson* the Court of Appeal found that Parliament must have intended the application of practical statutes to be easy, based on information readily available to both the employer and employee at that time.[19]

[75] The second point was that in *Law v Woodford House* the Court decided "antiquated" legislation must be interpreted in light of current circumstances.[20] The observation was made in the context of considering if the Act applied to salaries as

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18 He referred to the Interpretation Act 1999, s 5 but now see the Legislation Act 2019. *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2017] 3 NZLR 767.

19 *Idea Services*, above n 7.

20 *Woodford House*, above n 8, at [55].

distinct from wages. Mr Thompson accepted that the Act applies to salaried employees but tempered that acknowledgment with an observation that attention still needed to be paid to the fact that salaries are often determined on a different basis compared to wages.

[76] Mr Thompson distinguished between the union and company's positions because the union had overlooked the word "rate" in cl 4(d). The company's case was that, so long as the rate of pay for actual hours worked was not less than prescribed by the order, no breach occurred.

[77] Mr Thompson's submissions on the text of the order began with an observation that minimum wage legislation has remained essentially unchanged since 1945 and the text has consistently required a rate of pay, which needed to be given meaning. The argument continued that, since the minimum rates are for the periods described (which he described as an hour, a day, a week and a fortnight), it is necessary to ascertain the meaning of those periods of time.

[78] The submission was that what is meant by the periods of a day, a week and a fortnight can be calculated from cl 4 itself. All of those periods of time are mathematically derived from the hourly rate, and the way in which the additional payments are dealt with shows that what is intended is a rate of pay for actual work. That is because, for example, cl 4(b)(ii) provides for payment of hours worked exceeding eight hours in a day, so what is intended for a day's work is eight hours. Similar calculations were put forward for the remainder of cl 4. In relation to cl 4(d) the submission was that it could be seen to be payment for working an 80-hour fortnight.

[79] Applied to the part-time employees, their salary complied so long as the rate at which it was paid did not fall below the minimum hourly rate and they were paid for the actual hours worked in a rostered fortnight. On this basis the pro-rating system in the collective agreement complied.

[80] Mr Thompson relied, at least partly, on a decision of the full Court in *Gate Gourmet New Zealand Ltd v Sandhu* for this reference to payment for actual work.[21] His submissions were made before the Court of Appeal's judgment in *Sandhu v Gate Gourmet New Zealand Ltd* was issued.[22] Counsel took the opportunity to make further submissions about the outcome of that case which are discussed later.

[81] Two cases were drawn on to support Mr Thompson's submissions about the text of the order: *Hopper v Rex Amusements Ltd* and *Idea Services Ltd v Dickson*.[23] In *Hopper* the Court of Appeal applied an approach to the 1945 Act's use of "rate of pay" consistent with Mount Cook's preferred interpretation of cl 4(d).

[82] *Hopper* was a case stated under the Industrial Conciliation and Arbitration Amendment Act 1945. It dealt with the attempted recovery of entitlements to a minimum wage claimed to be owing to a theatre employee employed under a registered award. The employee was paid in accordance with the award but the issue was whether his pay complied with the 1945 Act.

[83] The Court of Appeal was satisfied that the employee's pay complied. It concluded that the employee was paid by the hour from the way the award dealt with payments per theatre performance. The Court was able to calculate how much was paid to the employee under the award and compare that to the hourly rate in the 1945 Act. It held that nothing more was payable. A cross-check of sorts was undertaken when the Court considered the practice used in calculating overtime.

[84] The nub of Mr Thompson's submissions lies in *Hopper's* analysis of whether the employee would have fallen within s 2(c) of the 1945 Act that provided for the "in all other cases" category now contained in cl 4(d).

[85] In *Hopper* the Court rejected an argument for the employee that payment had to be made at the specified amount in the legislation. It did so by analysing how the 1945 Act provided for minimum "rates" of pay with examples to illustrate the point.

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21 *Gate Gourmet New Zealand Ltd v Sandhu* [2020] NZEmpC 237, [2020] ERNZ 561.
22 *Sandhu v Gate Gourmet New Zealand Ltd* [2021] NZCA 591.
23 *Hopper v Rex Amusements Ltd* [1949] NZLR 359 (CA); *Idea Services Ltd v Dickson* [2009] ERNZ 372 (EmpC); and *Idea Services*, above n 7.

The first example was where an employee, working for an hourly rate, worked only half an hour. The Court said that, if the employee was paid half the hourly rate, he or she was properly described as being "paid at that rate per hour".[24] The second example was for a daily employee. The Court referred to the situation that would arise if a daily rate of pay was agreed on and the employee worked for a day and a half. The conclusion reached was that he or she would be properly paid by receiving one and a half times the daily rate. The examples continued with a weekly rate using the same methodology.[25]

[86] While the Court considered these examples it returned to the circumstances of the case stated to illustrate some of its reasoning. In that case the award fixed the hours of work for the employee who was classified by it as a doorman/fireman. They were not to exceed 36 per week. It concluded:[26]

> …It seems reasonable, therefore, that a weekly rate of wages for [the worker] should be considered as for a week of thirty-six hours, and for the purposes of the Minimum Wage Act, 1945, he is to be regarded as entitled to recover as a minimum a proportion of the weekly rate calculated according to the number of hours per week he works—that is, in this case, 21/36ths of £5 5s. a week. …

[87] Not surprisingly, Mr Thompson submitted that this case fell within the examples given by the Court of Appeal in *Hopper*, applying a rate to actual hours, and that the reasoning remained sound when applied to the 1983 Act.

[88] Mr Thompson acknowledged that *Hopper* was discussed by the full Court of the Employment Court in *Idea Services* but in the context of a debate about averaging remuneration over a pay period, which was not the situation in this case. His point was that the full Court did not distinguish *Hopper* or attempt to reconsider its interpretative approach.

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[24] At 369.

[25] The example was that if the weekly rate of pay was £5/5 then, for one and a half weeks' work, payment would amount to £7/17/6 and, if the employee worked only half a week, the remuneration would be £2/12/6; in other words linking the pay to actual hours worked.

[26] At 369.

[89] Adding weight to this argument was a claim that *Hopper's* approach was the methodology used in other registered awards that pro-rated remuneration for part-time employees.[27]

[90] Support for this proposition was said to be found in the Court of Appeal's decision in *Idea Services*. In that case the Court held that a rigid demarcation between each of the categories in cl 4 was not intended.[28]

[91] From *Hopper* and *Idea Services*, Mr Thompson argued that pro-rating the salary complied. That meant so long as each of the part-time cabin crew employees were paid not less than the minimum rate specified for each of the hours they worked over the course of the rostered work the order and the Act were not breached.

[92] Turning to the purpose of the Act and the order, Mr Thompson's theme was that it supported his textual analysis. Acknowledging that the Act and the order do not contain formal statements of purpose, he submitted that they were part of legislation providing for an overall minimum code of rights for employees to provide minimum rates of pay for work performed.

[93] The key to understanding the purpose of the legislation was said to be the minimum hourly rate wage "framework", referring to the daily, weekly and fortnightly rates being mathematically derived from the minimum hourly wage rate. In that context he argued that the purpose of the rate was to protect a minimum hourly rate for "actual work".

[94] On this argument the purpose could not have been to create an inconsistency in earnings based on the frequency of payment or whether an employee is waged or salaried. It was said an absurdity would result if the frequency of payment could determine the value of the work. The point was illustrated with an example by comparing provisions in the collective agreement for a casual cabin crew employee and for a part-time employee. A casual employee is paid by the day under the

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[27] The two Awards referred to were the New Zealand Area Health Boards Medical Radiation Technologists Award, registered 17 June 1991 and the College of Education Advisors and Reading Recover Tutors Award, registered 2 July 1991.

[28] *Idea Services*, above n 7, at [31].

agreement. If a casual employee was engaged to work on the same six days in a fortnight as a part-time cabin crew employee they would get different pay.

[95] To underscore that argument, and as a form of cross-check, Mr Thompson cautioned against an outcome that could have unintended consequences. He gave an example of such a consequence where an employee agreed to be available to work a variable number of hours but on only one morning each fortnight for an annual salary of $5,200 paid fortnightly. Mr Thompson argued that, on the union's interpretation, that employee must be paid $1,600 each fortnight, which was clearly not intended by the agreement in his example.[29]

[96] Given the emphasis in the submissions on actual work, counsel were provided with an opportunity to make further submissions following the Court of Appeal's decision in *Sandhu v Gate Gourmet New Zealand Ltd* which reversed the full Court's decision in that case.[30]

[97] Mr Thompson submitted that *Sandhu* supported Mount Cook's position, particularly where it held that if an agreement is reached to reduce working hours the Act applies only to the reduced hours.[31] Mr Thompson also referred to the Court's answer to the approved question on appeal, that the reference to the minimum wage was to it being payable for the hours of work the employee had agreed to perform. Drawing those threads together he submitted that, if an employee paid fortnightly agreed to reduce the hours of work from (say) 80 to 60 in a fortnight, he or she is paid for those hours and is still paid fortnightly. That was because the Act applied only to the reduced hours of work. In other words, the effect of *Sandhu* was to allow pro-rating the minimum wage to the hours worked.

[98] In Mr Cranney's further submissions he took issue with the interpretation of *Sandhu* argued for by Mr Thompson. Specifically, he referred to the employees in that case being paid weekly with a minimum 40-hour week. That meant they did not fall into the "all other cases" category and the decision was taken out of context by Mr Thompson.

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29 The example drew on the 2021 order.
30 *Sandhu*, above n 22.
31 At [51].

Analysis

[99] I do not agree that the Act and order are satisfied if a complying salary is pro-rated to provide a salary for part-time work without the resulting remuneration also complying. Mr Thompson's arguments concentrated on "rate" of pay, which involves assessing a unit of time to apply without considering whether the resulting remuneration complied.

[100] The difficulty with Mount Cook's approach is that in *Idea Services* the Court of Appeal held that the expression "rate of pay" meant an amount payable for a unit of time. The units of time are those in the order: an hour, day, or week.

[101] The language in cl 4 of the order is clear and does not suggest that what is payable can be a part or portion of those units of time. Such an outcome would dilute or undermine the effect of a minimum wage. The clause begins by saying that "the following rates are the minimum rates of wages" which unambiguously introduces cls 4(a)–(d). The words indicate that what follows is mandatory even if a rigid demarcation between each category was not intended.[32]

[102] Mr Thompson's submissions required attributing a meaning to cl 4(d) so that it is a statutory fortnightly rate where the employee works at least 80 hours. For fewer hours, it followed on his analysis, the rate is proportionate to the actual work performed. So long as the rate is paid for each hour actually worked compliance would be achieved. I am not persuaded that this approach is the correct way to interpret cl 4(d), as if it creates a unit of time of a fortnight. Clause 4(d) is introduced with the words "in all other cases" which indicates it applies in those situations where the employee is not employed by the hour, day, or week. It applies to other intervals of time and the way in which Mr Thompson approached the matter would deprive the clause of that broader meaning. It will also have consequences for cls 4(a)–(c) inclusive. If the only issue to assess is whether payment for each hour actually worked satisfied the minimum hourly rate, there would be no need to specify other rates for a day or a week. It would be sufficient if the order had stated that remuneration

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[32] *Idea Services*, above n 7, at [31]–[33].

complied when converted to an hourly rate so long as it was more than a stipulated dollar amount.

[103] Mr Thompson attempted to illustrate a supposed frailty in the union's case by arguing that had the position been as it claimed, cl 4(d) would refer to payments over a fortnight or a part of a fortnight. I disagree. That is, in fact, exactly what Mount Cook has been arguing through Mr Thompson's submissions by drawing links between a rate of pay and actual hours of work.

[104] Before considering Mr Thompson's further submissions about *Sandhu*, a brief comment about *Hopper* is needed. *Hopper* does not assist Mount Cook's argument. The conclusion of the Court in that case was that the employee was an hourly worker.[33] The examples that followed were not material to the decision and are, therefore, not binding.

[105] Reliance on the other examples in *Hopper* also presents difficulties. The Act and the order do not define a "day", a "week", or a "fortnight" and the 1945 Act did not define units of time either. In contrast to Mr Thompson's submission that a working week can be determined to be 40 hours, the Court of Appeal in *Hopper* considered it to be 36 hours by reference to the award.[34] That conclusion suggests the rate to apply is a question of fact about the terms of the employment agreement.

[106] Further, the examples given by the Court did not explain why an employee who entered into an agreement to work for an hour, a day or a week should get less than the amount for that period of time just because he or she was released early from the contractual obligations. If the employee is not required to work for the full length of the engagement that is a decision for the employer, but that is not a satisfactory explanation for being able to pay less than the terms of the agreement required.

[107] There is also a conflict between *Hopper's* examples and the decision in *Idea Services*. In *Idea Services* the Court of Appeal held that rate of pay means an amount for a unit of time and did not mention *Hopper*.[35]

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33 *Hopper*, above n 23, at 368.
34 At 369.
35 *Idea Services*, above n 7, at [33].

[108] *Sandhu* does not assist Mount Cook. In *Sandhu* the Court of Appeal described the history of minimum wage legislation, giving effect to the Minimum Wage–Fixing Machinery Convention 1928.[36] That case involved claims about payment of minimum wages under s 6 of the Act to employees who were able to work but were not working because of COVID-19. The Court of Appeal held:

> [46] The only logical reading of s 6, in the context of the Act as a whole, is that it requires payment of the minimum wage for the whole of the time that the employee has agreed to work. If the employee does not work for some of that time – if time is "lost" – then s 7(2) describes the consequences and sets out the only circumstances in which payment of wages may be withheld in respect of that time.

[109] As Mr Cranney pointed out, *Sandhu* was concerned with employees who worked a 40-hour week and the case was about what deductions might lawfully be made when considering the relationship between ss 6 and 7(2) of the Act. *Sandhu's* findings about the relationship between those sections reinforces the position being taken by E Tū. That is, that the minimum wage can only be departed from in the limited circumstances created by s 7(2). In all other cases it must be applied.

[110] Part of Mr Thompson's submissions about *Sandhu* concentrated on the words "agreed to work" in para [46] but that discussion was taken out of context. That case does not support a proposition that the Act and order are satisfied for a part-time employee if his or her income has been derived from pro-rating the remuneration of a full-time employee. The end result must also comply.

[111] The Court of Appeal's comment in *Sandhu*, about the purpose of the Act setting a floor below which employees and employers cannot go, supports the analysis of the text of the order.[37] It would be inconsistent with providing a floor to interpret the order in a way that reduces the minimum payment that is required in "all other cases".

[112] The last part of this analysis is to undertake a cross-check. Mr Thompson argued that an absurd result would be created if the union's argument succeeded, by drawing on an example of a casual employee and a part-time employee. I do not accept that the example proves the point. Part-time cabin crew employees earn a salary for

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36 *Sandhu*, above 22, at [9].
37 At [47].

making themselves ready, willing and able to work on a 14-day roster on which they will be allocated a tour of duty on six of those days. In contrast the collective agreement provides that casual employees are engaged for a day at a time. The difference in the tenure between a casual employee and a part-time one explains any difference that might emerge in their pay.

[113] I prefer E Tū's argument about how to interpret cl 4(d) over the one offered by Mount Cook. It does not follow that, because a full-time cabin crew employee's salary complies with the Act and order, it is appropriate merely to pro-rata that salary to arrive at the remuneration payable to a part-time employee. The part-time salary must still comply with the order.

[114] Determining the appropriate rate of pay under the order is a question of fact. There is nothing in the collective agreement from which an intention to create a method of payment falling within one of the categories in cls 4(a)–(c) might be discerned. Unlike *Hopper*, there are no provisions in the agreement between E Tū and Mount Cook which could lead to a calculation of a part-time salary for cabin crew employees by reference to an hour, day or week. There is provision for a part-time cabin crew employee to work a seventh day in a rostered period, and to be paid for that day, but that does not assist because it stands outside the calculation of the salary. It follows that cl 4(d) applies.

[115] The remaining issue is whether it is appropriate for declarations to be made. There is agreement about the salary payable but that may not be the full picture. The agreed statement of facts sets out an example for one part-time cabin crew employee on salary step 5 and covering one rostered period in 2019. The amount paid was one-twenty-sixth of the annual salary and came to $1,105.46 before adding allowances. Those allowances included breakfast, lunch, dinner, and overnight allowances for a fortnight in December 2019 but did not include what was referred to in the agreed statement of facts as "less frequently paid allowances" for example the grooming and transport allowances which are paid twice each year.

[116] On the basis of the admitted pleading it seems that in the example given the employee concerned was underpaid. What is not clear, however, is whether any other

allowances were payable and have been included or, if not, whether they ought to form part of the employee's remuneration for salary purposes.

Conclusion

[117] I have concluded that it would not be appropriate to make the declaration sought at this stage. However, the parties may be able to clarify the position from the information provided in which case I may be able to make a declaration or declarations. Leave is reserved to file further submissions on the issues raised in paragraph [116] if the points raised are capable of clarification. Memoranda may be filed proposing a timetable.

[118] Costs are reserved. Both parties have had some success and my preliminary view is that costs should lie where they fall. However, if either party considers costs should be ordered memoranda may be filed requesting a timetable to exchange submissions.

K G Smith
Judge

Judgment signed at 10.15 am on 18 March 2022