IN THE EMPLOYMENT COURT
AUCKLAND

AC 22/08
ARC 45/07

IN THE MATTER OF	a point of law challenge to a determination of the Employment Relations Authority
BETWEEN	NZ AMALGAMATED ENGINEERING PRINTING & MANUFACTURING UNION Plaintiff
AND	MARLEY NEW ZEALAND LIMITED Defendant

Hearing: 8 April 2008
Supplementary submissions received on
10 and 16 April 2008
(Heard at Auckland)

Appearances: J A Wilton, counsel for plaintiff
R L Towner and C Abaffy, counsel for defendant

Judgment: 3 June 2008

JUDGMENT OF JUDGE B S TRAVIS

Introduction

[1] The plaintiff union has challenged a determination of the Employment Relations Authority, issued on 26 June 2007, which found that the defendant's employees were not entitled to a shift allowance when they worked 8 hours of overtime. The employment relationship problem involved a dispute between the parties as to the interpretation, operation and application of the Plastics Industry Collective Agreement 2005-2007 (the meca) which is a multi-union, multi-employer, collective agreement to which both the plaintiff union and the defendant (Marley) are parties.

[2] The union did not seek a full hearing of the entire matter, but only of certain issues involved in the determination. These were:

> *(a)* *Whether a "traditional view" that time paid for at overtime rates does not attract the payment of a shift allowance is an appropriate starting point for interpretation of the collective agreement.*
>
> *(b)* *Whether, on a proper interpretation of Clause 19 in the context of the collective agreement, a shift allowance is payable to a shift employee who works an extra shift, notwithstanding that that extra shift is payable at overtime rates.*

[3] The dispute concerned a situation where a Marley employee, having already worked five 8-hour shifts during the week, works a further 8-hour period on a sixth or seventh day during the weekend when Marley's operations are continued through the weekend. The employee is paid overtime for each of those further 8-hour periods. The union contends that these extra 8-hour periods are "*shifts*" for the purposes of the meca and therefore attract the shift allowance, while Marley contends that such work periods are not rotating or alternating shifts and therefore do not attract the shift allowance.

Background

[4] Marley is a manufacturer of plastic pipes, fittings and rainwater systems. It operates four separate companies in five sites employing around 230 employees, some of whom are members of the plaintiff union. Marley's main site is in Manurewa where it carries out a number of manufacturing functions. Each of those functions operates as a separate cost centre. Marley also has a site in Christchurch that operates as a satellite of the main Auckland site, employing around 30 employees. Different practices have developed in the separate plants. For some time, some of those plants paid shift allowances in the circumstances described above, while others did not.

[5] Marley's normal operations are 24-hours a day, five days a week, running from 7am Monday until 7am Saturday. There are three shifts "A" and "B" are "*swing*

shifts". Employees on these shifts work on alternative weeks a morning shift (7am until 3pm) and an afternoon shift (3pm until 11pm). "C" shift is a permanent night shift (11pm until 7am). These are all rostered shifts.

[6] When customer demand requires it, Marley will operate its plants over all or part of the weekend. Volunteers for the work are sought, usually on the Thursday before the weekend. The weekend work most commonly occurs in the months leading up to Christmas when customers are building up their stocks. Depending upon the demand the team leaders will approach employees and ask them to work extra 8-hour periods on either one or two days of the weekend. In the period of high production demand the plant will run all weekend, that is to say 24-hours a day, Saturday and Sunday. If the employees had worked morning shifts during the week, they would be invited to work an extra 8-hour shift starting on Saturday morning, and then an extra 8-hour shift starting on Sunday afternoon. If the employees had been on a shift working in the afternoons, they would be offered an extra 8-hour period starting on Saturday afternoon and then an extra 8-hour period starting on Sunday morning with an 8-hour break between those two periods. They would be paid overtime for that work.

[7] Generally the overtime work on the weekends did not involve the entire plant but only selected machines. It is Marley's expectation that the employees working a particular shift on a particular machine would be the first to work a similar period on the same machine during the weekends. This ensures that employees with the right experience are working the particular machines during the weekend. The key to keeping the plant operating in the weekends is to ensure that the machinery is kept running and the plant "*hot*".

[8] On some occasions when Marley had thought it had caught up with sufficient production, the plant might work one work period but not two on either Saturdays or Sundays. Occasionally only a small amount of extra work is required in the weekends and this would be regarded as a continuation of the normal regular five day production cycle.

[9] Shift allowances were not paid to employees who worked less than an extra 8-hour period. The union is not seeking the shift allowance for employees working less than an 8-hour extra period.

[10] Marley regards the meca as a minimum rate agreement. It pays above those minimum rates.

The meca

[11] In about 1988 it was agreed between the employer organisations in the plastics industry and relevant unions that the Metal Trades Award which had covered manufacturers of plastic products amongst other diverse industry groupings, had become too large. The parties involved in the plastics industry set out to develop a specific plastics industries award. The effort took place over a number of years and carried on after the introduction of the Employment Contracts Act 1991. The parties remained willing to have a multi-employer, multi-union document even after the change in the legislation and adjustments were made in the negotiations to have the document become a collective employment contract. The first plastics industry collective employment contract (the "1991 cec") was signed late in 1991. There has been a collective employment contract or collective agreement in force between the parties ever since.

[12] The shift allowance provision, which now appears in clause 19.10 of the meca, was originally contained in a similar form, but with lesser payments, in the 1991 cec. Until 2007 the unions made no claims in bargaining that their members should be paid a shift allowance for working either overtime hours or extra work periods on a weekend, in respect of which they were already being paid overtime pay. The present dispute arose at the end of 2006. The union first made a claim in bargaining in 2007 for both the shift allowance and overtime but this was subsequently withdrawn.

[13] The following are the relevant clauses in the meca regarding shifts:

19. SHIFTS

…

19.4 DEFINITIONS

Day Shift:	*A shift starting not earlier than 6.00am.*
Afternoon shift:	*A shift starting after 12 noon and finishing at or before midnight.*
Night shift:	*A shift finishing after midnight and at or before 8.00am.*

The above definitions include shift work which is alternating, rotating or fixed.

A "shift employee" is an employee who is employed on any of the above shifts.

19.5 SHIFT OPERATION – 5 DAY SPAN

The ordinary hours of work shall not exceed five consecutive shifts of not more than 8 hours each to be worked between the hours of midnight Sunday/Monday and 8.00am Saturday.

19.6 SHIFT OPERATION – CONTINUOUS 7 DAY SPAN

Shifts may be worked over seven days of the week to cover continuous 7 day operations. Not more than five shifts each of eight consecutive hours shall be worked in any one week without the payment of overtime. Provided that shift employees working on Saturday and/or Sunday as part of their ordinary 40 hour week shall be paid time and a half for the first three hours before noon on Saturday and double time thereafter or for time after noon. On Sunday double time shall be paid for all hours worked.

19.7 SHIFT OVERTIME

19.7.1 *Overtime is defined as:*

- *Time worked in excess of 40 hours per week.*
- *Time worked in excess of 8 hours, or in excess of the hours established pursuant to clause 19.1.*
- *Time worked on any rostered day off.*

…

19.7.2 *Overtime shall be paid at the rate of time and a one half for the first three hours and double time thereafter, calculated on a daily basis: Provided that any time worked after noon on Saturday or any time on Sunday shall be paid at the rate of double time.*

…

19.9 SHIFT MEAL ALLOWANCE

A suitable meal shall be provided by the employer in the following situations:

- *After the first nine hours of work and after each subsequent four hours of work, providing work continues thereafter.*
- *After the first four and a half hours on a rostered day off or a public holiday.*

If not provided with a suitable meal, the employee shall be entitled to a meal allowance …

19.10 SHIFT ALLOWANCE

A shift employee shall be paid a shift allowance in addition to the appropriate rate:

Rotating or alternating shifts:	***$7.71 ($7.98 from 1/12/06)***
Afternoon shifts:	***$7.18 ($7.43 from 1/12/06)***
Night shifts:	***$8.24 ($8.53 from 1/12/06)***

…

19.11 GENERAL SHIFT PROVISIONS

19.11.1 *The ordinary hours of work shall be fixed by roster and shall not be departed from except in the case of emergency.*

…

19.11.5 *An employee employed on a continuous shift operation or process shall remain on duty until relieved: Provided that any such employee shall be relieved within two hours if he/she so requests.*

…

50. SKILL-PAY MATRIX

Where an employee has had his/her skills fully and formally assessed in accordance with the procedures of the Plastics Industry Training Programme (or other NZQA approved procedures), their minimum rate of pay shall be determined in accordance with the pay matrix set out on the next page.

[14] The minimum wage rates are then set out with the skill level descriptors. These are detailed and run over several pages. Qualification payments are also set out.

The union's submissions

[15] Mr Wilton correctly observed that while the meca describes various types of shifts it does not define the word itself. "Shift" has been held to refer to "*a relay of workers working successive periods usually at substantially the same tasks*": *NZ (with exceptions) Food Processing, Chemical and Related Products Factory Employees' IUOW v Skeggs Foods Ltd* [1984] ACJ 85 at 87. The Arbitration Court also noted the occasionally loose use of the word "*shift in common parlance*" and held that it was open to parties to any document to create, in effect, their own dictionary (p88).

[16] Mr Wilton submitted that, even in the absence of an express definition, the parties to the meca appear to have accepted this view of "*shift*" by the use of the term in the preamble to clause 19 "*employees working in shifts*" and by clause 19.11.5 which requires the employees on a continuous shift operational process to remain on duty until relieved. He submitted, therefore, for the purposes of clause 19, a "*shift*" was one of the successive 8-hour periods of work performed by relays of workers in a continuous production process.

[17] Mr Wilson observed that although the basic working week was five shifts, shifts may be worked as required by the employer (clause 19.3) and more than five shifts of 8 consecutive hours cannot be worked in one week without the payment of overtime (clause 19.6). He submitted that shifts worked in excess of five were still "*shifts*" and were to be paid at overtime rates. This is confirmed by clause 19.7 which defines overtime as "*including time worked on any rostered day off*". He submitted that the payment of overtime rates would not stop the period from being a shift if it otherwise qualified as such. He also contended that the shift meal allowance supported the proposition that the period of 8 hours, worked on a rostered day off as part of a relay of workers on a continuous production operation, was to be regarded as a shift.

[18] Turning to clause 19.10 Mr Wilton noted the shift allowance is to be paid when certain kinds of shifts were worked. He submitted that this does not expressly limit the payment of a shift allowance to a certain number of shifts per week and does not expressly exclude shifts for which overtime rates are payable. He submitted it does not limit the payment of the allowance to "*rostered*" shifts as opposed to extra shifts which the employees may be asked to work. Mr Wilton contended that the clause anticipates that some shifts will be payable at different rates from other shifts and that this is the inescapable conclusion from the use of the term "*in addition to the **appropriate rate***" (emphasis added). He submitted that this is a critical point which distinguishes this clause from the one considered in *Carter Holt Harvey Limited v Parkes* [2004] 2 ERNZ 1. There the collective agreement provided for a shift allowance "*in addition to his/her **ordinary rate** of pay*" (p4 emphasis added). Chief Judge Goddard in *Parkes* stated:

> *[17] … For shift employees, their ordinary hours of work are to be fixed by roster. The shift allowance is expressed as being an addition to the ordinary rate of pay. These are the key words. Employees working an extra day and therefore being paid overtime are already receiving remuneration additional to the ordinary rate of pay. That additional remuneration is greater than the shift allowance. However, there is no intention expressed that overtime hours or overtime "shifts" should also attract the shift allowance. As the cases show, it is inaccurate and misleading to think of overtime periods of work as shifts.*

[19] The Chief Judge had previously referred to earlier cases dealing with the award system, which he had brought together in *Wellington Caretakers IUOW v Armourguard Security Limited* [1989] 3 NZILR 117. He stated in *Parkes*:

> *I there noticed the "traditional view… that, in the absence of clear language, a shift allowance is not payable for [extra] shifts in a week, where those shifts attract overtime rates".* (para [15])

[20] The Chief Judge in *Parkes* noted as a matter of course that each document must be construed in its own context with regard to the terms used, and effect given

to the intent of the parties derived from the words they chose to use, even if that was not what they meant to say. He went on to state:

> *However, it was well understood in those days, as I explained in* Armourguard Security *at p127, that* "shift work is not overtime and overtime is not shift work". *Unless the award otherwise provided, as it could. So if employee A is unable to work his rostered shift and employee B works it instead, in addition to his own rostered shifts, employee B will be working overtime, even if, loosely speaking, he could also be said to be doing A's shift. At the end that is so unless the collective agreement provides otherwise.* (para [18])

[21] As Mr Wilton submitted, the Authority had applied *Parkes* and concluded "…*the traditional view*" is that overtime does not attract the payment of shift allowances. The Authority went on to state:

> … *The cases are plain that unless it is crystal clear that a shift allowance is to be paid in addition to overtime rates that will not occur.* … [Para 13 Authority Determination]

[22] The words "*crystal clarity*" are to be found in *NZ Labourers etc IUOW v Joint Venture Zublin Williamson* [1986] ACJ 468 per Chief Judge Horn, cited by Chief Judge Goddard in the *Armourguard* case.

[23] The Authority found that the meca did not express a clear intention that overtime work also attracted the payment of the shift allowance. It found clause 19.10 referred to the system of individualised pay rates based on the skill pay matrix. It declined to read into the meca a definition of a shift as a period of 8 hours worked as part of a relay of continuous production, applying the distinction in clause 19.5 which deals with the fixing of ordinary hours of work by roster.

[24] Mr Wilton attacked these conclusions and submitted that there was no basis under the Employment Relations Act 2000 to continue to apply "*a traditional view*". The earlier cases, he submitted, depended on the award system which had been abandoned and clause 19.10 should now be construed purely in its context. To

require the words to be crystal clear would be an unjustifiable extra element imposed on the normal principles of interpretation.

[25] He relied on the words "*in addition to the appropriate rate*" and contended for these to have a sensible meaning they must mean the rate payable for the particular shift which is either the ordinary rate or the overtime rate. He contended that the Authority was in error to have accepted Marley's argument that the term "*appropriate rate*" referred to the rate payable to an individual employee under the skill-based pay matrix. This was an error because clause 19.10, having commenced with the individual form, "*a shift employee*", surely would otherwise have continued by referring to "*his/her*" appropriate rate, rather than "*the appropriate rate*". He also submitted that clause 50 is a relatively compact scale of pay rates, based on 10 skill levels, rather than an infinite number of potential individual rates and therefore there was no difficulty in determining ordinary rates. He submitted that it was much more likely that the use of the term "*appropriate rate*", in its context, was intended to refer to and incorporate both the ordinary rate and overtime rate rather than to acknowledge that individual employees may have different pay rates. He submitted that if the parties had intended that a shift allowance was only payable when it was in addition to the ordinary rate they would have said so, as the parties in *Parkes* had. Instead they used the term "*appropriate rate*" which was quite different to that used in *Parkes* and that difference must be given proper weight.

[26] As invited to by the Court, Mr Wilton addressed the Court of Appeal's decision in *Radio New Zealand Ltd v Clark* [1993] 1 ERNZ 270 at 271 in a subsequent memorandum. In *Clark* the Court of Appeal had held that both the Employment Court and the Employment Tribunal had placed too much emphasis on interpreting a clause on the way the words had been used in previous cases. It stated:

> *The question arising is one of construction of contractual documents. Reference to past decisions in such a case is seldom of much help. It generally tends more to confuse and unnecessarily lengthen the discussion. The key point is to determine the intention of the parties involved. This must be done from the words they have used in the context of their contractual document (here documents) read as a whole against the relevant factual*

> *background. The only circumstances in which previous cases may be of help are first when they are directly in point and second when the words used are said to have been used in a technical or specialised sense based on previous authority. Neither situation applies in this case.*
>
> *Accordingly we propose to make no reference to the numerous previous cases referred to in the decisions of the Tribunal and the Court below. We mean no disrespect when we say that the close attention below to previous authority may have distracted attention from the necessary exercise of interpreting the present contract.* [p271]

[27] After referring to the Employment Court Judge's use of a substantial number of earlier cases to ascertain the meaning of the words "*total ordinary pay*", the Court of Appeal stated:

> *That, with respect, shows the danger of using previous authorities as an aid to construction. The Totalisator case was concerned with the defined expression "ordinary pay" in the Annual Holidays Act 1944. The context was quite different and we see nothing in that case which assists. It was the definition which led to the conclusion. There is of course no definition in the present case.* [p277]

[28] Mr Wilton submitted that this decision supported the plaintiff union's argument that the Authority had erred in its approach, having been "*distracted*" by previous authorities. He submitted that the previous cases referred to and relied on by Marley were not directly in point, nor did they involve words which had been used in a technical or specialised sense and therefore there was no basis for departing from a normal contractual interpretation approach. He maintained that the conclusion in *Parkes* was inevitable on a conventional construction basis because of the use of the word "*ordinary rate of pay*". He therefore submitted, on the basis of *Clark*, neither party in the present case should have any starting advantage based on earlier cases and there should be no presumption in favour of either position which then has to be rebutted to a higher standard by the other party. Mr Wilton submitted that the Court had to resolve the matter by way of conventional contractual interpretation techniques applied to the words actually used by the parties.

Marley's submissions

[29] Mr Towner relied on the decisions of the Industrial Court, the Arbitration Court, the Labour Court and the Employment Court, which had all held that a shift allowance was not payable to shift workers who undertook overtime work in addition to rostered shifts for which they had received overtime payments. He closely analysed the wording of the awards and agreements in those cases and submitted that they were substantially the same as the present meca in the way they described the employer's right to operate shifts. He contended there was no difference in substance between the wording in the shift allowance clause in the *Parkes* decision referring to the "*ordinary rate*" of pay and that in clause 19.10 in the meca, referring to the "*appropriate*" rate. He submitted that the use of the word "*appropriate*" was not intended to, and did not signify that employees were entitled under the meca to receive a shift allowance in addition to the overtime pay, because there was no clear language, or clarity, indicating that the parties intended to depart from the usual, well-established position.

[30] Mr Towner observed that the *Armourguard* case had been decided in November 1989, at the time the parties were negotiating the original Plastics Industry Award. This decision would thus have been known to them when they reached agreement on the wording which has been maintained through to the present meca. He cited in support the following passage from *Armourguard* at p126:

> *However, the traditional view is that, in the absence of clear language, a shift allowance is not payable for the sixth and seventh shifts in a week, where those shifts attract overtime rates. I do not think it appropriate to depart from that view, especially as negotiators rely on accepted interpretations when settling awards and entering into agreements. On the basis that the parties were aware of these interpretations, it was open to them to stipulate for other wording which would make it clear than an overtime shift is still a shift for the purposes of clause 5(w) and that a worker employed on overtime shift is still to be regarded as employed on a shift. If the result is unsatisfactory or anomalous, that defect must be cured by renegotiation and not by departing from accepted understandings of the meaning of words in the same or similar contexts.*

[31] Mr Towner submitted that in the *Parkes* decision, which had been decided in July 2004, and therefore would have been known to the parties at the time the current meca was negotiated, Chief Judge Goddard had stated that it was inaccurate and misleading to think of overtime periods of work as shifts.

[32] Turning to clause 19.10, Mr Towner submitted that the words "*appropriate rate*" were not intended to signify that a shift allowance was payable in addition to an overtime payment, but were a reference to the pay rate matrix in clause 50 which is described as the "*minimum wage rates*". As no overtime was payable where the rostered shift was worked, there was no indication in clause 19.10, or elsewhere in the meca, that the words "*appropriate rate*" were to mean, inclusive of overtime pay, where employees worked extra hours outside of the rostered shifts. He submitted that the meca did not specify a "*rate*" for overtime work in the same way as it does for "*wage rates*" and that the shift overtime clause (clause 19.7) sets out the basis for calculating how overtime was to be paid.

[33] Mr Towner also advanced an argument that the subsequent conduct of the parties would be admissible to assist the Court in the proper understanding of the context or factual matrix within which clause 19.10 was to be construed, citing the following passages from the judgment of Tipping J in the Supreme Court in *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277:

> *[52] As a matter of principle, the Court should not deprive itself of any material which may be helpful in ascertaining the parties' jointly intended meaning, unless there are sufficiently strong policy reasons for the Court to limit itself in that way. I say that on the basis that any form of material extrinsic to the document should be admissible only if capable of shedding light on the meaning intended by both parties. Extrinsic material which bears only on the meaning intended or understood by one party should be excluded. The need for the extrinsic material to shed light on the shared intention of the parties applies to both pre-contract and post-contract evidence. Provided this point is kept firmly in mind, I consider the advantages of admitting evidence of post-contract conduct outweigh the disadvantages. The latter comprise primarily the potential for ex post facto subversion of earlier jointly shared intentions and the lengthening of*

interpretation disputes by encouraging the parties to produce evidence which is often only tenuously relevant at best.

[53] For good policy reasons the common law has consistently adhered to what is usually called an objective approach to contract interpretation. An objective inference from conduct in which the parties are mutually involved after they have contracted does not significantly depart from the conventional approach. I will call conduct in which both parties are involved, either actively or passively, mutual or shared conduct. Inviting inferences from the conduct of one party, in which the other party is not involved, would make a significant inroad into the need to ascertain objectively the shared intention of the parties as to their meaning. The words they have used, construed in the light of all the relevant and objective circumstances in which the parties have used them, must prima facie be the best guide to their meaning. But, if some mutual or shared post-contract conduct of the parties is objectively capable of shedding light on the meaning they themselves placed on the words in dispute, I consider more is to be gained than lost by allowing the Court to take it into account.

[34] In his supplementary memorandum Mr Towner submitted that the *Clark* decision makes no difference to the proper interpretation of clause 19.10. He submitted that the law has developed since *Clark* to the point that the accepted approach to the interpretation of contracts can include reference to the state of law as part of the relevant background, citing Lord Hoffman in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 All ER 98 at 114-115, explained by Lord Hoffman in *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] 1 All ER 961 of 975 where Lord Hoffman stated:

…there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective (or proved common assumptions which were in fact quite mistaken) [p975].

[35] Mr Towner noted that the *West Bromwich* case had been adopted by our Court of Appeal in *Boat Park Limited v Hutchinson* [1999] 2 NZLR 74. He observed that this was an accepted approach to contractual interpretation as reflected in a passage in *Burrows, Finn, Todd Law of Contract in New Zealand (3ed)* at p162 which states that the relevant factual matrix might include "*the legal background*". He also submitted that, following the *Clark* decision, the Employment Court had continued to examine previous decisions in its specialised jurisdiction as an aid to interpretation, albeit not a paramount factor, citing *Dwyer v Air New Zealand Ltd (No 2)* [1996] 2 ERNZ 435 at 477; *New Zealand Waterfront Workers Union v Ports of Auckland Limited* [1994] 1 ERNZ 604 at 610 and the *Parkes* decision.

[36] Mr Towner submitted that the specific "*danger*" referred to in *Clark* was not raised by the decisions cited by Marley as they did not involve drawing an analogy from the defined expression in a different statute or agreement with the obvious "*danger*" of a different contractual context. He submitted that the cases cited by Marley were both relevant and directly in point on the same issue of whether parties in a collective agreement had intended for there to be an entitlement to a shift allowance when overtime payments were already payable. Although the *Zublin Williamson* case did not involve the circumstances of a shift allowance, it was nevertheless relevant and on point to the extent that it concerned an issue of "*double payments*". He also submitted that the cases on awards he had cited acknowledged that each had to be considered in its own right and context and with regard to the terms used. He observed that the original version of clause 19.10 was negotiated between 1988 and 1991, in the time of awards, and also immediately afterwards, so the cases decided in the time of awards still had relevance.

[37] Finally, Mr Towner submitted that even without reference to any previous authorities, that the proper construction of 19.10, and in particular the words "*appropriate rate*", resulted in a conclusion that there was no entitlement to a payment of a shift allowance for a sixth or seventh shift outside the rostered shifts, when employees are already paid overtime.

Discussion

[38] I will first approach the matter as if there were no previous authorities. I accept the union's argument, at its strongest when dealing with the situation when Marley continues to run its plants on a 24-hour basis over a weekend, that it is difficult to see that the 8-hour work periods on which its employees are engaged on overtime at the weekends are anything but shifts. That accords with the common usage of the word shift as acknowledged by CJ Goddard when he described B "*loosely* speaking" as doing A's shift in *Parkes* at paragraph [18]. It is also accords with the dictionary definitions. The "Oxford English Dictionary Online" provides:

> *Shift, n.*
>
> *…spell of work, relay of workmen, …*
>
> *… one of successive parties of workmen …*
>
> *…one of several sets of persons or things, period of working time (in mining), one of several successive parties of miners working together for a fixed period of hours. …*
>
> *b. The length of time during which such a set of men work.*
>
> …

[39] The Concise Oxford Dictionary (1990) defines shift as:

> ***2 a** a relay of workers (the night shift). **b** the time for which they work (an eight-hour shift)*

[40] In a very recent decision, *Sealed Air (New Zealand) v The New Zealand Amalgamated Engineering Printing & Manufacturing Union Inc*, WC 8/08, 19 May 2008, which turned on the question of what were shift workers, Chief Judge Colgan stated:

> *There is no statutory or other like definition of the phrases "shift work" or "shift worker" in New Zealand, although cases in this jurisdiction have, from time to time, determined whether that status is applicable in the circumstances.* (para [21])

[41] Chief Judge Colgan referred to *NZ (with exceptions) Food Processing etc IUOW v Skeggs Foods Ltd* [1984] ACJ 85, 87 as follows:

> *What is a shift? A shift as we understand it is normally considered to be a relay of workers working successive periods usually at substantially the same tasks. … We note that Judge Jamieson in Inspector of Awards v. Caxton Printing Works 75 B.A. 6445 said:*
>
> > *"… the term 'shift' does not today connote, as it once did, 'a relay of workers following each other on a continuous process'. In this particular award, as in others, a 'shift' means no more than a period of work permitted at ordinary rates of wages at a time which would otherwise attract overtime rates because the work is performed outside the declared hours."*

[42] The Chief Judge also quoted from paragraph [1828] (Shift work), volume 2 of Mazengarb's Employment Law which states:

> *… In the absence of some express contractual definition, it is usually easy to say whether a particular system of work is or is not a "shift", but difficult to define "shift" or "shift work" in the abstract.*

[43] In *Sealed* the parties were part of a team that took over a continuous production from a similar team and subsequently handed it on to a successor, a situation in which the Chief Judge said by any commonsense and colloquial definition the employees were shift workers.

[44] I therefore accept Mr Wilton's submissions that a person working a voluntary 8-hour period on the weekend could be said to be working a shift. This, however, is not the end of the matter for I must still determine whether the overtime shifts during the weekends are shifts for the purposes of clause 19.10 and therefore attract the shift allowance in addition to overtime rates.

[45] The meca expressly allows for shifts to be worked as required (clause 19.3) and the day, afternoon and night shifts are defined. The time worked is not to exceed five consecutive 8-hour shifts (clause 19.5). Shifts may also be worked over seven days of the week to cover continuous seven day operations. No more than five can be worked without the payment of overtime (clause 19.6). This all implies that what is being worked after the five shifts, each of 8 consecutive hours, are still shifts, although overtime must be paid. The time and a half and double time overtime

payments are paid to "*shift employees*". Shift meal allowances are paid after the four and half hours on a rostered day off or on a public holiday. The shift allowance is paid to a shift employee in addition to the appropriate rate (clause 19.10). In terms of clause 19.6 what is being worked by a shift employee after the five shifts during the week clearly appears to be a shift, although the ordinary hours of work are fixed by roster and an employee employed on a continuous shift operational process must remain on duty until relieved (clauses 19.11.1 and 19.11.5).

[46] Turning to clause 19.10, it is arguable that because an employee is working a weekend shift, the "*appropriate rate*" is the rate that is being paid for such a shift. That is capable of including the overtime rate applicable on weekend shifts.

[47] "*Appropriate*" is defined in the Oxford English Dictionary Online as:

> ***4.*** *Attached or belonging as an attribute, quality or right; peculiar to, own.*
> ***a.*** *absol.* …
>
> ***5.*** *Specifically fitted or suitable, proper* …

[48] The phrase "*appropriate rate*" is, however, equally capable of meaning rates of pay determined in accordance with the skill-pay matrix in clause 50 of the meca.

[49] There is force in Mr Towner's submission that the shift allowance being payable to a "*shift employee*", as defined, excludes an employee voluntarily undertaking an overtime period at the weekend. That is consistent with the lack of rostering of such an employee in contrast to the shift employees during the week who are rostered on defined rosters.

[50] The lack of rostering and the ability of employees to chose which of the particular shifts to work on the weekend, because such work is voluntary and requires the agreement of the parties, suggests a context where an employee working overtime in such circumstances is not a shift employee. Clause 19.4 contains three sets of definitions and a "*shift employee*" is defined as an employee who is employed on any one of the above shifts. It is arguable that the voluntary assumption of an overtime period on the weekend may not correspond directly to those definitions.

[51] It is also difficult to categorise precisely which of the shifts provided in clause 19.10 would apply to someone voluntarily working a shift different to the shift they had worked during the week. There would be an issue as to whether they were working rotating or alternating shifts or fixed shifts, or afternoon, day or night shifts. This again suggests that the context of clause 19.10 was not intended to include voluntary overtime work.

[52] The thrust of the meca is to cover regular rostered shifts that can be categorised clearly under the definitions of clause 19.4 and which will entitle the employees to the appropriate shift allowance in clause 19.10. The two provisions work closely together whereas the overtime shift arrangements appear to stand outside of them.

[53] The onus of establishing an entitlement for its members under the meca rests upon the union. The interpretations advanced by the union and by Marley are both possible and the position is not expressed with clarity.

[54] This clarity could have been achieved by the simple addition in clause 19.10, at the end of the first sentence, of the words "*including overtime*", if the parties had intended the payment of both overtime and shift allowances. Instead a more abstract term "*appropriate rate*" was used. Although the matter is somewhat finely balanced, because the onus rests on the union, even had there been no other factors in this case, I would have concluded that the entitlement to both overtime and shift allowances had not been established. The absence of such clarity supports Marley's position.

[55] The next issue is whether I can take into account those earlier decisions which have found that an absence of clarity negatived a claim for both overtime and shift allowances. I prefer Mr Towner's submission on the effect of the *Clark* decision. I consider the present case is one where reference to past decisions is of help in determining the intention of the parties. The earlier decisions are directly on point because they covered virtually identical provisions in both awards and agreements and may be said to have defined words used in a technical or specialised sense. *Clark* is also distinguishable in that, unlike the situation there, the context of

those previous decisions is virtually identical to the words used in the present case. They are therefore of considerable assistance.

[56] I accept Mr Towner's submissions, based on the cases he cited, that the legal background of the earlier decisions, against which the meca was entered into, may be taken into account as an aid to the interpretation of the meca, which would otherwise be ambiguous. The meca is ambiguous in not clearly defining whether overtime shifts were to include payment of the shift allowance.

[57] The negotiations for the first plastics award took place in the context of a continuous series of cases which had held that, in the absence of clear language, or an express provision of crystal clarity, authorising double payments, shift allowances were not payable for extra shifts, where those shifts attracted overtime rates. Those cases did not shirk from describing such work periods as shifts, but nonetheless did not permit the payment of the shift allowance for these shifts which were already attracting overtime rates.

[58] The earlier cases were summarised in *Armourguard* in 1989, during the time when the parties were endeavouring to negotiate a plastics award. The shift provisions in the 1991 cec closely reflected the provisions in the awards that had been the subject of these earlier decisions and, in particular, the provisions of the award set out in the *Armourguard* case. They provided that no more than five 8-hour shifts could be worked in any one week without the payment of overtime, which is virtually identical to clause 19.6 in the meca. The definition of afternoon and night shifts are similar and the shift allowance provision simply provided that the particular employees who work such shifts would be paid an allowance. As Mr Towner submitted, this is arguably even a wider clause than that in the meca.

[59] The collective agreement in *Parkes* in 2004, again had similar provisions to those in the meca. Shifts could be worked as and when required by the employer. There was an express definition of shift work, meaning work carried out by two or more successive relays or spells of workers and whose ordinary hours fall wholly or substantially outside the ordinary hours of day workers employed under the agreement. The ordinary hours of shift employees were fixed by rosters which could

not be departed from except in the case of emergency. That is the same as the meca. Overtime rates were payable for any employee who worked in excess of the ordinary number of hours on any shift. The shift allowance was expressed in the following terms:

> *In addition to his/her ordinary rate of pay, a shift employee shall receive an allowance for shift work in accordance with that prescribed in schedule 1 of this agreement.*

[60] For the purposes of that clause, day, afternoon and night shifts were defined in similar terms to the meca. Although Chief Judge Goddard noted that key words were the "*ordinary rate of pay*" he found that if the overtime rate was greater than the shift allowance, there was no intention expressed that overtime hours or overtime "*shifts*" should also attract the shift allowance.

[61] The *Parkes* decision was reached on very similar contractual provisions to those appearing in the 1991 cec yet when the current meca was negotiated it did not result in any change in the relevant wording. These cases and especially *Parkes* in 2004, must have provided a warning to the parties that where an overtime shift was intended to attract both an overtime payment and a shift allowance, this needed to be expressed with clarity. As the Chief Judge observed in *Parkes* at p126, set out above, citing from *Armourguard*, negotiators rely on accepted interpretations in settling collective agreements. In the absence of such clarity it was to be expected by the parties that the Court would construe their agreement as not intending to provide double payments.

[62] Whilst I accept Mr Wilton's submission that the word "*appropriate*" is not synonymous with the word "*ordinary*", I do not find that that is a sufficient distinction to disregard the line of authority which had dealt with precisely the same issue on very similar provisions in the same context.

[63] For these reasons I accept Mr Towner's submissions and agree with the conclusion of the Authority that the meca does not provide that 8-hour periods of

overtime shifts attract the payment of the shift allowance. The challenge must therefore be dismissed.

Costs

[64] Costs properly were not sought as this was a dispute over the interpretation of a meca.

B S Travis
Judge

Judgment signed at 4pm on 3 June 2008