IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2022] NZERA 374
3138481

BETWEEN	NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION Applicant
AND	FIRE AND EMERGENCY NEW ZEALAND Respondent

Member of Authority:	Michael Loftus
Representatives:	Peter Cranney, counsel for the Applicant Geoff Davenport, counsel for the Respondent
Investigation Meeting:	24 March 2022 at Wellington
Submissions Received:	At the investigation meeting
Date of Determination:	9 August 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a dispute about what constitutes the relevant daily pay for the purpose of calculating pay for overtime worked on a public holiday.

[2] The Union takes an approach that would see its members paid a total of time 2 and a quarter (T2.25) for working on a public holiday. Fire and Emergency (FENZ) says time and a half (T1.5) is appropriate.

The Authority's Investigation

[3] The Authority's investigation was face-to-face, albeit limited to legal submissions only. This was as a result of the parties agreement and followed various exchanges which saw FENZ

lodge witness statements. Those witnesses were not called with the Union accepting the content of their statements and choosing not to offer any contrary evidence. Instead the Union relies on legal argument alone to justify its position.

[4] What is also being sought is a declaration regarding the correct computational approach and not a specific monetary award.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received though there is discussion of the latter given this is a dispute and the submissions are crucial.

[6] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

Background

[7] The Union and FENZ are party to a collective agreement. Contained therein is an overtime clause which states *"All time worked by shift workers outside their usual rostered shifts and Yellow and Black Watch works outside of their normal daily hours shall be paid for at the rates specified in the relevant Tables in part 5 of this agreement."*

[8] The tables referred to above prescribe various "per hour" and "per shift" rates for various overtime scenarios, along with work on a public holidays. The rates differ depending on an employees' rank (firefighter or officer) and their seniority therein but include a T1.5 component.

[9] There are then, for each combination of rank and seniority three rates. Rate one is payable for the first three hours overtime while rate two is payable for all additional hours and/or all those worked between midday Saturday and on Sunday. Rate 3 is specified as payable for all hours worked on a public holiday and while there were gaps between the three these have closed over time in accordance with the transitional provision described below.

[10] It is the Union's view that when paid these rates should be considered the relevant daily pay. Accordingly it follows that s 50 of the Holidays Act 2003 requires that this rate be multiplied by T1.5 when that day happens to be a public holiday.

[11] FENZ disagrees. In doing so it relies upon events which occurred when the present pay structure was developed through a joint working party in 2013 and a view the rate now being claimed is inconsistent with what was agreed. The terms of that agreement were recorded in a "Record of Agreement" dated 20 September 2013. Of note therein is the statement:

> …transitional arrangements will occur over a longer time period than that which the new Collective Agreement spans, and for that reason the parties wish to record their agreement to the transitional steps that will occur after the expiry of the new Collective Agreement.
>
> This document records the agreement of both parties to the transitional arrangements detailed in this agreement, and both parties wish the agreements detailed to be final, binding and enforceable on them.

[12] With respect to overtime rates the agreement records:

> The parties acknowledge the intent to transition to overtime rates that the 1.5 times the standard hourly rate, regardless of when that overtime is worked. Prior to the negotiation of the new Collective Agreement, overtime rates varied depending on whether the overtime was worked on a week day or a weekend or public holiday.
>
> The calculation of the standard hourly rate is Total Weekly Wage divided by 42 (42 being the average number of hours worked in a seven-day period).
>
> The parties also acknowledge that this will result in substantial increases to current overtime rates, and have therefore agreed to transitional steps over a six year period to progressively move overtime rates to 1.5 times the standard hourly rate, regardless of when that overtime is worked.

[13] The transitional steps referred to above would see an incremental introduction of the new overtime rate via 7 steps timetabled to occur on 1 July of each of the years 2013 to 2019 inclusive. For example the first three hours of overtime worked by firefighters on a weekday or before midday Saturday would be paid initially be paid at 1.1 times the standard hourly rate with the 1.1 increasing over the years till it reached T1.5 on 1 July 2019. That said, the rate payable for overtime worked on a public holiday immediately moved to "1.5 times the standard hourly rate" with effect 1 July 2013 in order to meet what was then a statutory requirement. These incremental steps increases were conditional upon the attainment of various goals in respect to the reduction of short term absences and the filing of relief worker positions.

[14] Finally the agreement recorded:

> The parties agree that
> i. The terms of this agreement are final and binding on, and enforceable by, us, and ii. Except for enforcement purposes, neither of us may seek to bring those terms before the Employment Relations Authority or any Court whether by action, appeal, application for review, or otherwise.

[15] When summarising what FENZ considers this to mean a witness who was involved says:

> The Union appears to be arguing that it doesn't matter what was agreed to in 2013 - the Holidays Act compels an outcome of Rate 2.25 for overtime on a public holiday because we pay overtime on non public holidays at Rate 1.5. That is not correct. The parties looked at overtime comprehensively, and agreed that all overtime, including on public holidays would result in a payment of Rate 1.5; and to achieve that agreed result, it was agreed that the relevant daily pay for the calculations would be Rate 1 (the standard hourly rate) and:
>
> (a) for non public holidays this Rate 1 (the standard rate) would be multiplied, by contract, by 1.5; and
>
> (b) for public holidays, the Holidays Act would operate to increase Rate 1, (the standard rate) to Rate 1.5.
>
> The result is that for all days, the end payment for overtime is Rate 1.5.
>
> The 1.5 Rate paid for overtime on a non-public holiday is not the relevant daily rate (the starting point) for the calculation of overtime pay on a public holiday, because it (the overtime rate for non public holidays of 1.5) is not "the amount of pay that the employee would have received had the employee worked on the day concerned" (to quote section 9 of the Holidays Act) had it not been a public holiday. That Rate of 1.5 is for overtime

[16] The same witness argues that it is clear the Union, which was then under different leadership, had a similar view and cites a Union newsletter which accompanied the subsequent 2015 settlement. It recorded that the absenteeism goal had been achieved and reiterated the overtime rates applicable as of 1 July 2015 "as in the 2013 Agreement."

Discussion

The Unions submission

[17] Essentially the Union's argument is premised on an assertion FENZ's approach means "…the rates specified in Part 5 for public holiday overtime work "already includes" the T.5 required by s 50 of the Act (The Holidays Act 2003). This is not lawful."

[18] It is asserted it is not lawful as ss 52(2) and (3) provide:

> (2) The employment agreement must include a provision that confirms the right of the employee to be paid in accordance with section 50 for working on a public holiday.
>
> (3) To avoid doubt, the employment agreement may not state that the relevant daily pay or average daily pay of the employee already includes an amount that is calculated to comply with section 50.
>
> (Emphasis is Mr Cranney's)

[19] It is submitted *"This rule* (particularly (3)) *if followed prevents precisely what has occurred in this case"* and that:

> …the statement that the overtime rate ""already includes" an amount which complies with s 50 rests on the presumption that the same 50% loading can be relied upon for two separate purposes-first to compensate for overtime and second to comply with s50.

[20] Here it should be noted that for each rank/seniority profile rates one, two and three, previously differed they are now the same as a result of the agreed transitional provisions. In the unions view it therefore now follows that:

> Although the agreement illegally states that the payment for working overtime on public holidays (rate 3) "already includes" an amount calculated to comply with s50, it is clear that is not the case. The "rate 3" rates for public holiday overtime are exactly the same as those paid for non-public holiday overtime.
>
> There is no "identifiable additional amount" to compensate the firefighter for working overtime on a public holiday as that phrase is used in s50(2)(a). Rate 3 is not therefore a "penal rate" in terms of s 50(2)(a).
>
> The effect of the employer's position here is that the relevant daily pay is reached by:
> (i) identifying the appropriate "rate 3" rate from the tables setting out the overtime rates;
> (ii) deducting one third (to establish relevant daily pay);
> (iii) multiplying the relevant daily pay by 1.5.
>
> On this theory, the additional payment for working overtime on a public holiday is not part of relevant daily pay and is not itself multiplied by 1.5.
>
> That approach is contrary to s9(1)(b)(ii), which provides that overtime payments are part of relevant daily pay and are to be included prior to multiplication under s50. The same applies if average daily pay is used, as overtime payments are part of "gross earnings" (see sections 9A and 14).
>
> The full payment for working overtime is therefore required to be included *before* the s50 exercise occurs. The employer is not entitled to rely on a clause

> that states the rate for public holiday overtime "already includes" an amount calculated to comply with s50: s52(3).

[21] In summary the Union says:

> Now that 1.5 is the rate for overtime, it is that rate that needs to be multiplied by 1.5. There is no longer "identifiable additional amount" in the public holiday overtime payment, as both public holiday overtime and public holiday overtime have the same rate. In those circumstances the s50(1)(a) sum is always greater.

FENZ's submission

[22] FENZ's response is that the Union's assertion employees working overtime on public holidays should be paid is incorrect.T2.25 is incorrect for three reasons. They are that:

(a) The claim is a direct breach of the agreement the parties entered into in September 2013; and

(b) It is completely inconsistent with the Union's conduct in the following eight plus years; and

(c) It is not required by the Holidays Act 2003 as the September 2013 Agreement is not a breach there-of.

[23] There is little point in examining the first two of these contentions. The evidence leaves no doubt FENZ has applied the 2013 agreement and the Union has, at least until its change of leadership, acted in accordance with the terms there-of. That is confirmed by the evidence proffered by FENZ and the Union's decision not to challenge or contradict it.

[24] The issue here is whether or not the arrangement is in breach of the Holidays Act as notwithstanding FENZ's compliance with the agreement, and the Union's earlier concurrence therewith, the parties cannot contract out of the law unless your provision is more favourable.

[25] In saying the arrangement does not breach the Act FENZ starts by asserting overtime arrangements are contractual and in this case a comprehensive agreement was concluded and applied. It is submitted this must be considered given the Courts have concluded the question of what constitutes relevant daily pay is intensely fact specific.[1] It is argued the principles cited therein reinforce *"the fact specific assessment is to have regard to the employment*

[1] Citing *New Zealand Airline Pilots' Association and Anor v Mt Cook Airline Limited* [2012] NZEmpC 218 at [41]; *New Zealand Airline Pilots' Association and Anor v Mt Cook Airline Limited* [2013] NZCA 174 at [15] and [18] and *McPherson v Carter Holt Harvey Limited* [2017] NZEmpC 103 at [42]

agreement applicable to the parties in question, and their own agreements" and that the long term practices adopted by the parties are also relevant.

[26] As already said these issue support FENZ's position but the Act remains. With respect to this FENZ cites s 9(1) of the Act and says:

> Importantly, ***"the day concerned"*** is the actual day in question. Various decisions of the Courts, including the Court of Appeal in Postal Workers Union of Aotearoa Incorporated and Street v NZ Post [2012] NZCA 481) have noted that section 9 is concerned with the payment a worker would have received "if he or she had worked the day or days concerned".
>
> In other words, the "day concerned" is the public holiday.
>
> "Received" is also fact specific — what does the employee in fact receive (an analysis reinforced in the Mt Cook decisions referred to above). In this matter, the parties have agreed that the relevant daily pay rate for overtime on a public holiday is "the standard hourly rate". That agreement is, as noted above, recorded in multiple places in the September 2013 Agreement. That has also been the resulting practice over more than 8 years.
>
> That the employee receives Rate 1.5 contractually for overtime on non-public holidays, **is irrelevant,** because those payments are for non-public holidays **only.** They are not "the amount of pay that the employee would have received had the employee worked on the day concerned", namely the public holiday. Nor does it matter that the September 2013 Agreement does not use the label "relevant daily pay". What matters as in the Mt Cook decisions (Employment Court and Court of Appeal)) is what the employee receives for work on that day.

[27] FENZ then cites s 9(3) and asserts it does not require penals on penals before noting s 50(1)(a) and saying:

> This section sets out that the worker is entitled to be paid the "portion of the **employee's relevant daily pay** or average daily pay (less any penal rates) that relates to the time actually worked on the day plus half that amount again".
>
> The highlighted words **"employee's relevant daily pay"** then takes one back to section 9(1), and section 9(3), and the analysis above.

[28] By way of summary FENZ says:

> … the Union's argument is based on a fallacy that the "relevant daily pay" for overtime on a public holiday is Rate 1.5, because that is the contractual rate paid for overtime on a non-public holiday. In other words, if an employee receives rate 1.5 for working overtime on a standard Friday, that employee must therefore be entitled to rate 2.25 for overtime on an Easter Friday.
>
> That view is wrong - in fact, and in law.

[29] The reason it is wrong in fact is that the parties agreed that Rate 1.5 (calculated using the single time rate- the standard hourly rate - as the base) is paid for overtime on a public holiday.

[30] The reason it is wrong in law is that the Holidays Act does not require the payment of Rate 2.25 and there is then the Mt Cook case which, when discussing how "relevant daily pay" is to be assessed stated:

> ... If the interpretation of s 9(1) contended for by the plaintiffs had been intended, it would have been a relatively easy matter for the legislature to have so provided but it did not do so. On the contrary it provided an intensely practical method of calculating relevant daily pay and that is by reference to the amount of pay the employee would actually have received if he or she had worked on the day.[2]

Conclusion

[31] Having considered and analysed the parties submissions I am persuaded by the Union's approach notwithstanding the fact it is contrary to what it agreed in 2013.

[32] In saying this I am particularly cognisant of the quote from Mt Cook in [30] above which. If anything it undermines FENZ's approach. If a firefighter worked overtime s/he would now receive the same rate (T1.5) whether that work was performed on a public holiday or not and the day concerned cannot, therefore, take cognisance of the fact it is a public holiday.

[33] FENZ's approach a[pears the conflate the concepts of overtime and public holidays when they are in fact separate things. Furthermore, the specified rates are single ones and not broken down into identifiable components which means a portion there-of cannot be identified as a penal rate[3] and cannot therefor be deducted in accordance with s 50(1)(a) before setting the relevant daily pay to which the public holiday premium of T.5 is applied.

[34] This is also, as the Union submits, consistent with s 9(1)(b)(ii) as the payment would otherwise have been received had overtime been worked irrespective of whether or not it was a public holiday.

[2] *New Zealand Airline Pilots' Association and Anor v Mt Cook Airline Limited* [2012] NZEmpC 218 at [42]
[3] Section 50(2) of the Holidays Act 2003

[35] A contrary outcome must, in my view, fail to comply with the Act and the requirement enunciated in s 50 that there be a premium for working on a public holiday.

[36] For these reasons I conclude the Union is correct. It follows the remedy sought, namely a declaration that the correct methodology is that it identified, is granted.

[37] Costs were sought and are reserved with the parties being encouraged to resolve the issue between themselves. In saying this I recommend the parties view the applicable practice note and particularly paragraph 5.[4] If costs remain an issue and an Authority determination is needed the Union may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date FENZ will have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Michael Loftus
Member of the Employment Relations Authority

[4] www.era.govt.nz/assets/Uploads/practice-note-2.pdf