IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 29
EMPC 22/2023

IN THE MATTER OF	a challenge to determinations of the Employment Relations Authority
BETWEEN	E TŪ INCORPORATED Plaintiff
AND	NEW ZEALAND STEEL LIMITED Defendant

Hearing: 25 - 27 October 2023

Appearances: G Pollak for the plaintiff
C Pearce for the defendant

Judgment: 26 February 2024

JUDGMENT OF JUDGE J C HOLDEN

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[1] This judgment deals with a challenge by E Tū Incorporated to two determinations of the Employment Relations Authority.[1] The issue is in respect of the collective agreement between E Tū and New Zealand Steel Ltd that came into force on 1 July 2018 and was for a term expiring on 30 June 2021 (the Collective Agreement). Although that is the collective agreement that is the subject of the dispute, the wording of the clause in issue was first adopted in the collective agreement negotiated and entered into in 2011 and has been in place in subsequent collective agreements ever since.

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1 *E Tū Inc v New Zealand Steel Ltd* [2022] NZERA 166 (Member Eleanor Robinson); and *E Tū Inc v New Zealand Steel Ltd* [2022] NZERA 677 (Member Eleanor Robinson).

The main issue is around "make-up pay"

[2] The clause in the Collective Agreement that is at the front and centre of these proceedings is clause 80.6.1, which provides for "make-up pay". Broadly speaking, make-up pay is an allowance that is paid to employees in certain circumstances if they agree to a request from New Zealand Steel to work outside their established ordinary hours.

[3] Clause 80.6.1 reads:

> Where an employee is requested to do work outside his/her established ordinary hours of work and as [a] result is unable to complete his/her ordinary hours of work, he/she shall be paid make-up pay for those lost ordinary hours, paid at expected weekly/hourly earnings as defined above.

[4] The focus of the dispute has been on the meaning of "ordinary hours". These are provided for in cl 11 of the Collective Agreement:

> 11 Hours of Work
>
> 11.1 The tables below outline the ordinary hours, start/finish times, meal intervals and rest intervals for employees on days, day rosters and shifts. Any changes to established hours of work shall be as per **clause 11.4 (Variation of Hours).**
>
> 11.2 HOURS OF WORK: TABLE
>
> **Day Employees**
>
> **Ordinary Hours**:
>
> - Not exceed 40 hours;
> - Per week (37.5 for clerical employees);
> - Not more than 8 per day (7.5 for clerical employees);
> - 5 days per week Monday to Friday.
>
> **Start/Finish Times**:
>
> - Between 7.30am and 5.00pm or;
> - Between 6.00am and 6.00pm (E tū members).
>
> **Meal Intervals**:
>
> - Not more than 1 hour nor less than ½ hour for lunch (unpaid);
> - After no more than 4½ hours continuous work (extended to 5 hours in an emergency).

Day Roster Employees

Ordinary Hours:

- 40 hours per week;
- Not more than 8 hours per day;
- On each of any five of the seven days of the week;
- Saturday or Sunday to be paid at penal rates.

Start/Finish Times:

- Between 7.00am and 5.00pm (Engineers);
- Between 7.30am and 5.00pm (others).

Meal Intervals:

- The 8 roster hours are inclusive of an opportunity for a meal;
- After no more than 4½ hours continuous work (extended to 5 hours in an emergency).

Shift Employees

Ordinary Hours:

- Not more than 5 shifts of eight consecutive hours in any week without payment of overtime.

Start/Finish Times:

- Day shift not to commence before 7.00am. For shift definitions refer to definitions page.

Meal Intervals:

- A reasonable opportunity must be allowed for a meal during each shift meal break will be taken between 3 and 5 hours after the start of the shift (except in unforeseen circumstances).

11.3…

11.4 VARIATION OF HOURS

11.4.1 Any of the hours of work provisions provided for elsewhere in this section of the CA may be varied as to all or a section of the employees by agreement between the two parties.

11.4.2 Any such agreement shall specify the application of time-related entitlements.

11.4.3. The agreement shall be reduced to writing and signed by management representatives and the Secretary of the appropriate union or its authorised agent.

11.4.4 In the event that agreement cannot be reached between the parties, then the established hours of work shall prevail.

[5] Although the issue of penal rates initially seemed to be in contest, the parties ended up agreeing that ordinary hours could include hours that attract penal rates (for day roster employees, whose ordinary hours include some work on Saturday or Sunday). I agree. Overtime hours, however, are not ordinary hours; time worked outside or in excess of the mutually agreed day-work hours, or outside or in excess of the ordinary shift hours, constitutes overtime unless the arrangement is made between the employees themselves. It is paid at double time.

[6] Also relevant to these proceedings is cl 17 of the Collective Agreement, which deals with Critical Path Shutdowns. Critical Path Shutdowns are situations where 24-hour working is required on emergency breakdowns of over 48 hours' duration, and/or critical activities within a planned shut, which are critical to the rest of the planned shut activities.

[7] When there is a Critical Path Shutdown and 24-hour working is required, the existing shift patterns or day work provisions are suspended, and management implements a two-shift arrangement to cover each 24-hour period by operating two shifts of 12 hours each. The start and finish times for the shifts may be agreed mutually in each work area to suit local arrangements, and it is common for agreed shifts to be *shift 1* – 7am-7pm, *shift 2* – 7pm-7am. If agreement cannot be reached, the start and finish times are *shift 1* – midnight to midday, *shift 2* – midday to midnight. Special rates of pay are paid for these shifts, being on a "20 for 12" basis, that is, the first four hours of a shift are paid at normal time rates, while the next eight are paid at double time rates. There are no change of shift or loss of rest day penalties payable while an employee is working on a critical path and work carried out does not attract overtime. Make-up pay is not payable.

The conduct of New Zealand Steel also is in issue

[8] At issue too is the conduct of New Zealand Steel after the dispute arose. E Tū says that New Zealand Steel has failed to maintain the status quo as required by cl 59.2 of the Collective Agreement, which provides:

> 59.2 Where either party interprets the agreement in a manner differing from existing custom and practice, and as a result wished to implement changes to existing custom and practice, the issue will be discussed between the Combined Union Site Convenor, the Union Organiser/s, the GM People and External Affairs and the ER Manager. No changes may be implemented until:
>
> 1) Agreement is reached on the changes; or
>
> 2) The matter is determined through the Employment Relations Authority or resolved as follows:
>
> - During the term of this agreement, the union may refer up to six matters to a nominated panel of mediators who will have the authority to make a final and binding decision if the parties are unable to reach agreement. Participation in this process will exclude legal (lawyers) representation.

Key questions

[9] The key questions for determination, as identified by the parties are:

(a) What is the correct interpretation and application of cl 80.6.1?

(i) What does the term "ordinary hours" in cl 80.6.1 mean?

(ii) How is cl 80.6.1 to be applied in general, when an employee is asked to work different hours from their normal hours?

(b) How is cl 80.6.1 to be applied when an employee goes on to or comes off a critical path?

(c) Has New Zealand Steel maintained the status quo for the purposes of cl 59.2 until the dispute was determined by the Authority?

[10] New Zealand Steel's position, accepted by the Authority, is that the scheme for make-up pay operates as follows:

(a) Clause 11.2 of the Collective Agreement defines "ordinary hours" to mean the number of hours an employee can ordinarily expect to work in a week.

(b) If the employee works more hours than that, they get paid overtime.

(c) If the employee, at New Zealand Steel's request, works fewer hours than that, they get make-up pay for the "lost" hours (cl 80.6.1), to "make them up" to their "full complement" of hours.

(d) If the employee, at New Zealand Steel's request, works different hours than they usually would, but does not work any fewer hours, no make-up pay is payable.

[11] E Tū says this position does not align with the clear words of cl 80.6, and is not consistent with long-established settled practice, which accords with the words and phrases used in the Collective Agreement. It says the concept of ordinary hours applies as per cl 11 of the Collective Agreement and is not akin to minimum hours (total) per week.

[12] Both parties agree that, when employees are working on a critical path, no make-up pay is payable. They also agree that, when employees are not on a critical path, make-up pay is payable (where applicable). The dispute around the critical path is over whether employees should get make-up pay in the week(s) that they transition onto or off the critical path. New Zealand Steel's position is that make-up pay is available to an employee transitioning onto (or off) a critical path but only where they have "lost" hours overall as a result of the transition, and only once per shutdown (even if they are moved on and off the critical path).

[13] E Tū takes issue with the assertion that make-up pay is only payable when employees have lost hours "overall". It says there is no reference to hours overall in the Collective Agreement.

[14] New Zealand Steel asserts that it has complied with cl 59.2. It says there is no consistent custom and practice onsite when it comes to paying make-up pay at the start or end of a stint on a critical path. It further says that it did not implement any changes to existing practice; it not only waited until the Authority determined the matter but has continued to refrain from implementing any changes while the challenge is before the Court.

Interpretation principles relating to contracts also apply to employment agreements

[15] In *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd*, the Supreme Court confirmed that the interpretation principles relating to contracts also apply to employment agreements.[2]

[16] The proper approach is an objective one, the aim being to ascertain the meaning the written agreement would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties at the time of the agreement. This objective meaning is taken to be that which the parties intended. The context provided by the agreement as a whole and any relevant background informs meaning. Nevertheless, while context is a necessary element of the interpretive process, and the focus is on interpreting the document as a whole, rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the whole agreement, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.[3]

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2 *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 at [74]–[78]; see also *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2022] NZEmpC 78, [2022] ERNZ 304 at [27]–[31].

3 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63]; and affirmed in *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [43]–[46], [232]–[233] and [250].

[17] It is, however, also relevant that collective agreements are not contracts and nor are they commercial in the way that business contracts usually are. They are not drafted, negotiated, and settled by practising lawyers, and the people covered by the collective agreement are not party to the negotiation. Collective agreements represent the development of a particular employment relationship between an employer and a union (and its members) over a long period that is confirmed and altered from time to time in the collective agreements between them, which must and do expire and are renegotiated. In that sense, they are relational agreements and are the product of compromise and opportunism.[4] Viewing collective agreements as relational is consistent with the theme of the Employment Relations Act 2000 (the Act), which the Supreme Court in *FMV v TZB* noted is focused on relationships, not contracts.[5]

[18] This means that, as collective agreements occur in a different context from arm's length commercial contracts, arrangements that may seem counterintuitive from a business perspective, nevertheless, may exist in a collective agreement.

Evidence of background circumstances may be admissible

[19] The Employment Court is not bound by the Evidence Act 2006. The starting point for the Court in considering the admissibility of evidence is the equity and good conscience test under s 189(2) of the Act.[6] Nevertheless, the Court should not get bogged down with evidence that is irrelevant.[7] If, however, the evidence would prove anything relevant to the notional reasonable person, it is admissible.[8]

[20] In *Vulcan Steel Ltd v Manufacturing & Construction Workers Union*, the Court considered the issue of admissibility of evidence of prior negotiations and subsequent conduct concerning an agreement.[9] It concluded that evidence that shows only a party's subjective intentional belief as to the meaning of words, or as to an undeclared

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4 *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2014] NZEmpC 168, [2014] ERNZ 709 at [14]–[18], cited with approval in *Le Gros v Fonterra Co-operative Group Ltd* [2023] NZEmpC 193, (2023) 20 NZELR 112 at [19].

5 *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, [2021] ERNZ 740 at [46].

6 *Lyttelton Port Co Ltd v Pender* [2019] NZEmpC 86, [2019] ERNZ 224 at [53].

7 *Courage v Attorney-General (No 4)* [2022] NZEmpC 23 at [7].

8 *Bathurst Resources*, above n 3, at [75]; *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2022] NZEmpC 78, [2022] ERNZ 304 at [28]-[30].

9 *Vulcan Steel Ltd*, above n 8, at [28]–[31].

negotiating stance or position is not relevant, but that the Court should have regard to the background circumstances of a collective agreement if a given provision has a long history, adopted in successive collective agreements.[10] Those agreements and surrounding documents are extrinsic evidence, which is potentially part of the background against which the provisions of the collective agreement are considered.[11]

Both parties gave evidence

[21] Evidence was given from both parties as to how make-up pay has historically been calculated. The evidence shows there has been some variation in the calculation of make-up pay but the predominant practice for many years has been in line with E Tū's position, at least in general.[12] Indeed, in its statement in reply, filed in the Authority, New Zealand Steel acknowledged this, saying:

> The current practice on site reflects E Tū's interpretation. In other words, employees who are asked to work outside their rostered shift currently get paid both for the shift they do work and for the shift they don't work (i.e. the original rostered shift).

[22] This is the practice New Zealand Steel has maintained pending the outcome of these proceedings, which is why it says it has complied with cl 59.2 of the Collective Agreement.

[23] Before the Court, New Zealand Steel suggested that in some cases that practice has been because of a lack of understanding by its supervisors, or because they do not wish to 'rock the boat', or because they are too busy to check timesheets, or that supervisors have felt pressured to agree to the employees' argument. New Zealand Steel also suggests that, in some cases, employees have arranged amongst themselves to maximise the total amount of make-up pay they receive.

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10 *Aviation and Marine Engineers Assoc Inc v Air New Zealand Ltd* [2013] NZEmpC 172 at [71] – [72]; *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2014] NZEmpC 168, [2014] ERNZ 709 at [14] and [17]; not doubted on appeal – *Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc* [2016] NZCA 131, [2016] 2 NZLR 829, (2016) 15 NZELR 105 at [76], and *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428 at [74] and [77].

11 *Vulcan Steel Ltd v Manufacturing & Construction Workers Union*, above n 8, at [31].

12 The approach when employees go onto or come off a critical path is less clear and dealt with at [31]-[32] of this judgment.

[24] Both parties gave evidence, however, that they have a respectful and communicative relationship and readily raise and discuss issues that come between them.

[25] New Zealand Steel says the interpretation has been in issue for some time. It referred to various documents. Most of those predate the collective agreement reached in 2011 so are of no real assistance. It seems there was little, if any discussion between New Zealand Steel and E Tū about the calculation of make-up pay from 2011 until 2018.

[26] In the 2018 collective bargaining, however, New Zealand Steel sought to discuss options for amending some provisions, including those relating to make-up pay. Before the Court, New Zealand Steel argued that the purpose of this proposed change was to clarify the meaning of the provision rather than to alter it, but the contemporaneous paper prepared by New Zealand Steel setting out its claims said the proposed amendment was to avoid the increased costs associated with the provision. I therefore agree with E Tū that this was the purpose of the proposed amendment. Specifically, New Zealand Steel sought to replace the clause on make-up pay with:

> Where an employee is requested to work outside his/her established ordinary hours of work and as [a] result is unable to complete his/her ordinary hours of work, he/she shall be paid make-up earnings as defined above.
>
> This clause only applies to an employee who has been unable to work their contracted hours (as per their employment agreement).
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> Example A: Kate's manager has asked her to change her ordinary hours of work. As a result, she will only work 36 hours of her contracted 40 hours per week. Kate will be paid for 40 hours for that week.
>
> Example B: Fred's manager asks him to change shift for one shift, from day shift to night shift. As Fred is not working hours in excess of his contracted hours as a result of changing shift, Fred will be paid a shift change allowance.

[27] New Zealand Steel's claim was not agreed to by E Tū and was withdrawn. It was not raised in the 2022 bargaining for a replacement collective agreement.

[28] The current dispute arose in discussions in early 2020 and then, on 29 May 2020, New Zealand Steel wrote to E Tū, saying:

> In NZ Steel's view; "Ordinary hours" is not used to refer to the hours that an employee is rostered to work in a particular week. Rather, it refers to the number of hours the employee is ordinarily expected to work in a week ([referred to] as a "quota") and the time window within which those hours will be rostered by NZ Steel.

[29] In that letter, New Zealand Steel advised that, as no agreement had been able to be reached, it would be submitting an application to the Authority to seek a determination as to the proper interpretation and application of clause 80.6.1. Ultimately, in March 2021, after mediation and after no application was made by New Zealand Steel, E Tū filed proceedings in the Authority.

[30] After the Authority issued its first determination, New Zealand Steel prepared a draft policy on make-up pay. That draft policy reflects New Zealand Steel's position, as accepted by the Authority, that make-up pay is only payable when an employee works fewer hours per week than their 40 ordinary hours. For employees who agree to work outside their normal ordinary hours, but who still work 40 hours in the week, no compensation is payable for that agreement. Several examples are given in the draft policy illustrating the position. New Zealand Steel refers to penal and overtime rates that, in some instances, are payable to the employees for such things as weekend working or working outside agreed start/finish times.

[31] A Critical Path Shutdown typically lasts four weeks and employees can be rotated on and off the critical path more than once during a single shutdown. In between those periods of time, the employee resumes their normal working hours. However, because of required breaks, the employee may not be able to go straight onto their normal hours.

[32] The approach to the payment of make-up pay in the context of a Critical Path Shutdown varies across the different plants. In some plants, employees get make-up pay once per shut, even if they come on and off the critical path during the shut. This would seem to be the most common approach although it is not universal. The most generous approach is for the Centralised Maintenance Groups (CMG), particularly

CMG electrical trades, where make-up pay has been paid whenever the employee is unable to work their usual shift as a result of going onto or coming off the critical path, including when they come on and off the critical path during the course of a shut. New Zealand Steel adopted the 'once only' approach essentially for pragmatic reasons; its fundamental view is that make-up pay should only apply if an employee works fewer than their ordinary hours for the week and, because employees work long hours while on the critical path, they will almost never end up short of hours, so make-up pay should hardly ever be required.

[33] It seems the present dispute had its genesis when two electricians raised a concern that they did not receive make-up pay when they agreed to go on to the critical path.

The history prior to 2018 is relevant background

[34] The background here includes the custom and practice that has prevailed since the term was included in a collective agreement between the parties in 2011. It also includes that, when the 2018 collective agreement was entered into, the practice had, generally, been in line with E Tū's interpretation. Also relevant background, is the negotiations in 2018, in which New Zealand Steel unsuccessfully sought to change the collective agreement to make the position clearly that which it now argues. The wording of cl 80.6.1 remained as it had been since 2011.

[35] Thus, while the words of cl 80.6.1 remain central, a reasonable person also would consider it relevant that the Collective Agreement included the same wording as had been agreed since 2011, and that there was a well-established practice over that time. Also relevant is that New Zealand Steel unsuccessfully sought to change the wording in 2018 to reduce the costs it was incurring for make-up pay.

The meaning of cl 80.6.1 revolves around "ordinary hours"

[36] Clause 80.6.1 requires New Zealand Steel to pay make-up pay to employees who are unable to complete their ordinary hours because they have worked other hours requested by New Zealand Steel.

[37] In considering the words of cl 80.6.1, the first question is whether an employee, on request, worked outside their ordinary hours. If the employee did so, the next question is whether that meant they were unable to complete their ordinary hours.

[38] Clause 11 sets out the parameters within which employees' ordinary hours are established; their actual ordinary hours will be established by their individual letters of appointment (or amended terms), or by the roster. New Zealand Steel's argument focuses on the number of hours to be worked in a week, but cl 11 includes other factors – the hours per day to be worked and the days of the week. It also does not expressly prescribe the actual number of weekly or daily hours, or the days of the week to be worked in all categories – for day employees and for shift employees the number of hours is expressed as a maximum.

[39] New Zealand Steel talks of how it considers cl 80.6.1 "should work". New Zealand Steel says the sole intention of cl 80.6.1 is to compensate employees where, because of a requested change in hours, they work fewer than 40 hours a week. It focuses on financial loss and includes overtime hours in its assessment of hours worked.

[40] While New Zealand Steel may feel that paying make-up pay when an employee works the same number of hours in a week but at different times is not warranted, evidence was given of negative consequences for employees working outside their normal hours. One witness gave evidence of his family having to give up weekend plans so that he could work as requested. He also gave an example of a time when, for personal reasons, he declined a request for a change in hours, even though, under the practice that then existed, he would have been well rewarded for doing so.

[41] New Zealand Steel's asserted intention is not reflected in the words of cl 80.6.1 or in the practice that has been adopted. The clause could have said that make-up pay was payable where there is a shortfall in the total number of hours worked per week because of the request to perform work at other times, but it does not do so.

[42] In short, the clause does not say what it is intended to address. In any event, it is not illogical that New Zealand Steel pays a premium to move employees from their

ordinary hours, or that employees get compensated for so moving. That is how the clause operated in practice for many years, and under successive collective agreements. New Zealand Steel wanted to change that arrangement in the 2018 bargaining but was unsuccessful.

[43] The pay rates employees receive for additional/alternative hours are not relevant to the issue. Penal rates and overtime are paid to compensate the employee for other matters (working on weekends; working long hours); they are not to compensate employees for having their hours of work changed.

[44] Further, cl 80.6.1 is only concerned with ordinary hours; overtime hours are not relevant to the assessment.

[45] Another point is worth making. If the sole concern was situations where, at the request of New Zealand Steel, an employee works fewer than their contracted hours, the clause would appear to be unnecessary. If an employee has a contractual entitlement to work 40 hours a week but is prevented from doing so because they agree to a request from New Zealand Steel, they would still need to be paid their contracted hours.[13]

[46] Accordingly, I find that cl 80.6.1 in the Collective Agreement has the meaning asserted by E Tū, particularly when considered against the relevant background.

Make-up pay may be payable for time before and/or after an employee goes on a critical path

[47] The Authority found that make-up pay is to be applied when employees come on or off the critical path.[14] New Zealand Steel agrees on the basis that lost ordinary hours refers to the quota of 40 hours (as found by the Authority).

[48] I have rejected the quota approach but agree that the usual provisions, including for make-up pay, apply before an employee goes on the critical path, as they do when the employee comes off the critical path. If an employee is unable to work

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13 *Sandhu v Gate Gourmet New Zealand Ltd* [2021] NZCA 591, [2021] ERNZ 1065.
14 First determination, above n 1, at [33].

some or all of their ordinary hours in the days or week before or after they go on the critical path, make-up pay is payable for those lost hours. I see no reason why that would not apply also when employees go on and off the critical path during the shut.

Status quo maintained

[49] E Tū appears to acknowledge that New Zealand Steel has maintained the status quo generally, not only until the Authority determined the matter (as required by cl 59.2 (2) of the Collective Agreement) but continuing.

[50] Although the evidence of both sides was that the CMG adopted a different approach to make-up pay, I do not consider there was or is a consistent custom and practice on make-up pay at the start or end of a critical path stint across New Zealand Steel such that cl 59.2 was breached.

E Tū's challenge accordingly succeeds on the main issue

[51] In summary, make-up pay is payable where, at the request of New Zealand Steel, an employee works outside their ordinary hours of work and, as a result, cannot complete their ordinary hours. Make-up pay is due for the ordinary hours not worked, even if the employee still works 40 or more hours in the week.

[52] This judgment stands in place of the determinations of the Authority.

No order as to costs

[53] Both parties have previously confirmed that, as this is a dispute relating to a collective agreement,[15] neither would seek costs in these proceedings. Accordingly, no order as to costs is necessary.

J C Holden
Judge

Judgment signed at 2.30pm on 26/02/2024

[15] Employment Relations Act 2000, s 129.