Employment Court of New Zealand

Supercity Towing Limited v Huch [2023] NZEmpC 205 (20 November 2023)

Last Updated: 24 November 2023

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2023] NZEmpC 205
EMPC 100/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SUPERCITY TOWING LIMITED Plaintiff
AND	SAKALIA HUCH Defendant

Hearing:	14 September 2023 (Heard at Auckland)
Appearances:	A Sharp, advocate for the plaintiff G Elwell, counsel for the defendant
Judgment:	20 November 2023

JUDGMENT OF JUDGE J C HOLDEN

[1] Supercity Towing Ltd challenges part of a determination of the Employment Relations Authority.1 In the relevant part, the Authority found that, as one of the remedies for his unjustifiable disadvantage, Sakalia Huch was due $38,770.40 in lost wages from Supercity.2

[2] Supercity accepts Mr Huch was unjustifiably disadvantaged and that some payment was due to Mr Huch for lost wages, but in its amended statement of claim, it

1 *Huch v Supercity Towing Ltd* [2023] NZERA 74 (Member Craig).

2. At [50]. The Authority also found Mr Huch was due $8,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 for the unjustifiable disadvantage, see *Huch,* above n 1, at

[48] and [57]. There is no challenge to that sum, and it has been paid.

says the correct amount is $9,229.60 (which it has paid).3 It has brought a non-de novo challenge in relation to the balance, which this judgment resolves. The dispute between the parties is over the number of hours for which Supercity contracted to employ Mr Huch. Supercity also challenges the Authority's cost determination, saying the Authority's costs award should be revisited in light of the Court's judgment.4

Mr Huch worked as a carpark monitor

[3] Mr Huch was offered employment with Supercity in September 2015. Initially, the offer was for him to be employed as a

recovery vehicle operator and driver, a position that required Mr Huch to have and maintain a V endorsement on his driver's licence. Mr Huch did not obtain the necessary V endorsement. Supercity was still prepared to employ him, however, but as a carpark monitor. In that role, Mr Huch identified and clamped cars that were unlawfully parked.

[4] The original employment agreement, prepared for the recovery vehicle operator and driver position, provides:

Normal Hours of Work:

Forty (40) hours per week less meal breaks.

The Hours of Work and Shifts offered to the Employee are set out below and are inclusive of all meal breaks and rest periods in accordance with the Employment Relations Act 2008;

Monday Start: **6:30am** Finish: **6:30pm** (including meal breaks) Tuesday Start: **6:30am** Finish: **6:30pm** (including meal breaks) Wednesday Start: **6:30am** Finish: **6:30pm** (including meal breaks) Thursday Start: **6:30am** Finish: **6:30pm** (including meal breaks) Friday Start: **6:30am** Finish: **6:30pm** (including meal breaks) Saturday **RDO**

Sunday **RDO**

It is acknowledged by the Employee that the Employers business is a twenty four hour, seven days a week operation and that the Employer maintains the

3 A lesser figure for the shortfall is used in submissions, but the claim has not been amended.

4 *Huch v Supercity Towing Ltd* [2023] NZERA 137 (Member Craig).

right to, from time to time, alter the Employees Hours of Work and Shifts to cover the requirements of the business.

[5] Supercity says that, when Mr Huch became a carpark monitor, reference to 6.30am to 6.30pm, Monday to Friday, became 7 am to 9 pm, Monday to Friday, and 7 am to 5:30 pm on Sunday. Nevertheless, it is common ground that there was never any formal variation to Mr Huch's employment agreement.

[6] Mr Huch was employed by Supercity from September 2015 until February 2022, and his hours of work varied from week to week. From the evidence it seems that, during the first year of Mr Huch's employment, disregarding weeks where he took leave, he worked on average something between 40 and 45 hours per week. As time went on, the number of hours Mr Huch worked increased but continued to be variable. In some weeks in the 14 months prior to March 2020 he worked over 80 hours. Mr Huch says his average weekly hours in this period (not counting weeks when he was on leave) was 55.43 hours.

[7] From the evidence of Mr Huch and Craig Burrows, who is the sole director and shareholder of Supercity, it is apparent that, up until the time of the outbreak of COVID-19, and the subsequent lockdowns in New Zealand, Mr Huch determined the precise hours he worked. Work was plentiful and, if there were cars requiring attention, Supercity benefitted from Mr Huch's work, as it received a payment for each vehicle clamped or towed. At one point, Mr Huch decided he no longer wished to do certain extra work and stopped doing it.

[8] Most of Mr Huch's work hours were paid at the ordinary time rate, which at the relevant time was $25 per hour. There were times, however, when he was paid at a special increased rate. From the evidence it seems that this was somewhat ad hoc and mainly happened when Supercity was working on events for the Auckland Council (eg rugby games, Round the Bays).

[9] It was clear from the evidence that Mr Huch was a valued employee of Supercity, and the work arrangements were satisfactory to both parties up until COVID-19 changed the situation.

[10] As is well-known, New Zealand entered the first COVID-19 lockdown on 25 March 2020. This was at Alert Level 4 under the Government's COVID-19 Alert System. Mr Huch was not an essential worker and so did not work. Over the period of the lockdown, Supercity originally just paid him the Government wage subsidy of $585.80 per week. Supercity accepts there was a shortfall in what it ought to have paid Mr Huch for this period. It accepts he was entitled to be paid for his contracted hours of work, which it says were for a 40-hour work week.

[11] The second relevant period is June 2020 (when New Zealand moved to Alert Level 1) to mid-August 2021. Although New Zealand was not in lockdown, there was far less traffic. During this period, Mr Huch was advised that he was not to work more than 50 hours per week, which Supercity says was 10 hours above Mr Huch's contracted hours of 40 per week.

[12] The final period in issue is from mid-August 2021 (when the "Auckland lockdown" commenced) until February 2022. In the first part of that period, Auckland was fully locked down; throughout the period, there was a severe downturn in traffic; even as restrictions eased, many people continued working from home. Supercity advised Mr Huch that he was to work strictly to the 40 hours per week.

[13] The issue for the Court is a relatively narrow one; it is whether Supercity was required to pay Mr Huch for more than 40

hours per week over the period 25 March 2020 to February 2022, and if so, what is the correct number of hours.

The answer turns on the interpretation of Mr Huch's employment agreement

[14] The Authority concluded that the parties' agreement was that, while Mr Huch had some discretion about the hours he worked, he was entitled to work and be paid for up to 12 hours a day, five days a week.5 It therefore based its calculation of the shortfall in wages on 60 hours per week.

5 *Huch,* above n 1, at [20].

[15] Supercity says this was an error. It says the correct position was that if there was work available over the 40 hours and Mr Huch elected to undertake that work, he was entitled to be (and was) paid for it, but that he had no entitlement to work more than 40 hours per week.

[16] Mr Huch argues in support of the Authority's interpretation. He also argues that if the employment agreement is ambiguous, it should be interpreted in his favour. He relies on the principle of contra proferentem.

There are rules of interpretation

[17] The Supreme Court confirmed in *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* that the interpretation principles relating to contracts also apply to employment agreements.6

[18] 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.7

[19] In interpreting a provision, each component of a provision must have a meaning, unless reconciliation between competing elements would lead to a distortion

6. *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].
7. *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].

of the objective intention of the parties, discerned from a reading of the whole agreement.8

[20] The Supreme Court has also noted on several occasions that, where there is ambiguity in a provision, the principle of contra proferentem applies, which means any ambiguity is interpreted against the party that drafted the agreement.9 Given the way employment agreements are generally entered into, that principle is consistent with one of the objects of the Employment Relations Act 2000, being to address the inherent inequality of power in employment relationships.10

The agreement set the entitlement

[21] Neither party raised any relevant background that would assist in interpreting the hours of work provision in Mr Huch's employment agreement.

[22] There are several key features of that provision. First, it stipulates that the normal hours are 40 per week, less meal breaks; second, it sets out a 12 hour period, Monday to Friday, that it describes as "the hours of work and shifts offered to the employee"; third, it notes that Supercity's business is a 24-hour, seven day a week operation and that Supercity maintains the right to, from time to time, alter the employee's hours of work and shifts to cover the requirements of the business.

[23] The interpretation adopted by the Authority, and asserted by Mr Huch, renders the first sentence of the provision meaningless, which is problematic. The use of the word "offered" in the next part of the provision is inconsistent with those being Mr Huch's contracted hours. It only works if the bargain was that Supercity was required to allow Mr Huch to work the hours set out, but Mr Huch had no reciprocal obligation to work them. That interpretation is, of course, inconsistent with the first sentence. It also is inconsistent with the final part of the provision, which allows

8. See *Totara Investments Ltd v Crismac* [2010] NZSC 36, [2010] 3 NZLR 285 at [31]; and Helen Winkelmann, Susan Glazebrook and Ellen France "Contractual Interpretation" (paper presented to Asia Pacific Judicial Colloquium, Singapore, May 2019) at 14–16.
9. *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 7, at [66]; *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* [2014] NZSC 185, [2015] 1 NZLR 341 at [32]; *Xu v IAG New Zealand Ltd* [2019] NZSC 68, [2019] 1 NZLR 600 at [131]–[133]; and *Kawarau Village Holdings Ltd v Ho* [2017] NZSC 150, [2018] 1 NZLR 378 at [204] per William Young and O'Regan JJ dissenting.

10 Employment Relations Act 2000, s 3(a)(ii).

Supercity to vary Mr Huch's hours "from time to time" in order to cover the requirements of the business.

[24] Taking account of each of the factors identified, the ordinary and natural meaning of the provision is that Mr Huch was contracted to work 40 hours per week, with those hours to be worked between 6.30 am and 6.30 pm Monday to Friday. Those were the hours Supercity was obligated to employ him, and he was obligated to work.11 Anything worked in addition to the 40 hours was by mutual agreement. There is no ambiguity in the provision that would lead to the interpretation advocated for by Mr Huch.

[25] While that answers the issue for the Court, I note that this interpretation is consistent with the way the parties operated. Initially, Mr Huch worked on average a bit more than 40 hours per week. Even in the last year before the pandemic, Mr Huch did not consistently work 60 hours per week.

[26] As noted, Mr Huch often wished to work more than 40 hours per week, and that was acceptable to Supercity in the circumstances that existed up until March 2020. The additional hours were, on the one part, worked by Mr Huch to earn extra income and, on the other part, agreed to by Supercity, as that was of benefit to it. However, Mr Huch was not obliged to work more than 40 hours per week, and Supercity was not required to provide work above those hours.

[27] Accordingly, I find that the calculation of the shortfall in wages due to Mr Huch for the period 25 March 2020 to the end of his employment in February 2022 ought to have been based on 40 contracted hours per week and not the 60 hours used by the Authority. The calculation is to be done on a weekly basis, without "averaging", which means that any extra hours worked in one week cannot be considered in calculating what is due for another week.

[28] The Authority's finding on this issue is set aside, and this decision stands in its place.12

11. Noting that the provision did allow Supercity to make temporary adjustments to these hours, where necessary.

12 Employment Relations Act, s 183(2).

[29] Supercity has paid $9,229.60, which it calculated as the appropriate amount to be paid to Mr Huch, based on a 40-hour work week. It is unclear whether the calculation of Supercity included holiday pay, which would be payable on top of the shortfall in wages. I leave the parties to resolve in the first instance whether Mr Huch is due any additional payment from Supercity, including in respect of holiday pay, noting that, as the figure of $9,229.60 is pleaded, Supercity cannot obtain a return of moneys it may now say was an overpayment.13 If the parties cannot agree on whether there is any additional amount due to Mr Huch, they may return to the Court.

Costs should be agreed

[30] The parties should endeavour to agree on costs. This includes in relation to the Authority investigation, bearing in mind the Authority uplifted costs from $6,250, calculated using its usual tariff, to $8,000, based on a Calderbank offer.14 If the parties cannot reach agreement, Supercity may apply for an order by filing and serving a memorandum within 28 days of the date of this judgment. Any response from Mr Huch is to be filed and served within a further 21 days, with any reply to be filed and served within seven days thereafter. Costs then would be determined on the papers.

J C Holden Judge

Judgment signed at 4.30 pm on 20 November 2023

13. *McCulloch v Smith* CA133/03, 3 December 2003 at [3]; and *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [72]–[75].

14 *Huch*, above n 4, at [17].