**IN THE EMPLOYMENT COURT**
**WELLINGTON**

**[2018] NZEmpC 151**
**EMPC 196/2018**

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| IN THE MATTER OF | proceedings removed in full from the Employment Relations Authority |
| BETWEEN | OVATION NEW ZEALAND LIMITED<br>First Plaintiff |
| AND | TE KUITI MEAT PROCESSORS LIMITED<br>Second Plaintiff |
| AND | THE NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INCORPORATED<br>Defendant |

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| Hearing: | 24 – 28 September 2018<br>(Heard at Wellington) |
| Appearances: | J Smith QC, R Brown and M Bialostocki, counsel for the plaintiffs<br>P Cranney and S Meikle, counsel for the defendant<br>P Skelton QC and J Upson, counsel for the intervenor - the Meat Industry Association of New Zealand (Incorporated) |
| Judgment: | 17 December 2018 |

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**JUDGMENT OF JUDGE B A CORKILL**

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## Introduction

[1] This judgment resolves two main issues. The first relates to payment of rest breaks for piece workers who are employed at three meat processing plants, for which provision is made in Part 6D of the Employment Relations Act 2000 (the Act). The second relates to whether the donning and doffing of protective clothing and equipment at the beginning and end of each shift, and at rest and meal breaks, is "work" for the purposes of s 6 of the Minimum Wage Act 1983 (MWA).

[2] The proceedings were initiated by Ovation New Zealand Ltd (Ovation), which operates meat processing plants at Feilding and Gisborne, and by Te Kuiti Meat Processors Ltd (TKM), which operates such a plant at Te Kuiti. Those parties have collective employment agreements (CEAs) with the New Zealand Meat Workers and Related Trades Union Inc (the Union) at each plant; they employ members of the Union either under piece rates or hourly rates; these workers process animals in either a slaughter department or a boning department.

[3] Earlier this year, the parties bargained for new CEAs. Disagreement was reached about the treatment of rest breaks for piece workers. The plaintiffs contended that piece rates incorporated payment for rest breaks. The Union disagreed. Proceedings were issued promptly in the Employment Relations Authority (the Authority). Both parties sought a removal of the proceeding from the Authority, which was declined.[1] Subsequently, special leave of the Court was sought to remove the matter from the Authority, which was granted by Chief Judge Inglis on 28 June 2018.[2]

[4] Prior to the removal, the Union had raised a counter-claim concerning donning and doffing. It contended that such activities were work for which both piece workers and hourly rate workers were not being paid, whether at the time of their breaks or at the start and end of each shift; it also contended that this activity impinged on rest breaks. The plaintiffs dispute both assertions. The Court determined that the matter which had been removed to the Court included these donning and doffing issues.[3]

[5] The Court dealt with several interlocutory matters, with a view to resolving the issues promptly.[4]

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1 *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2018] NZERA Wellington 51.

2 *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 73.

3 *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 82.

4 *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union* Inc [2018] NZEmpC 92; *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 98.

[6] The Meat Industry Association of New Zealand Incorporated (MIA) then applied for leave to appear and be heard as an intervenor. That application was supported by the plaintiffs and opposed by the defendant. The Court granted the application to intervene, but only in respect of the statutory interpretation issue pertaining to Part 6D of the Act. MIA was given leave for its counsel to appear at the substantive hearing so as to make relevant submissions, but not to call evidence or cross-examine any witness.[5]

## The issues before the Court

[7] It is common ground that the Court should make declarations as to whether or not the plaintiffs are complying with Part 6D of the Act by paying piece workers for their breaks; and that this will assist the parties in their bargaining.

[8] While the donning and doffing issue is relevant to the question of compliance under Part 6D, under its counter-claim the Union also seeks wages in respect of these activities under the MWA. Counsel submitted that the Court should in the first instance make liability findings for the purposes of the counter-claim, moving on subsequently to deal with remedies if appropriate thereafter.

[9] There are accordingly four issues requiring resolution by the Court at this stage:

i. Is the incorporation of paid rest breaks in piece rates unlawful? This is a question of law requiring a detailed consideration of the relevant statutory provisions, and previous case law.

ii. Were paid rest breaks incorporated in the relevant piece rates, and if so was there compliance with s 69ZD? This is an interpretation issue requiring consideration of the applicable CEAs at each plant; alternatively, it is necessary to consider whether the piece rates are inclusive of paid rest breaks, having regard to custom and practice principles.

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5 *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 101.

iii. Is donning and doffing work? This is a factual issue as to the correct characterisation of these activities; it requires an assessment of donning and doffing at each plant, measured against s 6 of the MWA as construed in previous New Zealand cases, as well as in some overseas judgments.

iv. Have there been insufficient breaks under part 6D? This issue relates to whether or not breaks of an appropriate length have been provided, and whether or not donning and doffing has in effect curtailed agreed breaks.

## First issue: is the incorporation of paid rest breaks in piece rates unlawful?

[10] The Union submits that payment for rest breaks cannot as a matter of law be incorporated into or made part of payment for other work.

[11] Before summarising counsel's detailed submissions and discussing those, it is necessary to describe the applicable legislative provisions.

*Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008*

[12] With effect from 1 April 2009, a new Part 6D was enacted. It relevantly provided:

**Part 6D**
**Rest breaks and meal breaks**

**69ZC Interpretation**

In this Part, unless the context otherwise requires, work period—

(a) means the period—

(i) beginning with the time when, in accordance with an employee's terms and conditions of employment, an employee starts work; and

(ii) ending with the time when, in accordance with an employee's terms and conditions of employment, an employee finishes work; and

(b) to avoid doubt, includes all authorised breaks (whether paid or not) provided to an employee or to which an employee is entitled during the period specified in paragraph (a).

### 69ZD Entitlement to rest breaks and meal breaks

(1) An employee is entitled to, and the employer must provide the employee with, rest breaks and meal breaks in accordance with this Part.

(2) If an employee's work period is 2 hours or more but not more than 4 hours, the employee is entitled to one 10-minute paid rest break.

(3) If an employee's work period is more than 4 hours but not more than 6 hours, the employee is entitled to—

(a) one 10-minute paid rest break; and

(b) one 30-minute meal break.

(4) If an employee's work period is more than 6 hours but not more than 8 hours, the employee is entitled to—

(a) two 10-minute paid rest breaks; and

(b) one 30-minute meal break.

(5) If an employee's work period is more than 8 hours, the employee is entitled to—

(a) the same breaks as specified in subsection (4); and

(b) the breaks as specified in subsections (2) and (3) as if the employee's work period had started at the end of the eighth hour.

### 69ZE When employer to provide rest breaks and meal breaks

(1) Rest breaks and meal breaks are to be observed during an employee's work period—

(a) at the times agreed between the employee and his or her employer; but

(b) in the absence of such an agreement, as specified in subsections (2) to (5).

(2) Where section 69ZD(2) applies, an employer must, so far as is reasonable and practicable, provide the employee with the rest break in the middle of the work period.

(3) Where section 69ZD(3) applies, an employer must, so far as is reasonable and practicable, provide the employee with—

(a) the rest break one-third of the way through the work period; and

(b) the meal break two-thirds of the way through the work period.

(4) Where section 69ZD(4) applies, an employer must, so far as is reasonable and practicable, provide the employee with—

(a) the meal break in the middle of the work period; and

(b) a rest break halfway between—

(i) the start of work and the meal break; and

(ii) the meal break and the finish of work.

(5) Where section 69ZD(5) applies, an employer must, so far as is reasonable and practicable, provide the employee with the rest breaks and meal breaks in accordance with the applicable provision in subsections (2) to (4).

**69ZF Penalty**

An employer who does not comply with sections 69ZD and 69ZE is liable to a penalty imposed by the Authority.

...

[13] Section 137 of the Act was amended to enable the Authority to order compliance where an employer did not observe or comply with any provision of Part 6D, as follows:

**137 Power of Authority to order compliance**

(1) This section applies where any person has not observed or complied with—

(a) any provision of—

...

(ii) Parts 1, 3 to 6, 6A (except subpart 2), 6B, 6C, 6D, 7, and 9; or

...

(2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.

...

*The Jetstar case*

[14] In *Jetstar Airways Ltd v Greenslade*, the Court of Appeal addressed the legislative history and purpose of these provisions as follows:[6]

> [27] Part 6D of the ERA was introduced along with a new pt 6C by the Employment Relations (Breaks and Infant Feeding) Amendment Bill. The *Explanatory note* accompanying the Bill provides a general policy statement to this effect:
>
> > This Bill implements government policy to make legislative provision for the promotion and protection of infant feeding through breastfeeding and for rest and meal breaks. The Bill amends the Employment Relations Act 2000 (the Employment Relations Act) to require employers to provide facilities and breaks for employees who wish to breastfeed and to provide employees with rest and meal breaks.
> >
> > The objective of these amendments is to create minimum standards for a modern workforce in respect of the provision of rest and meal breaks. Further, these amendments support government policy concerning the choices of employees, particularly regarding their work-life balance and caring responsibilities.
>
> [28] To the extent that the Bill introduced minimum standards for rest and meal breaks, the evident government purpose was to benefit employees by providing for a better work-life balance. The regulatory impact statement accompanying the Bill noted that while almost 93 per cent of active collective agreements provided for rest and meal breaks, there were some problems regarding the organisation of work in specific sectors which meant that the actual provision of rest and meal breaks might be inadequate. The impact statement added that little was known about whether break provisions were included in individual employment agreements which covered a majority of the work force. The service and manufacturing sectors were identified as appearing to be the most prone to providing less than optimal rest and meal breaks.

*Employment Relations Amendment Act 2014*

[15] Part 6D was amended by the Employment Relations Amendment Act 2014, with effect from 6 March 2015.

[16] Those provisions, which remain current,[7] read as follows:

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6 *Jetstar Airways Ltd v Greenslade* [2015] NZCA 432, [2015] ERNZ 71.

7 These will apply until 6 May 2019, when the Employment Relations Amendment Act 2018 comes into force, amending some provisions in Part 6D.

### 69ZC Interpretation

In this Part, unless the context otherwise requires,—

**compensatory measure—**

(a) means a measure that is designed to compensate an employee for a failure to provide rest breaks or meal breaks in accordance with section 69ZD(1); and

(b) includes (without limitation) a measure that provides the employee with time off work at an alternative time during the employee's work period, for example, by allowing a later start time, an earlier finish time, or an accumulation of time off work that may be taken on 1 or more occasions

**work period—**

(a) means the period—

(i) beginning with the time when, in accordance with an employee's terms and conditions of employment, an employee starts work; and

(ii) ending with the time when, in accordance with an employee's terms and conditions of employment, an employee finishes work; and

(b) to avoid doubt, includes all authorised breaks (whether paid or not) provided to an employee or to which an employee is entitled during the period specified in paragraph (a).

### 69ZD Employee's entitlement to rest breaks and meal breaks

(1) An employee is entitled to, and an employer must provide the employee with, rest breaks and meal breaks that—

(a) provide the employee with a reasonable opportunity, during the employee's work period, for rest, refreshment, and attention to personal matters; and

(b) are appropriate for the duration of the employee's work period.

(2) The employee's entitlement to rest breaks and meal breaks may be subject to restrictions, but only if the restrictions—

(a) are—

(i) reasonable and necessary, having regard to the nature of the employee's work; or

(ii) if subparagraph (i) does not apply, reasonable and agreed to by the employer and employee (whether in an employment agreement or otherwise); and

(b) relate to 1 or more of the following:

(i) the employee continuing to be aware of his or her work duties or, if required, continuing to perform some of his or her work duties, during the break:

(ii) the circumstances when an employee's break may be interrupted:

(iii) the employee taking his or her break in the workplace or at a specified place within the workplace.

(3) An employee's entitlement to rest breaks under this section is to paid rest breaks.

**69ZE Timing and duration of rest breaks and meal breaks**

(1) An employee must take his or her rest breaks and meal breaks—

(a) at the times and for the duration agreed between the employee and his or her employer; but

(b) in the absence of such agreement, at the reasonable times and for the reasonable duration specified by the employer.

(2) For the purposes of subsection (1)(b), an employer may specify reasonable times and durations that, having regard to the employer's operational environment or resources and the employee's interests, enable the employer to maintain continuity of service or production.

(3) An employer must provide an employee with a reasonable opportunity to negotiate with the employer and reach agreement under subsection (1)(a) on the times when the employee's rest breaks and meal breaks are to be taken and on the duration of the breaks.

(4) To avoid doubt, subsection (3) does not limit the requirement of the employer and employee to deal with each other in good faith as set out in section 4.

**69ZEA Compensatory measures**

(1) An employer is exempt from the requirement to provide rest breaks and meal breaks in accordance with section 69ZD(1)—

(a) to the extent that the employer and the employee agree that the employee is to be provided with compensatory measures; or

(b) if paragraph (a) does not apply, only to the extent that, having regard to the nature of the work performed by the employee, the employer cannot reasonably provide the employee with rest breaks and meal breaks.

(2) To the extent that an employer is not required to provide rest breaks and meal breaks under subsection (1), an employee is entitled to, and the employee's employer must provide the employee with, compensatory measures.

**69ZEB Compensatory measure must be reasonable**

(1) A compensatory measure provided to an employee under section 69ZEA must be reasonable.

(2) To avoid doubt, if an employer provides an employee with a compensatory measure that involves time off work at an alternative time during the employee's work period, that measure is to be treated as complying with subsection (1) if—

> (a) the employee is provided with an equivalent amount of time off work (that is, the same amount of time that the employee would otherwise have taken as a rest break or meal break); and
>
> (b) the time off work at an alternative time is provided on the same basis as the rest break or meal break that the employee would have otherwise taken.
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> **69ZF Penalty**
>
> An employer who does not comply with any of sections 69ZD to 69ZEB is liable to a penalty imposed by the Authority.

[17] The general policy statement of the Bill which introduced these provisions stated that the intention was to reduce prescription and allow for flexibility, including the availability of compensatory measures where a break is not in fact provided. It was stated that the Bill would implement Government policy:[8]

> ... aimed at creating an employment relations framework that *increases flexibility and choice, ensures a balance of fairness for employers and employees, and reduces compliance costs,* particularly for genuine small to medium sized enterprises. It also reduces unnecessary regulation. The Bill will help create an environment where employers can grow their business while ensuring the rights of employees are well protected.

[18] The same document went on to record the Committee's view that with regard to rest break and meal break provisions:

> The Bill acknowledges the importance of rest and meal break provisions for employees to ensure they have a genuine break from their tasks and the opportunity to rest, eat, and drink and to attend to personal matters, but it also recognises that these provisions need to be practical in a workplace. *The Bill encourages employers and employees to negotiate, in good faith, rest and meal breaks that comply with the legislation without compromising business continuity and flexibility. Employers are required to give employees meal breaks and paid rest breaks or provide compensatory measures.* Workplaces will be able to time rest breaks and meal breaks to suit service or production continuity, as far as is reasonable (including allowing for those circumstances in which it is necessary to restrict breaks because of the nature of the work being undertaken), with an employer being able to determine the arrangement where agreement cannot be reached. The change has also clarified that rest breaks must be paid.

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8 Employment Relations Amendment Bill 2013 (105-1) (explanatory note) at 6-7 (emphasis added).

*The Lean Meats case*

[19] Both the original and amended provisions were considered by the Court of Appeal in *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc.*[9] After considering the assessment made by the same Court in *Jetstar* as to the purpose of creating a statutory requirement for rest breaks, the Court in *Lean Meats* went on to state in respect of the original provisions:

> [16] ... The purpose of the new minimum standards for rest and meal breaks was to benefit employees by providing for a better work-life balance.[10] Parliament's intention was to provide for the wellbeing of employees by requiring them to take specified rest and meal breaks during work periods.[11] Parties are not permitted to contract out of the entitlement.[12]
>
> [17] Employees may not benefit if employers have an unrestricted choice of what rate they will pay for rest breaks. If employers pay employees less than the amount they would otherwise be paid for the break period, employees will lose money, and may choose to take no break at all (there is no requirement for employees to take their rest breaks).[13] If employees do not take their rest breaks, the purpose of improving their work-life balance is defeated. The purpose of this part of the Act is only met if employees are not penalised for taking a break.

[20] The Court observed that the original provision for breaks was replaced in 2015 by "a more flexible formula".[14]

[21] These observations arose in a context where the Court was considering whether the relevant provisions in Part 6D of the Act required rest breaks to be paid at the same rate for which the employee would be paid to work.

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9 *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZCA 495, [2017] 2 NZLR 234, [2016] ERNZ 381.

10 *Jetstar Airways Ltd v Greenslade*, above n 6, at [28].

11 At [35].

12 Employment Relations Act 2000, s 238.

13 Under s 69ZD, employees have an *entitlement* to minimum rest breaks and employers a commensurate *obligation* to provide them.

14 *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc,* above n 9 at [10].

[22] That question arose from a judgment of this Court which had concluded that in light of the language used and evident purpose of the legislative provisions, it was apparent Parliament intended rest breaks to be paid at the same rate for which the employee would be paid to work.[15] Ultimately, the findings of fact made by this Court focused on employees' hourly rates, so it was not necessary to determine a related issue which had been raised, whether payment for rest breaks could be included in a piece rate.[16]

[23] When the Court of Appeal considered these issues, it referred to the "rate of pay"[17] and later to a "single rate"[18] of pay; it did not state its consideration was limited to workers paid on any particular basis, such as an hourly rate. Thus, its findings should be regarded as having a broad application.

[24] The Court of Appeal made several findings which are relevant for present purposes.

[25] First, it commented on a submission made by counsel that the parties could reach their own agreement as to the rate to be paid for rest breaks. The Court stated:

> [18] However, when faced with the question of what would happen if [the parties] could not agree, Mr Quigg proposed that under the section they must agree. Such a surprising requirement would be inconsistent with the recognition in the Act of the inequality of bargaining power between employer and employee.[19] It assumes a freedom of contract that in relation to minimum entitlements the Act does not. Further, it is not indicated by the words or context of the section, and would require implying additional words.
>
> [19] The concept of a rate depending on the agreement of parties would leave a potential *lacuna* if they could not agree. At that moment the section would be unworkable. In contrast, the section works well without straining the language or the practical realities, if the interpretation of "paid" as paid at the rate the employee would be paid to work at that time, applies. The basic rate of pay remains open to negotiation between the parties. The same reasoning applies to the wording of s 69ZD after the 6 March 2015 amendment.

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15 *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2015] NZEmpC 176, [2015] ERNZ 986 at [69].

16 At [54]-[56].

17 *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc*, above n 9, at [19].

18 At [21].

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

[26] Second, the Court commented on a submission that practical problems could arise in calculating rest break payments for employees who could be on rates of pay that varied throughout the day. On this topic, the Court stated:[20]

> ... where a single rate is being paid, there will be no difficulty at all in making the calculation. Even where there are variable rates, employees will have been receiving a rate of pay at the time of the break and we have no doubt that a payable could be discerned.

[27] The Court ultimately concluded that the relevant provisions of Part 6D of the Act required rest breaks to be paid at the same rate for which the employee would be paid to work.[21] In this judgment, I will for convenience, refer to this conclusion as the "*Lean Meats* principle".

*Counsel's submissions*

[28] Since the defendant raised this issue, I summarise Mr Cranney's submissions first:

a) There is limited law on the concept of piece rates.[22]

b) The Court of Appeal judgment in *Lean Meats*, however, is relevant. It substantially resolved the issue as to the meaning of the phrase "paid rest breaks" when it concluded that Part 6D requires rest breaks to be paid at the same rate for which the employer would be paid to work. Mr Cranney submitted that the Court addressed the issue of piece workers.

c) Under the Court of Appeal analysis, the issue of how much is required to be paid turns on a counter-factual: what rate would have been paid for the break period if, instead of not working, the employee had worked?

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20 *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc*, above n 9, at [21]. See also at [12].

21 At [23].

22 Reference was made to *New Zealand Freezing Companies Assoc v Wages Tribunal* [1978] 1 NZLR 243 (CA) at 250; *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2006] ERNZ 605 (EmpC) (leave to appeal declined in *AFFCO New Zealand v New Zealand Meat Workers etc Union Inc* [2006] ERNZ 951 (CA)).

d) The Court also gave a further indication as to methodology of payment, when it stated that even where there are variable rates, employees would be receiving the rate of pay which applies at the time of the break; thus, a payable rate should be capable of being discerned.[23]

e) For this reason, it is unlikely a rest break payment could be "incorporated" or made "part of" either an hourly rate or a piece rate (or any other rate). In order to discern a payable rate, it is necessary to identify and rely upon a rate of pay which does not include any aspect or proportion of the rest break itself.

f) For all practical purposes, two sub-sections of s 130 of the Act prohibit "incorporation" practices. The wages and time provisions in s 130(g) and (h) require disaggregation; this is necessary to enable a worker or the Labour Inspector to check compliance.[24] That can only be achieved if the rest break amount is separately identifiable, or is easily identified.

g) Incorporation would allow the breaks legislation to be easily side-stepped, because a worker could be told the relevant payment is allegedly included in the work rate. Such practices would result in schemes where a nominal rest break could be included in a work rate, and an employee could be required to work across a work period where rest breaks were not paid for properly.

h) The scheme of the statute is to allow payments for rest based on payments for work. A scheme that allows for an alleged higher rate for work in return for the foregoing of a payment for rest would be contrary to the *Lean Meats* principle.

i) It follows that rest breaks are best viewed as an additional cost of labour, over and above the amount paid for each piece produced, or the amount paid for time actually worked.

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23 Reference was made by counsel to *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc*, above n 9 at [12] and [21].

24 The Court of Appeal commented on an equivalent provision which then existed as s 8A of the Minimum Wage Act 1983: *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522, [2011] ERNZ 192.

[29] For the plaintiffs, Mr Smith QC submitted in summary:

a) *Lean Meats* is not authority for the proposition that rest breaks must be paid by way of a separate payment; only that those breaks be paid at the same rate for which the employee would be paid to work.

b) There is nothing in the statutory framework which prevents the parties from agreeing to incorporate payments for rest breaks within piece rates. The only requirement is found in s 69ZD(3) that rest breaks must be "paid".

c) There is no reason why one form of payment cannot be incorporated into another, as in the current circumstances. One payment may be "added to" another payment, the total sum would still be comprised of its component parts.

d) If the defendant's argument was correct, then salaried employees could not be regarded as having been paid for their rest breaks, because their salary was a payment for work and there was no separate and identifiable payment for rest breaks.

e) The method of incorporating one form of payment into another is expressly referred to in s 28 of the Holidays Act 2003 (HA); under that section, in certain circumstances an employer and employee may agree that the employee will receive payment for annual holidays with their regular pay. Such a practice does not lead to a conclusion that the employee does not receive payment for annual holidays, or that what is holiday pay is to be re-characterised as payment for work.

f) Section 130 of the Act focuses on the number of hours "worked" in each day; the "method of calculation" referred to in s 130(h) relates to the means by which "wages" are paid to the employee for "each pay period". Further, s 130 does not state that an employer is required to keep a record of payments made to the employee for the purposes of their rest breaks.

g) There is no other legislative requirement for rest break payments to be an identifiable component of an employee's pay. Where Parliament considers this to be necessary, it has said so, such as in s 28 of the HA which states that holiday pay must be paid as "an identifiable component of the employee's pay".

h) The MWA clearly contemplates that employees can be remunerated based on time (whether by hour, day, week or fortnight) or piece work. Minimum Wage Orders (MWO) have made this clear for many years.

i) Where parties have agreed to include payment for rest breaks within set piece rates, the equivalent hourly rate of pay can be calculated by dividing the employee's total earnings for a day by the total number of hours worked and the time provided for paid rest breaks. This will produce an equivalent hourly rate that the employee receives for work, and for when the employee is on a paid rest break or breaks. Breaks are thus able to be paid at the same "rate" that the employee is paid to work.

j) Freedom to contract remains a foundation of the employment relationship, although it may be subject to a "regulatory overlay".[25] The extent of any restrictions is a matter of policy. The balance between freedom of contract and regulation has shifted with changes of government. It follows that any legislative restrictions on this principle must be express and specific.

k) Although Part 6D of the Act provides for an employee's entitlement to take breaks during a work period, currently it does not prescribe when the breaks must be taken, how long they need to be or how they must be paid. These details are left to the employer and employee to reach agreement on in good faith, having regard to the particular working environment and circumstances. This is an example of the flexibility which permeates these arrangements.

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[25] Referring to dicta of the Court of Appeal in *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533, [2001] ERNZ 660 (CA) at [81].

[30] For the intervenor, Mr Skelton QC advanced submissions that were similar to those advanced for the plaintiffs. He emphasised:

a) The word "paid" in s 69ZD is not defined. But the word does have an ordinary meaning in the employment context. He submitted that pay is the "consideration an employee is entitled to receive for services provided under an employment agreement". Usually, pay is a consideration for *all* services an employee has rendered.

b) Wages are defined by s 2 of the Wages Protection Act 1983 broadly. Thus, payment for employment services can be calculated not only by time (for example, hourly rates) or a fixed sum (for example, salary) but also by throughput (as a piece rate).

c) It is accordingly important to distinguish between what services an employee is providing and entitled to be paid for his or her work on the one hand, and the method by which the parties agree to pay for such work on the other.

d) A rest break is a period during which an employee does not have to perform "active work". However, employees are nonetheless "at work", but subject to restraints so that they are not free to use their time as they please. The statutory entitlement to "paid rest breaks" recognises that employees while on a rest break are still providing services, and that this is time at work for which they are entitled to be compensated.

e) It is incorrect to say that a payment for rest breaks is not a payment for work. It is a payment made in consideration for employment services that the employee has provided, namely, being at work during the period that the employee is required to attend work – that is, their work period.

f) The Act provides in Part 6D that the "work period" includes all authorised rest and meal breaks, paid and unpaid. The MWO applies this concept by requiring payment by piece work to be at the minimum rate of $16.50 per hour. Thus, employers are expressly permitted to meet their obligation to pay at least the minimum wage by piece rates, even

although these must be calculated by reference to throughput based on a shift tally rather than hours worked. In other words, the MWO allows for piece rates so long as, overall, an employee's wages equal or exceed the minimum hourly rate.

g) This highlights the important distinction between work and payment for work. The former involves the provision of services under an employment agreement during the work period. Payment is the consideration for work. In the case of the piece rate, payment for work is determined by throughput over a period of time, namely, the work period. Provided that minimum entitlements are met, there is nothing unlawful about paying employees based on piece rates, including for rest breaks, if that is the agreed method of remuneration.

h) The Act grants the parties freedom to agree their own contractual arrangements, except to the extent that doing so would exclude or contract out of minimum entitlements guaranteed by statute. Although there is no ability to contract out, the parties are free to reach any agreement that they wish as to *how* the rest break is to be paid. Parliament has left the parties free to reach an agreement, subject only to complying with minimum pay legislation.

i) Freedom of contract is emphasised by s 54(2) of the Act. That provision is the starting point. The Court must then determine whether or not there has been any restriction in the Act that would prevent the incorporation of rest breaks within the piece rate. Mr Skelton submitted there have been no such restrictions.

*Discussion*

[31] In this statutory interpretation exercise, it is necessary to acknowledge s 5 of the Interpretation Act 1999, and the observations made by Tipping J about that provision in *Commerce Commission v Fonterra Co-Operative Group Ltd*:[26]

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[26] *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36; [2007] 3 NZLR 767 (footnotes omitted).

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance to may be the social, commercial or other objective of the enactment.

[32] I approach the interpretation of the applicable provisions in Part 6D of the Act in light of these principles.

*Piece work and piece wages*

[33] Before considering the relevant statutory provisions, I refer to the concepts of "piece work" and "piece wages". These terms are well understood. They concern "payment for production achieved",[27] or "payment according to the number of individual pieces of work completed".[28]

[34] Such wages are commonly paid in the meat processing industry, where it may be agreed between the parties that payment will be on the basis of an amount per animal processed.

[35] Piece wages are of course but one form of remuneration for work. Other types of pay include time wages, salary, commission, overtime, bonus payments; or parties may agree that a combination of any of these be paid, such as time wages plus commission.

[36] Generally, the legislature acknowledges that wages and income can take many forms. So, there is a broad and non-exclusive definition of "wages" in s 2 of the Wages Protection Act 1983 (WPA); it includes "piece wages". It provides:

> **2 Interpretation**
>
> ...
>
> **wages** means salary or wages; and includes time and piece wages, and overtime, bonus, or other special payments agreed to be paid to a

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[27] *New Zealand Freezing Assoc v Wages Tribunal* [1978] 1 NZLR 243 at 249 (CA).

[28] *Idea Services Ltd v Dickson* [2009] ERNZ 372 at [68].

> worker for the performance of service or work; and also includes any part of any wages

[37] Section RD5 of the Income Tax Act 2007 also has a broad definition of salary or wages:

> **RD 5 Salary or wages**
>
> *Meaning*
>
> (1) Salary or wages—
>
> (a) means a payment of salary, wages, or allowances made to a person in connection with their employment; and
>
> (b) includes—
>
> (i) a bonus, commission, gratuity, overtime pay, or other pay of any kind; ...

[38] For the period with which the Court is concerned, Parliament did not see it as necessary to confine the description of remuneration for services provided by an employee, in the Employment Relations Act; there was no limiting definition of the term "wages"; nor was it seen as necessary to refer expressly to the circumstances in which a piece wage might be paid.[29] What the Act does state is that there are certain minimum entitlement provisions relevant to the payment of wages which are contained in the Holidays Act 2003 (HA), the Minimum Wage Act 1983 (MWA), as well as the WPA.[30]

[39] MWOs, as made under the MWA, refer to applicable rates of wages payable to a worker paid by piece work. Currently that rate is $16.50 per hour.[31] The term "piece work" is not defined in either the MWA, or applicable MWOs. That instrument assumes that parties to an employment agreement can convert a piece rate to an hourly rate. Providing the stipulated minimum rate as prescribed on an hourly basis is satisfied, this particular statute, or the orders made under it, do not impose any further requirements as to the composition of a piece wage. Thus, if minimum entitlements are respected, there is no impediment under the provisions of the MWA or MWOs to

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[29] This position will be somewhat altered on 6 May 2019, when the Employment Relations Amendment Act 2018 comes into force. This amends s 5 to include a definition of "wages", coinciding with the introduction of a new provision which will require rates of wages and salary to be included in collective agreements.

[30] Employment Relations Act 2000, s 5.

[31] Minimum Wage Order 2018, cl 4; see also a similar mechanism with regard to starting out workers, cl 5; and with regard to trainees, cl 6.

the parties agreeing that a piece wage may include compensation for other entitlements.

[40] The question in this case is whether the Act imposes a relevant constraint.

*Key provisions in Part 6D*

[41] Turning to the statute, the starting point must be s 69ZD(3); both versions of that provision make it clear that the employees' legislative entitlement is to "paid rest breaks".

[42] The sub-section arises in a part which is intended to apply to all employees, whatever the nature of the employment relationship, and whatever the means of hire or reward under his or her contract of service. The sub-section potentially has a broad reach.

[43] Both versions of s 69ZC make it clear that all authorised breaks, "whether paid or not", are included in the "work period", within which rest breaks and meal breaks must appropriately fall.[32] In neither version of Part 6D is there any other provision which describes the method of payment for rest breaks, or indeed refers to the fact of payment.

[44] Although some aspects of the rest and meal break scheme are mandatory, others have been left to the parties to agree. Thus, in *Lean Meats*, the Court of Appeal noted that employees could choose not to take a break at all, since the statute did not stipulate that employees were required to take a rest break. Rather, the Court noted that under s 69ZD, employees have an *entitlement* to minimum rest breaks and employers a commensurate *obligation* to provide them.[33]

[45] In the pre-2015 version of s 69ZE, the statutory breaks were to be provided at times agreed between the employer and employee; in the absence of agreement, the times for these were stipulated, but only if they were reasonable and practicable. The

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[32] Employment Relations Act 2000, s 69ZD(1)(b).

[33] *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc*, above n 9, at [17].

post-2015 form of the scheme contains considerably more flexibility in the timing and duration of rest breaks and meal breaks, the limitations on breaks in certain circumstances,[34] and in relation to reasonable compensatory measures. The form or means of payment of compensatory measures is not stipulated.[35]

[46] Although minimum periods are no longer specified for rest breaks, it is inherently unlikely that Parliament intended these would be less than the periods which were specified in the former s 69ZD. Rather, the emphasis is now on employees being provided with a reasonable opportunity for rest, refreshment and attention to personal matters. But that opportunity has to be appropriate for the duration of the employee's work period. All of this means there has to be a genuine break.

[47] In short, it is evident from the immediately surrounding statutory provisions in both versions of Part 6D that on the one hand Parliament legislated for certain mandatory entitlements, which could not be contracted away.[36] A reasonable opportunity for rest breaks must be provided; and they must be remunerated. Against that it has allowed for the parties to reach agreement on a range of other matters relating to breaks; the method of payment for rest breaks is one of those matters.

[48] I conclude that s 69ZD(3) provides an entitlement to be paid; but the means or method of payment is not prescribed in that subsection, or elsewhere in Part 6D.[37] On this point, Part 6D is silent.

*Other relevant provisions in the Act: s 56*

[49] Turning to statutory provisions elsewhere in the Act, I accept the submission made by Mr Smith and Mr Skelton that it is appropriate to have regard to those provisions which underscore freedom of contract, a concept which applies to both collective employment agreements,[38] and to individual employment agreements.[39]

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34 Section 69ZD(2).
35 Section 69ZEA(1).
36 Section 69ZD(2).
37 A similar conclusion was reached with regard to the Holidays Act 2003, in *Greenlea Premier Meats Ltd v Horn* [2002] 1 ERNZ 380 (CA) at [47]-[48].
38 Employment Relations Act 2000, s 54(2).
39 Employment Relations Act 2000, s 65(1)(b).

[50] In *Coutts Cars Ltd v Baguley,* the Court of Appeal held:[40]

> [81] The Employment Contracts Act, now repealed, was a statute which provided, in substance, for freedom of contract to set the terms of employment. The Employment Relations Act also contemplates that the agreement of the parties is the underlying foundation for terms of employment but it also imposes a regulatory overlay.

[51] The same point was emphasised by this Court in *Lend Lease Infrastructure Services (NZ) Ltd v Recreational Services Ltd*, where Judge Inglis explained that Part 6A of the Act is "an exception to the usual principles regarding the freedom to contract in employment".[41]

[52] Here, the "regulatory overlay" is provided by the obligation to provide breaks, although the parties are free to agree on aspects of those arrangements, as already explained. Given the acknowledgment that parties may contract with each other as they see fit except where otherwise provided for, I consider that any limitations on the freedom to contract must be obviously intended. To this point, the language of the statute does not lead to such a conclusion.

*Section 130*

[53] The next statutory provision requiring consideration relates to the record which all employers must keep, the "wages and time record" as described in s 130, which relevantly provides:

> **130 Wages and time record**
>
> (1) Every employer must at all times keep a record (called the **wages and time record**) showing, in the case of each employee employed by that employer,—
>
> ...
>
> (g) the number of hours worked each day in a pay period and the pay for those hours:
>
> (h) the wages paid to the employee each pay period and the method of calculation:
>
> ...

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40 *Coutts Cars Ltd v Baguley,* above n 25, at [81].

41 *Lend Lease Infrastructure Services (NZ) Ltd v Recreational Services Ltd* [2012] NZEmpC 86, [2012] ERNZ 145 at [81].

(1B) If an employee's number of hours worked each day in a pay period and the pay for those hours are agreed and the employee works those hours (the **usual hours**), it is sufficient compliance with subsection (1)(g) if those usual hours and pay are stated in—

(a) the wages and time record; or

(b) the employment agreement; or

(c) a roster or any other document or record used in the normal course of the employee's employment.

(1C) In subsection (1B), the **usual hours** of an employee who is remunerated by way of salary include any additional hours worked by the employee in accordance with the employee's employment agreement.

(1D) Despite subsection (1C), the employer must record any additional hours worked that need to be recorded to enable the employer to comply with the employer's general obligation under section 4B(1).

...

[54] The section referred to in s 130(1D), s 4B(1), stipulates that an employer must keep records and sufficient detail to demonstrate that the employer has complied with "minimum entitlement provisions"; as already mentioned, this phrase is defined in s 5 as referring to entitlements under the HA, the MWA, and the provisions of the WPA. Significantly, the phrase does not refer to the obligations of Part 6D.

[55] For several reasons, I am not persuaded that s 130 is intended to apply to entitlements under Part 6D, or that it is an aid to the interpretation of s 69ZD(3).

[56] First, s 130 was a provision of longstanding prior to the introduction of Part 6D. Over many years, the obligation to maintain wages and time records in a particular format was well understood as relating to the proper recording of information relevant to hours worked each day. Given the well established meaning and use of this provision, if Parliament subsequently determined that payment for rest breaks could not be incorporated with other means of payment, separate provision would need to be made. But s 130 has not been amended to provide that a separate record must be maintained for paid rest breaks and/or that proper provision for those breaks cannot be included in a piece rate, or any other means of payment such as a salary.

[57] Second, s 130 was amended in 2016: once again, Parliament could have enacted provisions relating to the recording of the paid rest breaks, or that piece rates could not include such an allowance, but it did not do so.

[58] Third, I refer to Mr Cranney's submission that the purpose of s 130 is to allow a worker or a Labour Inspector to check compliance, particularly as to whether a discernible rate of payment was made for breaks according to the *Lean Meats* principle; and that this was a yet further reason for concluding that Parliament intended that the relevant amount had to be separately identified or easily identifiable. He went on to argue that an alleged higher rate for work, in return for the foregoing of payment for rest, could not have been intended.

[59] I agree that it would not be right for an employee to be required to forego his or her right to payment for a rest break. But the more appropriate question is whether an employee is being paid properly for his or her rest break in accordance with the *Lean Meats* principle.

[60] It is apparent that Parliament intended to address the issue of proper payment by providing for the possibility of compliance orders being made,[42] or a penalty being imposed.[43] In such a case, the onus must fall on the employer to satisfy the Authority or Court that rest breaks have been paid properly since the employer carries the obligation to do so. This must include an employer being able to establish that rest breaks are paid at the same rate for which the employee would be paid to work.

*Holidays Act 2003, s 28*

[61] Finally, by way of cross-check, I refer to s 28 of the HA. As submitted by counsel, this provision states that an employer may regularly pay annual holiday pay with the employee's pay if the amount so paid is "an identifiable component of the employee's pay". The provisions of Part 6D or s 130 of the Act do not contain such language. The language used in s 28 of the HA suggests that when Parliament intends to impose a requirement as to an identifiable component, it says so.

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[42] Employment Relations Act 2000, s 137, a breach of which can of course ultimately be the subject of sanction under s 140(6).

[43] Section 69ZF.

*Californian cases*

[62] Mr Cranney referred to several Californian cases, where courts have held that a piece rate compensation formula that did not compensate separately for rest periods would not comply with local minimum wage law,[44] because reliance was being placed on impermissible averaging.[45] These cases arose in a wholly different legislative context, and do not assist in resolving the present interpretation issue.

*Summary*

[63] In summary, I am satisfied that in light of s 69ZD(3), related provisions in Part 6D, and relevant sections elsewhere in the Act and in the HA, it is clear Parliament did not stipulate the means by which payment for rest breaks would be made.

[64] It follows as a matter of law, parties in an employment relationship are free to reach agreement that payment for rest breaks may be included within the employee's piece wage, there being no statutory indication to the contrary.

[65] Under the *Lean Meats* principle, such a payment must be paid at the same rate for which an employee would have been paid at the time of the break. Any issue of adequacy of performance of this obligation may be dealt with by way of the penalty and compliance provisions of Part 6D.

## Second issue: were paid rest breaks incorporated in the applicable piece rates, and if so was there compliance with s 69ZD?

*Introduction*

[66] The second issue raises a question as to the correct interpretation of the CEAs at each of the three plants so as to determine whether the applicable piece rates include a provision for paid rest breaks, as is asserted by the plaintiffs. They say, first, that as a matter of proper construction of each CEA, such payments were incorporated; alternatively, such a conclusion is available having regard to custom and practice. For

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44 *Bluford v Safeway Stores, Inc* 216 Cal App 4th 864 (2013); *Gonzalez v Downtown LA Motors LP* 215 Cal App 4th 36 (2013); *Vaquero v Stoneledge Furniture, LLC* 9 Cal App 5th 98 (2017); *Augustus v ABM Security, Inc* 2 Cal 5th 257 (2016).

45 As explained and precluded in *Armenta v Osmose*, *Inc* 135 Cal App 4th 314 (2005), at 324.

its part, the defendant asserts that neither such conclusion is available; moreover, it says the evidence does not establish that the prerequisites of s 69ZD are met, as explained by the Court of Appeal in *Lean Meats*.

[67] The CEAs with regard to each plant, and the context within which they must be considered, differ in material respects. Accordingly, a separate analysis of the CEAs at each location is required.

*Interpretation principles*

[68] There is no controversy as to the applicable principles concerning the proper interpretation of contractual interpretation.

[69] Both parties referred to the recent summary provided by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*,[46] which the same Court has confirmed apply to employment agreements.[47] Founding its analysis on the two earlier decisions of *Vector Gas Ltd v Bay of Plenty Energy Ltd*[48] and *Investors Compensation Scheme Ltd v West Bromwich Building Society*,[49] the Supreme Court summarised the position as follows:[50]

> [60] ... the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
>
> [61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contract has a significant history in New Zealand, although for many years it was restricted

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46 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.

47 *New Zealand Airline Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 at [71]. Reference should also be made to *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212 at [38], where the Court emphasised that the special features that characterise bargaining may be relevant to interpretation in some circumstances.

48 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

49 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL).

50 (Footnotes omitted).

> to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependant on there being an ambiguity in the contractual language.
>
> ...
>
> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, 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.

[70] An issue which falls for particular consideration in this case is whether the subsequent conduct of the parties is an aid to interpretation. In *Gibbons Holdings Ltd v Wholesale Distributors Ltd*, Tipping J referred to this topic, stating:[51]

> [63] Even if the meaning suggested by post-contract conduct is not the most immediately obvious objective meaning, the parties' shared conduct will be helpful in identifying what they themselves intended the words to mean. That, after all, must be the ultimate determinant. If the Court can be confident from their subsequent conduct what both parties intended their words to mean, and the words are capable of bearing that meaning, it would be inappropriate to presume that they meant something else.

[71] Justice Tipping returned to this topic in *Vector Gas*, when he stated:[52]

> [30] In *Gibbons Holding Ltd v Wholesale Distributors Ltd* I expressed the view that evidence of subsequent conduct should be admissible, if capable of providing objective guidance as to intended meaning. I suggested that, in order to be admissible, post-contract conduct should be shared or mutual. I saw this as a way of emphasising the need to exclude evidence which demonstrated only a party's subjective intention or understanding as to meaning. I now consider that the approach I am taking in these present reasons is a similar and clearer articulation of the appropriate principle, but one which still preserves the essential line between subjectivity and objectivity of approach.
>
> [31] There is no logical reason why the same approach should not be taken to post-contract and pre-contract evidence. *The key point is that extrinsic evidence is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both or all parties intended their words to bear ...*

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51 *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277 (footnotes omitted).

52 *Vector Gas v Bay of Plenty Energy Ltd,* above n 48 (footnotes omitted) (emphasis added).

[72] As mentioned, the Court is also required to consider whether the applicable term should be implied by custom and practice.

[73] The leading New Zealand case with regard to the implication of terms on the basis of custom and practice is *Woods v N J Ellingham & Co Ltd.*[53] In this judgment, Henry J discussed the principles for deciding whether a custom can be implied, which may be summarised as follows:

> a) The custom must have acquired such notoriety that the parties must be taken to have known of it and intended it should form part of the contract;
>
> b) the custom must be certain;
>
> c) it must be reasonable;
>
> d) until the Courts take judicial notice of a custom, it must be proved by clear and convincing evidence; and
>
> e) the custom must not be inconsistent with the express contract.

[74] I apply these principles in the following analysis.

*Feilding*

[75] The current Feilding collective agreement relevantly provides:

> **8.0 <u>HOURS OF WORK & BREAKS</u>**
>
> 8.1 The hours applicable to the slaughter floor and follow-on departments are contained in Schedule A.
>
> **9.0 <u>WAGES</u>**
>
> 9.1 <u>Slaughter floor wages</u>
>
> The rates of pay applicable to the slaughter floor and follow-on departments are contained in Schedule A.
>
> ...
>
> **<u>SCHEDULE A – SLAUGHTER HOURS AND WAGES</u>**

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53 *Woods v N J Ellingham & Co Ltd* [1977] 1 NZLR 218 (SC). These principles have been adopted in Employment Court cases such as *Edminstin v Sanford Ltd* [2017] NZEmpC 70, (2017) 15 NZELR 64 at [41]-[51]; and *Dean v Chief Executive of the Ministry for Primary Industries* [2017] NZEmpC 139 at [51].

**1.0 HOURS OF WORK**

1.1 The hours of work for employees shall be 575 continuous minutes per day (exclusive of refreshment breaks) worked between the ordinary hours of 6.20am and 5.20pm with the exception of during the bobby calf processing season when the hours of work shall be 575 continuous minutes per day (exclusive of refreshment breaks) worked between the ordinary hours of 6.20am and 8.20pm.

1.2 Where a second shift is worked the 575 continuous minutes per day (exclusive of refreshment breaks) shall be worked between the ordinary hours of 7.00pm and 6.00am the following day.

1.3 Time not exceeding 85 minutes shall be allowed daily for refreshment breaks, to be allocated at times agreed between the employer and employees. This will include one unpaid 30 minute break and two 20 minute smoko breaks per shift. These times are inclusive of leaving and returning to work.

Hourly paid workers shall be paid for the 20 minute breaks at the hourly rate applicable to the employee.

...

1.7 The above does not exclude the opportunity for management and employees to consult and agree changes to the above.

**2. WAGES**

2.1 Hourly rate work

...

2.3 Piece rate work

...

2.3.2 An agreement payment of **$0.1284** per animal for the first 1000 animals slaughtered, **$0.1526** per animal for the next 665 animals slaughtered and **$0.1833** for each animal thereafter will be paid to each piece rate worker. Slaughter of adult sheep will be paid at 1.2 times these animal rates. Slaughter of bobby calves will be paid at 1.25 times these animal rates. Each slaughter shift shall operate independent wage pools. Additional payment includes all slaughter and dressing tasks from sticking through to grading.

...

[76] Clause 2.5 goes on to provide for increases of rates effective from 15 February 2016, and 13 February 2017.

[77] I also record that there are in total four CEAs relating to the Feilding plant before the Court. These documents relate to the periods 2008 – 2010, 2010 – 2012, 2012 – 2014 and 2015 – 2018.

[78] There are no material differences in the language used with regard to breaks in the four documents, although the provisions reproduced above in sch A were part of the text in the 2008 – 2010, and 2010 – 2012 CEAs, rather than in an appendix.

[79] Mr Smith submitted in summary:

a) The rest and meal break clauses provide for two distinct entitlements; the first as to agreed periods for breaks; the second as to entitlement to receive payment for some of those breaks.

b) The method of payment is specifically stated for hourly rate workers, but there is no provision referring to a separate payment for rest breaks for piece rate workers.

c) Having regard to context, it should be concluded that all workers are entitled to the same amount of time for rest and meal breaks, that all workers are to be paid for those rest breaks; and that hourly workers are paid "separately" whilst piece rate workers are not.

d) The context reinforces a conclusion that piece rate workers are so paid.

e) At all material times, there was a statutory obligation to provide paid rest breaks, but lunch breaks were unpaid. Both parties recognised this.

f) To conclude that piece rate workers would not be paid for rest breaks would amount to a finding that the parties had the mutual intention to defy a legal regime of which they were clearly aware.

g) The company on two occasions, 2010 and 2012, asked the Union to include for clarification a clause to the effect that the piece rates included payment for rest breaks. The request was not successful, but thereafter the Union took no step. If members of the Union truly believed that piece rate workers were not being paid, its failure to act was extraordinary.

h) Reliance was also placed on the unchallenged evidence given for the plaintiff by Mr Goodall and Mr Gusscott, as to how allowance for a paid rest break would be made when fixing a piece rate. It would be contrary

to common sense for an employer to calculate a piece rate, while ignoring a liability it was required to pay.

i) Finally, a comparison between piece rates paid at the Feilding, Gisborne and Te Kuiti plants illustrate contextually that each plant has rest break payments in their piece rates.

[80] Mr Cranney submitted in summary:

a) There is no suggestion in cl 8, or in cl 1.3 of sch A that piece workers are paid for the breaks.

b) Piece rate workers' rates are dealt with in cl 2.3.2 of the schedule, which confirms that the amount paid identifies directly with each animal slaughtered. Such sum would be payable in full regardless of whether rest breaks are even taken, for example, where a worker worked from 6.20 am to 9.20 am and then went home prior to the first rest break.

c) The evidence is that the plaintiffs repeatedly attempted to seek the defendant's agreement to a clause providing that piece rates incorporated paid rest breaks, but this never occurred.

d) Clause 9.3.2 provided that the employer was required to provide workers with "details of the manner in which wages had been calculated"; if the rate was in fact calculated in a way that included rest break payments, one would expect evidence of that fact. There is none, including in payslips.

e) The agreement contains a detailed code of what money is paid, for what purpose and under what conditions, but makes no mention of piece workers' rates including payment for time-based rest breaks. The CEA rigidly records the hours of work required of piece rate workers and how wages are calculated for that working time.

*Discussion*

*The language used by the parties*

[81] Starting with the language used in the CEAs, the focus must be on the provisions relating to hours of work, and wages, as contained in cls 1 and 2 of sch A.

[82] Clause 1.3 refers to the periods which may be taken for "refreshment breaks". Although time not exceeding 85 minutes is to be allowed for this purpose, the clause goes on to provide that there will be one "unpaid 30-minute break", and "two 20-minute smoko breaks" per shift.

[83] There is no reference as to whether payment is to be made in respect of the remaining 15 minutes (that is, three five-minute breaks), although the parties accept those breaks should be paid. At least in this respect, the clause is incomplete.

[84] The schedule goes on to describe wages for hourly rate workers and piece rate workers. Focusing on the second of these, the material provisions are found in cls 2.3.1 to 2.3.3 are under the heading "Piece Rate Work". Clause 2.3.1 states that piece rate workers are required to work on the lamb-slaughter board and to "be a self-managing team, effectively managing the lamb slaughter dressing operation facility and equipment from sticking live animals through to grading of carcasses". In cl 2.3.2, the agreed rate of payment is for each animal slaughtered. Additional payments are made; for adult sheep at 1.2 times the core animal rate, and for bobby calves at 1.25 the core animal rate. The additional rates include all slaughter and dressing tasks from sticking through to grading. There is no indication that an animal rate is to include compensation for rest breaks. All of this is consistent with the commonly understood meaning of "piece work", that is, payment according to the number of individual pieces of work completed.

[85] There are other provisions which also point away from a conclusion that rest breaks are included in piece rates. Clause 1.7 indicates that management and employees may consult and agree to changes to the periods allowed for refreshment breaks. There is no statement that in such an event the piece rate would need to be re-negotiated if it included an allowance for rest breaks.

[86] Clause 9.3.2 requires all employees to be supplied in writing with details of the manner in which, and the date of which, their wages have been calculated, and that there is no evidence that such calculations include reference to rest breaks for piece workers. Although this point is not determinative, it is at least consistent with a conclusion that there is no such allowance.

[87] I find that the CEA contains very detailed provisions for payment in a wide range of circumstances. Considered objectively, the absence of any provision stating that piece rates include an allowance for paid rest breaks suggests the parties did not intend to provide for this payment.

*The evidence as to background*

[88] It is next necessary to turn to context to ascertain whether there are relevant background factors which would nonetheless lead an objective reader to conclude that the parties did intend such an allowance.

[89] Before doing so, I refer to a point raised by Mr Cranney regarding what he described as a "kill clause" contained in successive CEAs. The clause stated that the CEA replaced all previous contracts and/or agreements. He submitted that the effect of this provision was to preclude from consideration any longstanding agreements or understandings which the parties may have held, including as to the makeup of piece rates.

[90] For his part, Mr Smith responded that such a clause was not unusual, where the provision purported on its face to replace a preceding CEA with a new one. This did not mean, however, that the clause effectively disposed of any need to consider the background matrix of facts or information reasonably available to the parties going back some years, even to the commencement of the last operative CEA in each case. To adopt this approach would effectively flout the principles set out in cases such as *Investors Compensation* and *Vector Gas*.

[91] I agree. I return to the authorities summarised earlier.[54] When interpreting an employment agreement, the proper approach is an objective one, so as to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".[55] The background has to be that which a reasonable person would regard as relevant;[56] that is, all the facts and circumstances known to and likely to be operating on the parties' minds.[57]

[92] It would be illogical to conclude that a "kill clause" could operate to prevent the Court from applying orthodox principles of interpretation. It is one thing to replace all previous contracts and/or agreements with a new agreement. It is another to objectively consider context so as to ascertain the correct meaning of a CEA which contains the terms and conditions agreed between the parties. Accordingly, I conclude that the Court is not precluded from considering the various contextual matters raised by both parties in order to assess whether those factors may legitimately contribute to correct interpretation.

[93] The relevant history is as follows. The Feilding plant was built in 1996 by Lamb Packers Feilding Ltd (Lamb Packers). Initially, it was a slaughter-only facility.

[94] Mr Signal, the original plant manager, and now one of the directors and owners of Ovation, gave evidence. He said that he had owned a labour contract company called Feilding Venison Ltd, established in 1987; it was contracted by Lamb Packers to provide labour at the Feilding plant from 1996. He confirmed all employees of the labour company were on individual employment agreements. Slaughtermen were paid on a piece rate basis. Mr Signal said that his recollection was from the time the plant was established at Feilding, workers "have always taken smoko breaks". However, he gave no evidence as to the makeup of the applicable piece rates.

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54 Above at [69]-[72].

55 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HC) at 912 per Lord Hoffman; cited with approval *in Firm PI 1 Ltd v Zurich Australian Insurance Ltd,* above n 46, at [60], per Arnold J.

56 *Vector Gas v Bay of Plenty Energy Ltd*, above n 48, at [19].

57 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, above n 46, at [60].

[95] In 2005, Lamb Packers was sold to Bernard Matthews New Zealand Ltd (Bernard Matthews). In that year, a number of employees became Union members, and a CEA was adopted reflecting existing individual employment agreements.

[96] Mr Gusscott was employed by Bernard Matthews as a Human Resources and Business Development Manager from 1998, becoming a consultant for Ovation in 2007. He confirmed he had represented the company in negotiations for the Feilding CEA since 2005. He referred to issues and concerns that had been raised in bargaining, none of which related to any question as to payment for rest breaks.

[97] Mr Bayliss became Ovation's Group Operations Manager in 2008. Although he had no personal involvement in prior bargaining for CEAs at Feilding, he said that "at Ovation we have always taken the view that the piece rates are inclusive of payment for rest breaks taken".

[98] The next aspect of background relates to events which occurred from the inception of the statutory regime. As described earlier, Part 6D was introduced in 2008, taking effect on 1 April 2009.

[99] Mr Bayliss confirmed that negotiations with the Union for the renewal of the Feilding CEA in 2008 did not involve any discussion about payment for smoko breaks for piece rate workers.

[100] Then, reference was made to a letter written by the then Minister of Labour, Hon Kate Wilkinson, to the MIA, on 13 May 2009. It appears that this followed a meeting between the Minister and MIA representatives in February, supplemented by a submission sent in March 2009. She said she had considered the points raised, and noted "your primary concern is regarding the relationship between piece rates and paid rest breaks". She said her officials had advised her "the law will support current practice and should therefore have only minor effects in some workplaces. I am advised this should not impose any extra cost for *employers who already provide rest and meal breaks which meet or surpass statutory requirements*".[58] Clearly, her remarks were predicated on the basis that increased costs would only arise where the

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[58] (Emphasis added).

statutory requirements were not in fact being met already. This evidence cannot be construed as an acknowledgment from the Minister that this was the case in respect of any particular processing plants, such as those operated by the plaintiffs.

[101] On 26 May 2009, Mr Roger Middlemass, an organiser of the Union, wrote to the Plant Manager at the Feilding plant. Amongst other points, he referred to the question of compliance with the new legislative requirements. After referring to the position of hourly paid workers, he said that "piece workers [would] now need to be paid similarly". He proposed payment for smokos at an hourly rate.

[102] Mr Bayliss wrote to Mr Middlemass on 11 June 2009, stating that advice was currently being sought, and that he would revert in due course. He said that he later met with Mr Middlemass, providing him with a copy of the letter from the Minister. His evidence to the Court was that since "the company has always provided workers with the opportunity to take rest and meal breaks during their shifts", its understanding was that the new law would not impact on its workplaces; I infer that this is what he told Mr Middlemass.

[103] Mr Bayliss did not receive any further correspondence from the Union on the issue of payment; that said, the company decided that since the issue had been raised by the Union, there should be an addition to cl 8.3 to the effect that "the payment for rates of piece rate workers is inclusive of the payment for breaks". A claim to this effect was raised when negotiating the renewal of the Feilding CEA in 2010. The claim was rejected by the Union. However, it should also be noted that the Union's proposals for renewal contained no reference to a provision for paid rest breaks for piece workers.

[104] A similar claim was advanced by the company in 2012. That claim states Ovation wanted to "include wording and documents to clarify that payment for breaks is inclusive in piece rates". Again, the Union rejected the claim, which the company then withdrew.

[105] In its 2014 claims, Ovation raised a claim with regard to hourly paid slaughter workers, to the effect that their rates would be split into a base rate and a skill rate;

smokos would be paid at the base rate. No reference was made to the issue of payment for smokos of those paid on a piece basis.

[106] In 2018, the company proposed that there be an addition to cl 1.3:

> No separate payment will be made for paid rest breaks in respect of piece work (the rates for which include payment for rest breaks).

[107] That claim was not accepted by the Union; consequently, the present proceeding was commenced.

*Does the background assist interpretation?*

[108] A significant point arising from the evidence given as to background is that there is no evidence at all regarding the makeup of piece rates as from their introduction; nor as to their makeup at any subsequent time, for instance, when bargaining for replacement CEAs; nor as to their makeup under the current CEA. This is in spite of evidence for the plaintiffs that a calculation specifying an appropriate sum for the payment of rest breaks for piece workers is well capable of being undertaken. I am satisfied this evidence would have been produced if it existed. Its absence tends to suggest there is no direct and reliable basis for concluding that such rates are inclusive.

[109] The submission that both parties were obviously aware of the statutory regime, so that it is inherently unlikely they would have bargained for non-complying arrangements, does not recognise the history which existed prior to 2009. Piece rates were introduced well prior to the introduction of Part 6D. The alleged agreement as to incorporation could not have been made in response to the introduction of the statutory scheme.

[110] It was argued that the Court should conclude that the fact the Union did not take any steps after the company put up claims in 2010 and 2012 was a significant matter which should lead to a conclusion that it knew all along the rates were and are inclusive. Mr Smith submitted that on the company's case, there was a request to clarify the status quo; and that on the defendant's case, the response of the Union amounted to an acknowledgment that Union members were being short paid. He said

that in those circumstances, it was extraordinary the Union took no steps; the reality was more likely than not the Union knew the company was correct. On this submission, it followed that there was a common understanding as to the correct position, which should be taken into account in interpreting the CEAs.

[111] In fact, the position is more complex. It is also surprising the plaintiffs took no formal steps earlier, when it was obvious there was no consensus as to incorporation.

[112] I do not regard the fact the Union did not institute proceedings at an earlier point as leading to a conclusion that it knew all along that the company was correct. Mr Mischefski, an area organiser of the Union, gave evidence on this point and explained why no formal action had been instituted by the Union against the plaintiffs on this issue. He said that in fact, in 2014, the Union had filed a case with the Authority which related to the issue of paid rest breaks at the AFFCO Meat Works at Wairoa. The claim brought against AFFCO New Zealand Ltd was withdrawn because of other litigation concerning that company with which the Union was involved.

[113] Mr Mischefski said that the issue had been often discussed between officials and that the testing of the issues had to involve an appropriate case; any decision to do so had to be taken also in light of other litigation absorbing the Union's efforts and resources, such as the AFFCO litigation.[59]

[114] He also stated that the Union was involved in other litigation concerning paid rest breaks. A claim was brought against Lean Meats Oamaru Ltd in the Authority in 2014; it was considered by the Court in 2015, and by the Court of Appeal in 2016. Relevant issues were obviously being tested in that litigation.

[115] I conclude from the history of this issue as from 2009 that the Union consistently rejected the company's assertion that there was an existing agreement

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[59] A reference to the long-running litigation which commenced in this Court in 2015: *AFFCO v New Zealand Meat Workers and Related Trades Union Inc* [2015] NZEmpC 93, [2015] NZEmpC 94, [2015] ERNZ 776; the most recent summary of the various judgments involved is found in *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2018] NZCA 562 at [8]-[15].

regarding paid rest breaks for piece workers, and that there are plausible reasons as to why it took no steps to initiate appropriate proceedings.

[116] The history I have summarised cannot lead to a conclusion that there was a clearly understood common agreement between the parties on this issue which the Court can rely on for the purposes of interpreting the CEAs before it.

[117] Reliance was also placed on another matter which was said to be relevant to background and context. It is that a comparative analysis of the piece rates at the three plants indicates they are broadly similar, and that this too supports the proposition that those rates are inclusive at all three plants.

[118] This submission proceeded on the basis that piece rate workers performing the same tasks at all three plants received equivalent hourly rates that were substantially the same; these were $30.77 for Feilding, $31.55 for Gisborne and $29.59 for Te Kuiti. As Mr Bayliss stated, the average of these three rates is $30.62, the median $30.57 and the range $1.96.

[119] But the apparent equivalence is equally explicable by the fact that none of the three plants in fact have made provision for an inclusive piece rate. This evidence does not lead to a conclusion that piece rates at all three plants are inclusive so as to support the interpretation advanced by the plaintiff.

[120] Mr Bayliss also confirmed that piece rates were significantly in excess of hourly rates at each plant. The inference was that an allowance must have been made in the former for rest breaks. I am not persuaded that this inference should be drawn. The Court was told that piece rates are intended to incentivise piece workers; that fact may well explain the differential. In the absence of any evidence as to the composition of the various rates, this evidence is not an aid to interpretation.

[121] Mr Smith referred to apparent acknowledgments made by employees who worked at Te Kuiti (Messrs Nahu and Matterson), which he said were in accordance with the understanding of Ovation. Their evidence could only be relevant to the

position at Te Kuiti, and not at either of the other two plants; accordingly, it will be considered later.

[122] The final point to which I make reference is the assertion that there was an obvious means by which a calculation could be undertaken in respect of piece rates, which would include provision for rest break, a point I have already touched on. Evidence was given of just such an exercise being undertaken when considering a piece rate for work in the boning room at Feilding in 2014. This assessment occurred in a working party context involving Mr Hatfull, a slaughterman at Feilding. It was submitted that it was clear from this exercise that Union members were well aware in calculating piece rates, a calculation based on the cost of labour would take into account rest break periods.

[123] That this would be well known in 2014, some five years after the commencement of the statutory provisions, is unsurprising; it was to be expected that a calculation would be undertaken at that time in light of the statutory obligations. The evidence does not, however, provide evidence that Mr Hatfull, at least, was well aware of an existing understanding as to the composition of piece rates, reflected in longstanding rates and that this is an objective fact which points to a common understanding.

[124] In summary, I am not satisfied that the evidence relied on confirms there is a long-established practice that piece rates should include payment for rest breaks. In fact, for many years, there has been a disagreement between the parties on this issue.

[125] The analysis of background information, then, does not support a conclusion that the parties must have intended piece rates would include payment for rest breaks. Neither the actual language used in the CEAs, nor the context, permit such a conclusion.

[126] I find it is not established as a matter of interpretation of relevant CEAs that piece workers at Feilding have been provided with paid rest breaks.

*Gisborne*

[127] The current Gisborne collective agreement relevantly provides:

> **8.0 BREAKS**
>
> ...
>
> 8.4 Meal Break
>
> One unpaid 30-minute meal break shall apply within 1 working day/shift.
>
> 8.5 Smoko breaks shall be each of 15 minutes (20 minutes for first smoko break of each slaughter shift) duration, inclusive of the time of leaving and returning to the workstation. Provided that two hours work has been performed since commencing work or since a meal interval, employees shall be allowed a paid 15 minute (20 minutes for first smoko break of each slaughter shift) smoko break at approximately two-hour intervals if work is planned to continue after the smoko break. The length of the smoko break may be varied by agreement between the Company and Employee Representatives.
>
> 8.6 The smoko breaks applicable to departments are those outlined in Schedules A and B.
>
> ...

[128] Turning to sch A, which describes the lamb slaughter and stockyards' hours and wages, the following provisions are relevant:

> **2. MEALS AND BREAKS**
>
> 2.1 The total time of one hour and 15 minutes shall be allowed daily for refreshment breaks to be allocated at times agreed between the employer and employees. The first smoko break on each slaughter shift shall be 20 minutes in duration.
>
> 2.2 Hourly rate workers shall be paid for smoko breaks. Payment is inclusive of the appropriate skill rate as applicable to each individual employee.
>
> **3. CONTRACT RATE WORK**
>
> 3.1 It is expected that people working in the lamb slaughter premise be a self-managing team, effectively managing the lamb slaughter dressing operation facility, and equipment from sticking of live animals through to grading of carcasses. Customer requirements, both internal and external, will dictate process specifications. It is recognized that process specifications will change as customers and their needs change. The primary responsibility is to consistently present clean, well-dressed carcasses and co-products (i.e. in full, on time, to specification) to

customers. The co-ordinator and supervisors are expected to assist the slaughter team in the overall organisation of the operation.

3.2.1 An agreement payment of $2.468 per animal slaughtered will be paid into a pool to be split amongst the designated 18 contract slaughter persons engaged in the process, excluding supervisors and leading hands. Each slaughter shift shall operate independent wage pools. Should any additional persons be required to meet the processing demands, then by agreement, they shall be either paid outside the 18 or added to the 18 with a proportional increase of $2.468 per animal payment. Payment includes all slaughter and dressing tasks from sticking through to grading inclusive of wash downs at the end of the last shift, warm ups.

...

[129] Clause 4 of the Schedule describes rates to be paid to hourly rate workers.

[130] There are in total five CEAs before the Court, the first two (2003 to 2005, and 2005 – 2007), relate to the boning room only, and the remainder relate to slaughter and boning operations, covering the periods 2007 – 2008, 2012 – 2014 and 2014 – 2017.

[131] Each of the CEAs before the Court, from 2003 onwards, has included a provision for one unpaid 30-minute meal break, and for a paid 15-minute smoko break at approximately two-hour intervals.

[132] Mr Smith's submissions, as recorded earlier[60] applied to the Gisborne CEAs as well as the Feilding CEAs. He also emphasised with regard to the Gisborne CEAs:

a) The rest and meal break clauses provide for two distinct entitlements: the first is to the agreed periods of times when the employees are permitted to take a "break" from their work; the second is the entitlement to receive payment for some of these breaks.

b) Clause 8.5 of the Gisborne collective agreement provides that "employees shall be allowed a paid 15-minute ... smoko break". This wording makes it clear that the parties intended rest breaks would be paid for all workers: both those paid on an hourly basis and those paid by way of piece rates.

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60 Above at [79].

c) The method of payment is then specifically recorded for hourly rate workers, which meant that payment for rest breaks would be provided separately. However, this was not intended for piece workers, because there is no provision referring to a separate payment for rest breaks for those employees.

d) The fact that a separate payment is specified for hourly rate workers does not lead to a logical inference that piece rate workers are not paid for these breaks at all. The opposite conclusion is correct: that is, that they are paid, albeit not separately. That is because the clauses setting out the basic entitlement to rest and meal breaks apply to all employees; everyone gets the same amount of time for their rest and meal breaks.

e) The contextual analysis summarised earlier reinforces this conclusion.

[133] Mr Cranney submitted in summary:

a) Neither cl 8.5 nor cl 2 of sch A identifies a rate or a methodology of calculation of payment for piece workers' paid rest breaks.

b) There is no hint anywhere, and more particularly in cl 3 of sch A, that there was agreement that the piece rate (that is, the amount paid for unit of production) has two components, one being payment for the work and the other being payment for rest breaks. Rather, cl 3 identifies what is included in the piece rate payment and does not include rest break payments.

*Discussion*

*The language used by the parties*

[134] On its face, cl 8.5 appears to suggest that all employees are entitled to be paid for rest breaks. But cl 8.6 then provides that the smoko breaks applicable to departments are those outlined in schs A and B.

[135] Specificity is provided in cl 2 of sch A, which describes the lamb slaughter and stockyard "meals and breaks". After providing for the total daily time which may be

taken for refreshment breaks and the length of the first smoko break, the clause states that hourly rate workers are to be paid for smoko breaks. There is no comparable statement in respect of piece workers.

[136] Having dealt with "meals and breaks" in cl 2, the appendix goes on to describe in detail the payment arrangement for "contract rate work" in cl 3, and wages for "hourly rate slaughter workers" in cl 4.

[137] The description of contract rate work deals only with the processing of animals. Clause 3.1 states that such workers are required to manage "the lamb slaughter dressing operation facility, and equipment from sticking of live animals through to grading of carcasses". In cl 3.2.1, an agreed payment is specified for each animal slaughtered. The clause goes on to state that each slaughter shift is to operate an independent wage pool, and that if more than 18 persons are required to meet processing demands, then there is to be a proportional increase of $2.468 per animal "per animal payment". Then the clause states that payment is to include "all slaughter and dressing tasks from sticking through to grading inclusive of wash downs at the end of the last shift, warm ups".

[138] There is no indication in these provisions that the rate was to include remuneration for rest breaks.

[139] Clause 3.2.2 provides for the provision of information as to the slaughter floor pay calculations for the previous day worked. It is stated this will be "based on hours worked and carcasses slaughtered".

[140] As in the Feilding CEA, there are other provisions which also point away from a conclusion that rest breaks are included in piece rates. First, cl 8.5 states that the length of the smoko break may be varied by agreement between the company and employee representatives. There is no statement that in such an event the piece rate would need to be re-negotiated.

[141] Clause 20.4 states that each employee is to be supplied with details on how their wages have been calculated. There is no evidence that such calculations include reference to rest breaks for piece workers.

[142] I return to cl 8.5. Considered objectively the timing arrangements are to apply to all workers. However, when assessed in light of the provisions I have reviewed in Appendix A, there is doubt as to whether the reference to a paid 15 or 20-minute smoko break is to apply to all workers, or whether it is more likely to apply only to those for whom such provision is made in that schedule, the hourly paid workers.

*Description of background*

[143] I therefore turn to context, to ascertain whether the relevant background factors assist in interpretation.

[144] Mr Bayliss stated that the Gisborne plant was built in 1998 by Progressive Meats Gisborne Ltd (Progressive Gisborne). Initially, it was a slaughter facility only. At that time, all workers were employed on individual employment agreements.

[145] A boning room and cold store were built on site in 2001 by Bernard Matthews. The slaughter and boning operations were separately owned until 2005, when that company purchased Progressive Gisborne, and the CEAs which were in place for the slaughter and boning operations were combined. Bernard Matthews became the employer for all employees at the Gisborne plant.

[146] With regard to the history of the employment arrangements concerning the stand-alone lamb slaughter plant operated by Progressive Gisborne, Mr Mischefski said he raised with the then owner and controller of the applicable labour hire company, Mr Roger Driver, Union claims for a collective agreement. In discussions on this topic which took place in 2002 and 2004, Mr Mischefski sought payment for rest breaks taken by piece workers. These claims were not accepted because, as it was put by Mr Driver, “no carcasses are processed in the rest breaks”.

[147] As indicated previously, in the sequence of the CEAs which are before the Court, the earliest is that which applied from 2003 to 2005. It applied only to the

boning room. There was no provision for piece rate workers. The clause for breaks is practically identical to the clause appearing in the later CEAs. Significantly, it referred to a paid 15 minutes smoko break, and to an unpaid 30-minute meal break. Plainly, these provisions were intended to apply only to the workers covered under the agreement, who were hourly rate workers.

[148] The position is the same for the 2005 – 2007 CEA. However, under the 2007 – 2008 document, provision was made for the first time for contract rate workers. Notwithstanding this circumstance, no material alteration was made to the meal break provisions of cl 8.

[149] The history of a collective agreement may well be relevant to interpretation.[61] The history in this case suggests that the drafting of the meal break provision was inherited from a CEA that did not apply to piece rate workers; moreover, no adjustment was made to the original clause so as to cover piece workers' rest breaks.

[150] No evidence has been provided to the Court as to the composition of the piece rates, whether at the time of their introduction, at any subsequent time in the course of bargaining for substitute CEAs, or indeed at the present time. In the result, then, there is no direct evidence to confirm that such an allowance was discussed and/or agreed.

[151] Mr Gusscott said that he was involved in negotiations on behalf of Bernard Matthews in respect of the boning room before it commenced its operations in 2001. He also confirmed that the two applicable collective agreements applying to the slaughter and processing operations were merged after Bernard Matthews purchased Progressive Gisborne. However, he did not provide any evidence that upon merger, it was agreed piece rates would include remuneration for rest breaks.

[152] Each CEA which is before the Court with regard to the Gisborne plant shows Mr Mischefski was the organiser authorised to negotiate and sign those CEAs. Having regard to the evidence he gave concerning his discussions with Mr Driver, and the

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61 See, for example, *New Zealand Airline Pilots' Assoc Inc v Air New Zealand Ltd* [2014] NZEmpC 168, [2014] ERNZ 709 at [14]. Subsequently this point appears to have been accepted by the Supreme Court in *New Zealand Airline Pilots' Assoc Inc v Air New Zealand Ltd*, above n 47 at [75]-[76].

further evidence relating to the concerns and discussions held within the Union from 2009 onwards as summarised earlier,[62] it is clear that relevant members of the Union did not consider piece rates included payment for rest breaks. Furthermore, I have already found that the absence of formal steps by the Union cannot lead to a conclusion that its officers and/or members knew all along what the position was.

[153] In summary, a survey of the background evidence which has been placed before the Court does not provide any reliable basis for concluding that piece rates in fact included payment for rest breaks, and that this should inform the interpretation of the CEAs, particularly cl 8.5. Indeed, on the balance of probabilities, I consider that an objective analysis of the contextual evidence points away from a conclusion as to incorporation.

[154] In my view, the express reference to payment for rest breaks in cl 8.5 is an historical one, utilised before piece rates for slaughter work were introduced, and apparently rolled over without their being any reliable evidence the parties intended the statement was to apply to piece rate workers, as well as workers paid on an hourly rate. The language of the relevant CEAs, as construed in context, support this conclusion.

[155] As I indicated when considering the circumstances at the Feilding plant, the approximate equivalence of piece rates with the other two plants does not support a conclusion that the rates of all were inclusive.[63]

[156] I find it is not established as a matter of interpretation of relevant CEAs that piece workers at Gisborne have been provided with paid rest breaks.

*Te Kuiti*

[157] The current Te Kuiti collective agreement relevantly provides:[64]

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62 Above at [100]-[107], [110]-[116].
63 The finding is at [117]-[120] above.
64 (Emphasis added).

**9.4 Meals and Smoko**

9.4.1 Half an hour should be allowed for meals each day at a time to be mutually agreed between the Employer and the Union. Such intervals shall be unpaid.

9.4.2 Three fifteen minute rest periods for 10 hours and 45 minute days shall be allowed each day for smoko at a time to be mutually agreed between the Employer and Union. Employees on an hourly rate shall be paid for such intervals at the relevant base hourly rate of pay. *For piece-work Employees such interval has been taken into account in fixing the unit rate.*

[158] I also record that there are in total four CEAs relating to the Te Kuiti plant before the Court. These documents relate to the periods 2001 – 2004, 2006 - 2008, 2009 – 2011 and 2014 – 2017. Each contains the final sentence of the current cl 9.4.2.

[159] Mr Smith submitted in summary:

a) The first part of cl 9.4.2 sets out the employees' entitlement to take rest breaks during the work period – that is, they are entitled to three 15-minute breaks each day. The second part deals with payment for these breaks, first in respect of hourly paid workers, and then in respect of piece rate workers. He said that hourly paid workers are paid separately for these rest breaks at their relevant base hourly rate.

b) Then, the words "taken into account in fixing the unit rate" mean that the payments for rest breaks are "accounted for" within the agreed piece rates. It was submitted there is no ambiguity in the language used and the objective meaning of the final sentence in cl 9.4.2 is that payment for rest breaks has been included in the set piece rates. This construction was consistent with evidence in relation to the fixing of piece rates given by Mr Bayliss, Mr Goodall and Mr Gusscott for the company, and in cross-examination of Mr Matterson for the Union, evidence which I will describe where relevant shortly.

[160] Mr Cranney submitted in summary:

a) Clause 9.4 does not expressly provide that payment for rest breaks for piece rate workers has been taken into account in fixing the unit rate,

merely that for such employees, “such interval has been taken into account in fixing the unit rate”.

b) The clause refers only to “an interval” having been taken into account in fixing the unit rate. How the interval was taken into account is unknown by either party. The most that could be said is that the parties took into account an unpaid interval in fixing a higher piece rate; this would not have been an agreement to provide paid rest breaks to piece workers, but one to fix a higher piece rate instead of providing paid rest breaks.

c) Moreover, there is no evidence of any kind that any additional sum was added to the piece rate, or if it was that such sum was sufficient to comply with the principle identified in *Lean Meats*.

*Discussion*

*The language used by the parties*

[161] It appears to be implied from the plaintiffs’ submissions that the words “taken into account in fixing the unit rate” should be taken to mean that the plaintiffs’ obligation to pay for rest breaks are fully accounted for within the agreed piece rates.

[162] I accept Mr Cranney’s submission that how the interval was taken into account is unknown by either side. I also accept his submission that there are three possibilities:

a) The first of these is that the parties took the interval into account and then increased the piece rate above what they would otherwise have fixed.

b) The second is that the parties took the interval into account and did not change the piece rate from what they would otherwise have fixed.

c) The third is that the parties took the interval into account and agreed on piece rates that were lower than they would have otherwise have fixed.

[163] The CEAs do not resolve the question as to which of these possibilities may be correct.

*Description of background*

[164] A consideration of context begins with an assessment of the evidence about the development of rest break arrangements at Te Kuiti.

[165] As noted earlier, there are four CEAs before the Court containing the relevant sentence, the first of which relates to 2001 - 2004. Mr Bayliss traced the shareholding of the plant from 2001, but did not state when the plant commenced its operations, or when a piece rate was first agreed in respect of workers at that plant. Indeed, the 2001 CEA provides at cl 1.1 that it replaces all "previous employment terms, conditions, agreements and understandings" between TKM and employees covered by the agreement, implying that there were previous contractual arrangements between the parties with regard to employment of workers at the Te Kuiti plant. Mr Gusscott confirmed that the subject provision went back to "at least" 2001.

[166] Not only was no evidence given as to the actual makeup of piece rates at the plant whenever such rates were first introduced, but there was no reliable evidence given as to makeup of those rates when they were re-negotiated for the purposes of any subsequent CEA; or as to their composition now.

[167] Mr D J Goodall was General Manager of Te Kuiti Meats from 2001 – 2005; and from 2007 – 2011. He gave generic evidence as to how a piece rate would be calculated, stating by way of example that the hours of the work period would be taken, divided by the number of units processed; such hours would be inclusive of break payments.

[168] However, Mr Goodall did not state that such an approach was known to have been adopted with regard to the fixing of piece rates at Te Kuiti, either when first introduced, or at any subsequent time.

[169] He did say, however, that the company and the Union "always understood" piece rates were an all-inclusive payment and therefore included the payment for smoko breaks as well".

[170] This belief is not supported by direct evidence, and is contested by Union witnesses.

[171] Evidence of bargaining was given about a meeting which took place at Te Kuiti on 18 May 2004, attended by Mr Goodall and a Union official, Mr M R Nahu, amongst others.

[172] The minutes of the meeting attribute the following statement to Mr Nahu:

- Raised topic of staff being paid piece rate then hourly rate for smokos?
  as opposed to smokos built into piece rate.

[173] Mr Goodall said that he was surprised to read this statement, since it suggested the Union had made a formal claim or request for payment for smokos. He had no recollection of any such a claim or request from this time. He went on to state that the Union sometimes questioned the method of payment, though he asserted that in 2004 there was never any suggestion that the piece rates did not cover payment for smokos.

[174] For his part, Mr Nahu said that at the time, the Union was seeking payment for smokos for piece workers at many sites, such as at Te Kuiti where they were unpaid. The Union's approach was to seek payment at an hourly rate for the smoko time, as opposed to building it into the piece rate. He stated that he had wanted to be very clear that smokos would be paid for, and the best means of doing so was to provide for a separate payment. He said the company was not paying for the rest breaks, and disputed that there was a built-in allowance for smokos.

[175] The debate between the witnesses centred on a note taken of a point made by Mr Nahu in bargaining. Mr Goodall's evidence was by way of interpretation of the language recorded in the note, whereas Mr Nahu's evidence was informed by the fact that he made the statement. Since he is better placed to know what he said, I prefer Mr Nahu's evidence. Mr Goodall's evidence that there was not any suggestion that piece rates did not cover smoko payments has to be considered in light of the specific evidence from Mr Nahu that the Union did not accept this was the case.

[176] This evidence does not provide reliable context which assists in interpreting how rest break intervals may have been used to fix a unit rate at the outset. It merely evidences a dispute on the topic.

[177] The plaintiffs also placed reliance on the evidence of a remark made by an organiser, Mr T Matterson, at negotiations when bargaining for a new CEA at Te Kuiti in February 2018. He told negotiating teams that when he previously worked on a chain his understanding had been that piece rates were inclusive of all payments including breaks; however, due to the *Lean Meats* decision, “the law is the law”.

[178] In his evidence, Mr Matterson said he had been referring to an early understanding he held as a teenager, when working on a chain at a different plant. He also said his initial understanding changed very quickly when he got to know and understand the system. This evidence is of no direct assistance in construing the Te Kuiti CEAs.

[179] I repeat the finding made earlier, that a comparison of piece rates at each plant does not lead to a conclusion that they include payments for rest breaks, thus aiding interpretation.[65]

[180] Accordingly, the Court is left in the position where there is no reliable textual evidence which would assist in the interpretation of cl 9.4.2.

[181] I find there was a longstanding provision, suggesting that the rest break interval had been “taken into account in fixing the unit rate”, but how the interval may have affected the quantum of the piece rate is unknown. The clause has been in existence from at least 2001, well before the statutory breaks scheme was introduced. If an allowance had been made for a rest break, it was not made in light of the statutory provisions.

[182] I find it is not established as a matter of interpretation of relevant CEAs that piece workers at Te Kuiti have been provided with paid rest breaks.

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65 The finding is at [117]-[120].

*Custom and practice*

[183] Given the foregoing conclusions as to interpretation, it is next necessary to consider the plaintiffs' alternative claim for the implication of an appropriate term based on custom and practice.

[184] Mr Smith's submissions on this topic were based on three points, assessed globally in respect of the three plants.

[185] Two of these require a consideration of the history outlined earlier.

[186] It will be recalled that Mr Bayliss said it had always been the company's general understanding that piece rates were all inclusive, at all three plants. Mr Gusscott's evidence was to similar effect, although he had only recently been involved in bargaining issues with regard to the plant at Te Kuiti.

[187] The evidence of Union witnesses of some experience has already been referred to. They did not accept that there was an established custom. Mr Mischefski said he had previously been a slaughterman from 1981 to 1990 at the Takapu plant of the Hawkes Bay Farmers' Meat Company, where it was well known that piece rate butchers did not get paid for smokos. I have found that the Union raised concerns from 2009. These were articulated in Mr Middlemass' letter of 26 May 2009. Then, a claim for clarification by Ovation at the Feilding plant in 2010 and 2012 was not accepted.

[188] I have also touched on the evidence of Mr Nahu and Mr Matterson,[66] both of whom did not accept there was a longstanding custom or practice as to paid rest breaks; indeed, they believed that the contrary was true.

[189] Consideration was given by the Union to advancing proceedings against AFFCO on this topic. Although it did not do so, I am satisfied that the Union continued to be concerned about the issue. It initiated proceedings against *Lean Meats* in 2014.[67]

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[66] Above at [171]-[178].

[67] *New Zealand Meat Workers and Related Trades Union Inc v Lean Meats Oamaru Ltd* [2015] NZERA Christchurch 57; the investigation meeting took place on 2 December 2014.

The case proceeded to the Court of Appeal, and resulted in an important finding from that court in 2016.

[190] All of this tells strongly against a conclusion that there was an established custom and practice.

[191] Mr Cranney also referred to a judgment delivered by Judge Shaw in 2006, *AFFCO New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc*.[68] One of the issues in the dispute which was before the Court related to whether smoko payments were to be paid over and above any incentive payments made. The Court received evidence from a Human Resources Manager who was recorded as saying that there was "a very long established custom and practice for lamb cutters to be paid by the piece rate system which was always an all-inclusive rate and quite separate from other distinct operations" at the plant.[69]

[192] However, Mr Ratana, a Vice President of the Union who was employed in the lamb slaughter room as a butcher, gave evidence that in 2002 discussions, AFFCO offered workers who had hitherto been incentive or piece workers a payment for smokos if they became hourly rate workers.[70] The Court found that the effect of previous piece workers becoming hourly rate workers was that a relevant provision of the core collective agreement applied to them "for the first time and they became entitled to payment for smoko breaks".[71] This finding amounted to a rejection of the evidence which had been given as to custom and practice.

[193] Mr Smith also submitted that the comparison of piece rates at all three plants supported a conclusion there is an established custom and practice which meets the applicable tests. But as discussed earlier, such a comparison does not lead to a conclusion they are in fact paid at each plant; it could equally be concluded from that comparison that they are not.[72]

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68 *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2006] ERNZ 605 (EmpC).

69 At [17].

70 At [22].

71 At [41].

72 At [111]-[113].

*Conclusion as to interpretation/implication assertion*

[194] I find that it is not established that piece workers at any of the three plants have been provided with paid rest breaks, either as a matter of interpretation of the relevant CEAs, or by way of an implied term which meets custom and practice principles. It follows there has not been compliance with the *Lean Meats* principle.

## Issue 3: is donning and doffing work?

*Introduction*

[195] The statement of defence and counterclaim filed for the Union asserts that workers are required to don and doff protective clothing and equipment at the beginning and end of each shift, and breaks; that this is work for the purposes of s 6 of the MWA for which the minimum wage is payable; and that such work took place during breaks, which was and is a breach of Part 6D of the Act since it compromised the duration of agreed breaks.

[196] The plaintiffs strongly dispute any assertion that donning and doffing amounts to compensatible work; they say these activities occupy minor amounts of time; and that in any event the quantum of wages paid, if assessed on an hourly basis, means the obligations of the MWA are met. They also say there is no relevant breach of Part 6D of the Act, except in one minor respect.

*The facts*

[197] Meat processors such as the plaintiffs are highly regulated under the provisions of the Animal Products Act 1999. Section 13 of that Act requires all processors of animal material to operate a registered risk management programme in respect of their production or processing of such material; this is to fulfil one of the key purposes of the Act which is to meet New Zealand animal product standards so that food intended for human and animal consumption is "fit for intended purpose".[73]

[73] Animal Products Act 1999, s 2(a).

[198] The Animal Products Regulations 2000, promulgated under this Act, contains provisions intended to ensure hygienic practices for the primary processing of meat. Relevant obligations include those set out in reg 12, which states:

> **12 Hygiene of persons whose presence or actions may result in contamination of animal material or animal product**
>
> All risk management programme operators, persons who transport animal material or animal product from the place or premises of a primary processor, and other categories of person specified in specifications for the purposes of this regulation must ensure that persons, including visitors, whose presence or actions, at any premises or place where animal material or product is processed, may result in contamination of animal material or animal product—
>
> (a) wear appropriate protective clothing, where necessary; and
>
> (b) follow an appropriate personal hygiene routine; and
>
> (c) behave in such a manner as may be necessary or desirable to minimise contamination to animal material, animal product, and associated things.

[199] These stringent obligations are relevant not only to the objects of the Animal Products Act, but also to the processors' health and safety obligations under the Health and Safety at Work Act 2015[74] and related legislation, for instance with regard to safety when cleaning/sanitising with water produced at a high temperature, the sharpening and use of knives, and in mitigating the effects of noise in the workplace.

[200] The plaintiffs' hygiene and health and safety procedures arise in that context, and are reflected in the various documents which apply specifically to the plaintiffs' workplaces.

[201] With regard to the plant at Te Kuiti, the applicable CEAs include quality control and safety provisions, one of which is that employees are to wear protective clothing, use safety equipment, and comply with safety rules; these obligations are compulsory.[75] Employees must also read and abide by the various rules and conditions contained in an employee information booklet attached to the CEA.

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[74] And its predecessor, the Health and Safety in Employment Act 1992.

[75] Clause 6.1.7.

[202] That handbook contains a section under the heading "GENERAL-HYGIENE PROCEDURES", which includes the following description of personal protective equipment, and instructions as to correct use:

> **Personal Protective Equipment (PPE)**
>
> Employees shall be supplied with clothing and equipment that is necessary to carry out the task assigned.
>
> a) Personnel entering food areas must wear protective clothing covering at least the head, shoes and any street clothing within the potential food contact zone, i.e. – at least a dust coat or smock, hair covering, hearing protection and white gumboots.
>
> b) Staff cannot wear white protective clothing while sitting in designated smoking area.
>
> c) Workers handling unprotected food must:
>
> i) Have overall sleeves above the elbow or wear waterproof sleeve coverings that must be replaced every run.
>
> ii) Wear an apron. Note that the apron cannot be tied at the outside front of the apron.
>
> iii) Wear clean white gumboots.
>
> d) Operators whose job causes their protective clothing to routinely become soiled (e.g. – chiller operators) maybe provided with white plastic smocks.
>
> e) Aprons and personal equipment must not be worn outside edible/edible support areas and cannot be taken into toilets or inedible areas.
>
> f) Protective clothing that becomes excessively contaminated during the day must be cleaned or replaced.
>
> g) Storage of Aprons and personal equipment – After being cleaned at the end of the day aprons and other PPE equipment is to be returned to the Gear Issue Room.
>
> h) White Gumboots must be cleaned & returned to the boot room at the end of each day.
>
> i) Staff cannot wear white protective clothing outside the boundary fence of the plant or in any inedible area. An exception to this is made for staff required to work in the top bulk store, who must walk directly to and from the store on the concrete path.
>
> The PPE listed below are required to be worn while performing particular tasks. Some are required to be worn at all times, in several departments.
> It is an offence not to wear or use any safety gear provided. If you are required to enter a particular place in the processing plant and do not have the times of PPE required to enter that area, ask your supervisor to issue these items.
>
> | | | |
> |---|---|---|
> | Boots | Hard Hats | Safety Glasses |
> | Ear Muffs | Gloves | Leggings |
> | Chain Mesh Aprons | Chain Mesh Gloves | Arm Guards |

Kevlar Gloves

You are not required to wear items of PPE while inside the company's dining room or offices. You must return all items of PPE and clothing issued by Te Kuiti Meat Processors Ltd when your employment has ended, otherwise you will be charged for items not returned.

[203] The handbook also includes provisions relating routines to the enhancement of hygiene:

**Sanitary routine when entering food processing rooms**

1. The entrance to all edible processing rooms is through an Ante Room.
2. Boots must be washed in the boot wash and be clean.
3. Hands must be sanitised using soap and water. To reduce the chance of getting dermatitis, you should always wet your hands and forearms before applying hand soap.
4. Lather the entire area being washed for at least 10 seconds before rinsing off with water.
5. Then use Sanitiser once on Slaughter Floor and twice for Boning Room.

**Gear sanitation procedures**

1. At the start of the day, all gear must be rinsed in water before starting work.
2. And the end of each day all gear must be cleaned well so there is no visible contamination and then dipped in a drum filled with water and Divosan NR.
3. At breaks, aprons must be cleaned with hand soap or Divosan NR.
4. Disposable aprons and smocks must be discarded at the end of the day.

**Gloves and plastic sleeves**

1. Rubber gloves worn on the slaughter floor must be sealed at the top.
2. Rubber gloves must be worn over Kevlar gloves.
3. All rubber gloves and plastic sleeves must be discarded immediately if punctured.
4. Disposable rubber gloves and plastic sleeves must be discarded every run.
5. Wire mesh gloves must be cleaned at:
   - Every break
   - When contaminated
   - Cleaned and sanitised at the end of each day

[204] The plants operated by Ovation at Richmond and Feilding have similar agreements with their employees. For instance, the personal conduct provisions of the Feilding CEAs state that:

> ... it is vital that the highest possible standards of work, personal cleanliness and general tidiness of plant, grounds and amenities are consistently and constantly maintained. The deliberate refusal to comply with safety and work standards of the employer is unacceptable.

[205] Clause 16 is a health and safety provision; employees are required to use personal protective equipment, assist in keeping their work area safe, clean and hygienic in the course of normal production work, and abide with relevant regulations. Clause 18 is a provision as to clothing and protective equipment which must be kept in a clean condition.

[206] In the Gisborne CEAs, there are similar provisions with regard to health and safety; employees are required to use and maintain personal protective equipment, work areas are to be kept safe, clean and hygienic in the course of normal production work, and relevant regulations are to be complied with.

[207] Ovation's "Introduction to Hygiene Procedures" explains to its employees the company requirements with regard to the use of protective clothing. This includes instructions as to how protective clothing and food processing equipment are to be stored separately from personal gear; smoking is permitted in two identified areas (one for department boning employees, and the other for the slaughter department employees); white clothing is to be hung on especially provided hangers in corridors and may not be worn in the Canteen, toilets, outside or in the workshop; if smoking, workers are to place their white clothing in their lockers; hairnets, beard nets, earmuffs, earplugs and facial balaclavas are provided, which must be worn correctly; no street clothing is to be exposed; instructions are given for the washing of gumboots and hands, and for the sterilising and washing of gear; instructions are also given for the wearing of gloves in production areas; and employees are required to sterilise knives, pouches and steels before entering a production room.

[208] Detailed evidence was called by both parties as to actual practice. Those practices are broadly similar at each plant, although as will become evident shortly, the time for doing so differs having regard to the physical configuration of each plant.

[209] In summarising the evidence, I note that although the tasks I am about to describe are mandatory, the sequence of doing so can vary. It is also the case that some workers choose to arrive early at the plant, well before their shift commences, carrying out some preparatory tasks then attending the smoko room to have breakfast and socialise before completing their preparations. I will return to this point later.

[210] Schedule A to this judgment sets out the breaks which occur during a shift at each plant. It will be seen that there are multiple rest and meal breaks when these processes occur.

[211] I start with a consideration of practices at the Gisborne plant. Detailed evidence was given by Mr Kevin Morrell as to both the slaughter department and the boning department, and confirmed in its essentials by Mr Jemel Kupenga. I summarise that evidence fully since the process so described is largely consistent with the processes which occur at the other two plants.

[212] Prior to the start of a shift in the slaughter department, workers collect a pair of white overalls from the slaughter gear issue room, and their gumboots from a boot room.

[213] They then walk to the locker room:

- to change into their overalls and gumboots;
- to remove their shoes and store them in the locker room;
- to collect their safety glasses and earmuffs from their lockers or any other equipment they have chosen to store in their locker as opposed to the gear storage room;

- workers do not have to remove their street clothes as these can be worn under their white overalls.

[214] Next, the workers walk to the slaughter department ante room, where they obtain their scabbard, knives and steel, if not stored in their lockers, from an adjacent gear issue room. Then:

- aprons (a small number of workers wear smocks instead of aprons) and the scabbard are rinsed with a hose in the ante room; these are then worn;
- hair and beard nets are collected from dispensers, which must then be worn;
- workers are required to wash and sanitise their hands before putting on their disposable and Kevlar gloves;
- the scabbard with the knives and steel is dunked in the steriliser; and
- workers dunk their gumboots in the boot wash before entering the slaughter processing area.

[215] When leaving that area to go on a rest break or meal break, workers need to remove some of their clothing and equipment for hygiene reasons. Generally, this involves:

- removing gloves, aprons and scabbards;
- cleaning these with a hose, and brush if required; they are then hung up on hooks on the ante room;
- putting disposable gloves into the rubbish bin located in the ante room; and
- cleaning gumboots in the boot wash.

[216] Workers are not required to remove overalls, gumboots, hairnets and ear protection when leaving the slaughter processing area to attend breaks in the smoko

room. If, however, a worker wishes to go to a designated area to smoke, these items must be removed first, as they cannot be worn outside.

[217] At the end of a rest break or meal break, workers must:

- collect their aprons and scabbards from the ante room and put these back on;
- wash and sanitise their hands before putting on their disposable and Kevlar gloves; and
- dunk their boots in the boot wash on the way to the slaughter processing area.

[218] At the end of the shift, workers are required to remove their clothing and clean their gear before leaving the workplace. This involves;

- removing their apron, scabbard and gloves, which all need to be cleaned with a hose and brush if required (a designated person in the slaughter department is responsible for cleaning workers' aprons at the end of a shift);
- storing gear in the storage room next to the ante room (some workers elect to store their gear in their lockers);
- putting disposable gloves into the rubbish bin located in the ante room;
- cleaning gumboots in the boot wash, with a brush;
- removing hair and beard nets, and leaving them in the rubbish bins provided in the ante room;
- removing and storing safety glasses and earmuffs in the workers' lockers;
- removing and storing gumboots in the boot room; and
- removing and leaving overalls in a laundry bag provided in the locker room.

[219] The boning department is located in a different part of the plant. The layout of the relevant facilities is different, but the process is similar as will now be explained.

[220] Workers collect a pair of white pants and a jacket from the boning gear issue room and gumboots from a boot room.

[221] They proceed to a locker room to:

- change into overalls and gumboots;
- remove street shoes and store them (some workers elect to store scabbards and knives in their locker also);
- collect their safety glasses, hardhats and earmuffs from their lockers;
- workers do not have to remove street clothes as these can be worn under their white pants and jacket.

[222] In the ante room to the boning department:

- from an adjacent gear issue room, a scabbard, knives, steel and steel mesh gloves, unless kept in their lockers, are obtained by workers and then worn;
- aprons (or smocks) and scabbards are sanitised and rinsed with a hose;
- hair and beard nets are collected from the dispensers from either the ante room, or the hallway, or from a gear issue room, and then worn;
- earplugs may be obtained from dispensers if required;
- workers are required to wash and sanitise their hands before putting on their disposable steel mesh or Kevlar gloves;
- the apron is dunked in sanitiser, as are the scabbard and contents;
- workers dunk their gumboots in a boot wash before entering the bone processing area; and

- the final step is to put on Kevlar or mesh gloves in the boning processing area.

[223] At the start of breaks, workers must:

- remove their gloves, aprons and scabbard;
- clean these with a hose, and brush if required, and then hang on hooks;
- put disposable gloves into the rubbish bin located in that room;
- clean gumboots in the boot wash; and
- proceed to the locker room to remove and hang their jacket in their locker; alternatively, these items can be hung in a corridor on the way to the canteen.

[224] Workers do not need to remove all their clothing and gear at the start of breaks. For example, their white pants, gumboots, hair cover and ear protection do not need to be taken off for a break. If, however, a worker wishes to go to the designated area to smoke, these items must first be removed because they cannot be worn outside.

[225] At the end of a rest break or meal break, workers:

- walk to the locker room or corridor to retrieve and put on their white jacket;
- proceed to the ante room to collect and put on their apron and scabbard;
- dunk their boots in the boot wash;
- dunk their scabbard and contents in steriliser;
- wash their hands, and apply sanitiser from the dispenser; and
- enter the boning processing area and put on their disposable steel mesh or Kevlar gloves.

[226] Finally, at the end of the shift, workers in the boning department need to remove their clothing and clean their gear before going home. This involves proceeding to the ante room where each worker must:

- remove their apron, scabbard and gloves (which all need to be cleaned with a hose and brush if required);
- store gear in the gear issue room adjacent to the ante room (or if elected, in the worker's locker);
- place disposable gloves in rubbish bins in the ante room.
- clean gumboots in the boot wash; and
- remove hair and beard nets, leaving these in rubbish bins in the ante room.

[227] After proceeding to the locker room, workers must:

- remove safety glasses and earmuffs, storing these in the workers' lockers;
- remove gumboots and store these in the boot room; and
- remove white pants and jacket, leaving these in a laundry bag provided in the locker room or corridor.

[228] Evidence as to donning and doffing at the Feilding plant was given by Mr Hatfull, (slaughter department), and Mr Stuart Kauri (boning department). With regard to the Te Kuiti plant, the sole witness was Mr Ivan Hughes. I have reviewed the evidence of all these witnesses, and am satisfied that the processes they described are very similar to those which apply to the Gisborne plant which I have summarised.

[229] I turn now to the evidence as to the timing of these activities. These vary as between the slaughter and boning departments within each plant, and from plant to plant, as would be expected having regard to the different configuration of the areas under review at each location.

[230] The most complete evidence as to time taken for donning and doffing was given by Mr Bayliss. He provided average times, based on recordings he took of three to five workers at each plant. He used a variety of means to determine the average times, including the following of particular workers either directly or via CCTV. His information was cross-checked with management at each site. The information obtained by Mr Bayliss was consistent with timings given by individuals called for the Union.

[231] Mr Bayliss also recorded times actually spent during the breaks in the cafeteria areas, based on CCTV footage which I have reviewed. That evidence provides a cross-check of the times recorded from other sources.

[232] I have also been assisted by plans for each plant, as explained by Mr Bayliss; these provide a useful context for the assessing of the evidence.

[233] When considering the average times, it is necessary to acknowledge the point made earlier, that some workers are able to proceed through these processes more quickly than others; and that some employees arrive earlier than they need to, because they wish to spend time in the canteen first.

[234] Mr Bayliss' information records, in each instance, the time taken to undertake the tasks involved prior to or at the end of each shift or break in total; and also isolates the time it would take to walk the route in question without putting on or removing any of the gear and equipment.

[235] I also note that his review of time taken relates to both piece workers and workers paid on an hourly basis. His evidence is summarised at Schedule B of this judgment. It provides a reliable basis for making the assessments which are necessary for the purposes of this proceeding.

*Submissions*

[236] Mr Cranney submitted in summary:

a) It is unlawful for an employer to either require or receive unpaid work from employees.

b) The obligation to pay, and the entitlement to receive, is recorded in s 6 of the MWA.

c) In *Idea Services,* the Court of Appeal identified three helpful factors when assessing whether a particular activity is work.[76]

d) In *Labour Inspector v Smith City*, this Court suggested it could also be useful to ask whether the disputed activity is an integral part of, or indispensable to, the principal activity of the workers.[77]

e) Reference was made to a range of other New Zealand and overseas judgments dealing with such issues, to which reference will be made later.

f) Applying the law, actual and essential physical work is being undertaken of approximately 15 to 20 minutes per day on average, which is wholly unpaid. The work is mandatory; neither the plants nor the industry could operate without it. The relevant tests are accordingly met.

g) The activities at issue are essentially admitted by the plaintiffs. The time spent is considerable, as indicated in the evidence of Mr Bayliss; the evidence of the Union witnesses was slightly higher, but not inconsistent.

h) The argument raised for the plaintiffs, that donning and doffing is paid for because the average pay rate from the beginning to the end of each shift is greater than the minimum wage, is contrary to findings made by the Court of Appeal in *Idea Services* which prohibits averaging; and the CEAs, which attribute payable wages to periods of time or animals processed within those periods rather than donning and doffing.

[237] Mr Smith submitted in summary:

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76 *Idea Services Ltd v Dickson,* above n 24.

77 *A Labour Inspector of the Ministry of Business, Innovation and Employment v Smiths City Group Ltd* [2018] NZEmpC 43, (2018) 10 NZELC 79-091.

a) There are wide variations in terms of different work practices by individual employees; because of the variations, it is not possible to calculate precisely how long it takes to carry out the tasks involved. However, the company has provided evidence of average times. Importantly, these are all inclusive of the time spent walking from one area to the next. Donning and doffing is carried out during those walking times.

b) Donning and doffing involves preparatory and concluding activities that are not aptly described as work for the purposes of s 6 of the MWA.

c) The circumstances considered in previous New Zealand authorities are distinct and different. Donning and doffing involves micro periods of time that are spread out, occurring at various parts of the day. With regard to donning, at the start of a shift, if the time taken for walking is subtracted, the time remaining is one minute and 45 seconds, or less. A similar exercise establishes that doffing is about one minute and 45 seconds at the end of a shift. In total, this is about three and a half minutes.

d) Such a period is *de minimis* and not capable of constituting work for the purposes of the MWA, especially when it is considered that the time is broken up or fractionated during the day, and interspersed with other personal activities, for instance where workers arrive early to carry out non-work activities such as showering and having breakfast.

e) The three factors identified in *Idea Services* are not well suited to assessing whether donning and doffing amounts to work, and if applied would not lead to a conclusion that they do. Donning and doffing does not place significant constraints on employees. Although the donning and doffing of clothing and equipment needs to be undertaken correctly, this is no more than the responsibility of any employee who is required to wear specific clothing and equipment to work. There is clearly a benefit to the employer, but care needs to be taken in applying this factor. For example, there is benefit to the employer in having employees travel

to work in the morning because if they did not, they would not be able to work; that, however, would not meet the test.

f) Alternatively, if the Court concludes that donning and doffing at the beginning and end of each shift does constitute work, it is submitted that with some limited exceptions, employees are not paid at less than the minimum rate. If the time spent on these activities at the beginning and end of each shift is factored into the employees' hourly pay for the first and last hour of each shift, with a few exceptions for employees on the base hourly rate, employees are still paid above the prescribed minimum hourly rate for those hours.

g) Considering an employee's earnings over an hour is distinct from the averaging approach considered by the Court of Appeal in *Idea Services*, where the issue related to how an assessment was to be undertaken over a "pay period".

*Legal issues*

[238] As noted by counsel, the key provision in assessing the issues relating to donning and doffing in the present case is s 6 of the MWA. That section states that a worker is entitled to a minimum rate of wages for his work. The word "work" is not, however, defined. The section states:

> **6 Payment of minimum wages**
>
> Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[239] The scope of the term "work" received detailed consideration by this Court, and subsequently by the Court of Appeal in *Idea Services Ltd v Dickson*.[78]

[78] *Idea Services Ltd v Dickson* [2009] ERNZ 116 (EmpC); *Idea Services Ltd v Dickson*, above n 24.

[240] The case concerned the question of whether a community service worker who was required to sleep over at a resident's house was engaged in work, for the purposes of s 6. The Court of Appeal said:

> [7] In deciding whether sleepovers constitute work for the purposes of this section, the Employment Court found it helpful to consider three factors:[79]
>
> a) the constraints placed on the freedom the employee would otherwise have to do as he or she pleases;
>
> b) the nature and extent of responsibilities placed on the employee; and
>
> c) the benefit to the employer of having the employee perform the role.
>
> [8] The greater the degree or extent to which each factor applied (that is, the greater the constraints, the greater the responsibilities, the greater the benefit to the employer), the more likely it was that the activity in question ought to be regarded as "work". The Court said that the question has to be approached in an "intensely practical" way, adopting what was said by this Court in *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union*.[80]
>
> [9] The Court considered that all three factors applied to a significant degree in this case, and so concluded that Mr Dickson's sleepovers constituted "work" for the purposes of s 6 of the Act.[81] The Court did not attempt to be more prescriptive than Parliament had chosen to be, and we, with respect, think that was appropriate. As the Court noted, legislation applies to circumstances as they arise,[82] and so it would be a brave court that attempted to divine or craft an exhaustive definition of what work meant in 1983, or in 1945 (the date of the Act the current legislation is modelled on), or for that matter, what it means in 2010. What the Court did do was offer some guidance as to what factors will ordinarily be relevant in deciding whether a person is working. The Court's approach appropriately reflects, we think, the wide variety of work that can be undertaken and the circumstances in which it may take place. It also acknowledges the fact that what people ordinarily consider to be "work" has changed and will change over time. Parliament no doubt enacted the legislation with these points in mind.

[241] When the Employment Court had considered these factors, it held that Mr Dickson was significantly constrained during a sleepover, because he could only engage in a very limited range of activities, could not carry on normal family life or socialise with friends, was subject to limited privacy, did not have access to the

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79 *Idea Services Ltd v Dickso*n, above n 24.

80 At [63], citing *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2007] 2 NZLR 356, [2006] ERNZ 1009 (CA) at [12].

81 At [71].

82 Interpretation Act 1999, s 6.

comforts and resources of his home, and had to be sober and quiet; these were all constraints which were substantial and significant.[83]

[242] The Employment Court had also concluded that the nature and extent of responsibility on the employee was important. Mr Dickson had to care for and support service users. He also needed to ensure the safety of the resident. These responsibilities were continuous throughout the duration of each sleepover, whether Mr Dickson was asleep or awake. He was not relieved of those responsibilities until another staff member arrived in the morning. He inevitably performed numerous tasks during the period of each sleepover. He was liable to be disturbed by service users at any time, and had to respond quickly and appropriately on every occasion. These were unpredictable in their frequency and timing. Overall, the responsibilities of community service workers such as Mr Dickson were considered "relatively weighty".[84]

[243] Turning to the benefit to the employer of having the employee assume the role, the Employment Court found that it was critical to the business of Idea Services that a community service worker undertook a sleepover in each group home every night. Without the presence of such workers, the company would be in breach of its obligations to operate the group homes in an appropriate manner which would potentially jeopardise its funding.[85]

[244] The Court of Appeal approved the factors which the Employment Court had found helpful, and agreed with its application of them to the facts as found.

[245] That court went on to conclude that the Employment Court's decision was consistent with conclusions reached in overseas authorities, which illustrated the concept of work for minimum wage purposes, referring to four European cases to that

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83 *Idea Services Ltd v Dickson,* above n 28, at [65].
84 At [66].
85 At [69]-[70].

effect.[86] Consideration of these cases led to the Court of Appeal including that the full Court approach had not been radical or unworkable.[87]

[246] *Idea Services* has been applied in several subsequent judgments of this Court including *Law v Board of Trustees of Woodford House*[88] and *South Canterbury District Health Board v Sanderson*.[89]

[247] Most recently, the principles were discussed by a full Court in *Smith City*.[90] In that case, the question was whether sales staff should be paid for their time when attending a meeting before the company opened its stores to customers.

[248] The Court was referred to two cases of the Supreme Court of the United States of America which, in summary, concluded that if activities were "an integral and indispensable part of the principle activity", the conclusion could be reached that work was being undertaken: the cases were *Steiner v Mitchell*[91] and *Mitchell v King Packaging Company*.[92]

[249] On this topic, the full Court said:[93]

> [57] We agree that *Idea Services* must be applied and that doing so requires undertaking a factual enquiry. However, Smith City focused too narrowly on the three factors used to inform the enquiry in *Idea Services*, to the detriment of the fuller consideration of the facts that is the touchstone of that decision. As the Court of Appeal made clear, determining whether or not activity amounts to "work" is case specific. The factors considered helpful in undertaking the assessment in that decision need not be, and ought not be, slavishly applied. There will be cases where confining the factual enquiry to the three factors used in *Idea Services* would produce an anomalous outcome. In those cases, a more nuanced analysis is required. In the present case, we consider it is helpful to undertake this factual enquiry by assessing if the

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86 *SIMAP v Consellaria de Sanidad v Consumo de la Generalidad Valenciana* [2000] IRLR 845, [2001] All ER (EC) 609 (ECJ); *Landeshaupstadt Kiel v Jaeger* [2003] IRLR 804, [2004] All ER 604 (ECJ); *British Nursing Association v Inland Revenue* [2002] EWCA Civ 494, [2002] IRLR 480; *Scottbridge Construction Ltd v Wright* [2003] IRLR 21.

87 At [17].

88 *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576.

89 *South Canterbury District Health Board v Sanderson* [2017] NZEmpC 127; leave to appeal was declined in *South Canterbury District Health Board v Sanderson* [2017] NZCA 82.

90 *A Labour Inspector of the Ministry of Business, Innovation and Employment v Smiths City Group Ltd,* above n 77.

91 *Steiner v Mitchell* 350 US 247 (1956).

92 *Mitchell v King Packaging Co* 350 US 260 (1956).

93 *A Labour Inspector of the Ministry of Business, Innovation and Employment v Smiths City Group,* above n 77 (footnotes omitted).

> morning meetings were an integral part of the employees' principal activities as sales staff.

[250] In this case, counsel referred to both the approaches which were adopted in *Idea Services* and in *Smith City*. I will consider each shortly. As already noted, reference was also made to a range of overseas judgments. To the extent that those assist, I will refer to them where applicable.

*Discussion*

[251] As noted earlier, the plaintiffs' analysis of this issue focused primarily on the donning and doffing work which took place at the start and end of each shift, it being argued that once walking time was subtracted, the time spent was "*de minimis*", and merely amounted to preparatory and concluding activities which occupied micro periods. Then, it was argued that the period of time involved in these actions at the start and end of breaks was also "minimal and insignificant", and did not impinge on employees' rest and meal activities. The plaintiffs' case proceeded on the basis that these activities are not compensated for, and do not need to be.

[252] Mr Cranney highlighted US cases where a *de minimis* concept had been adopted. The doctrine is an application of the maxim "*de minimis non curat lex*", which means "[t]he law does not concern itself with trifles".[94]

[253] The starting point is a 1946 judgment of the Supreme Court of the United States, *Anderson v Mt Clemens Pottery Co*, where a question arose as to whether employees should be compensated for time spent walking to and from their work stations, and engaging in certain preliminary and postliminary activities.[95] The Court held that generally such time is compensable "since the statutory work-week includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace, the time spent in these activities must be accorded appropriate compensation".[96] However, that conclusion was qualified with the application of a *de minimis* rule, where the minimum walking time was negligible. The Court held that when the matter in issue concerns only a few seconds

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[94] Bryan A Garner *Black's Law Dictionary* (10th ed, Thomson Reuters, St Paul, 2014) at 524.

[95] *Anderson v Mt Clemens Pottery Co* 328 US 680 (1946).

[96] At 690 – 691.

or minutes of work beyond the scheduled working hours, such trifles could be disregarded. Split second absurdities were not justified by the actualities of working conditions or by the policy of the legislation under consideration: The Fair Labor Standards Act 1938.[97]

[254] The declarations made in judgments such as *Anderson* provoked a flood of litigation, which resulted in Congress determining there was an emergency requiring legislative amendment. This led to the enactment of the Portal to Portal Act 1947.[98] That Act eliminated from working time certain travel and walking time and other similar preliminary and postliminary activities performed prior or subsequent to the work day that were not made compensable by contract, custom or practice.[99]

[255] Subsequent judgments referred to by Mr Cranney suggest that US courts have been cautious in determining whether, at a federal level, the *de minimis* rule as discussed in *Anderson* continues to apply, for instance in Wisconsin *(United Food & Commercial Workers' Union v Hormel Foods Corp)*[100] and in California (*Troester v Starbucks Corp*).[101]

[256] Mr Smith emphasised that all the overseas cases referred to applied a completely different statutory regime and labour market to that which applies in New Zealand, and could only assist, as the Court stated in *Smith City*, as examples of how the factual enquiry may be undertaken. Mr Smith urged the Court to find that the donning and doffing activities are as a matter of fact *de minimis* for the purposes of s 6.

[257] The Court of Appeal in *Idea Services*, confirming the approach adopted by this Court, emphasised that whether activities would qualify as work is a matter of fact and degree. As it was put by the Court of Appeal, the greater the constraints, the greater the responsibilities, and the greater the benefit to the employer, the more likely it is that the activity in question ought to be regarded as work. In my view, this approach

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97 At 692.
98 *Integrities Staffing Solutions Inc v Busk* 574 US 27 (2014).
99 29 CFR 785.9.
100 *Wisconsin United Food & Commercial Workers' Union v Hormel Foods Corp* 2d 131 (2016).
101 *Troester v Starbucks Corp* Cal 5th 829 (2018).

is well able to cater for circumstances where activities are limited, such as the donning only of a high visibility jacket, and/or walking to a very proximate location to undertake work duties.

[258] In considering the donning and doffing activities which fall for consideration in the present case, I am not persuaded that time spent in walking should be subtracted. The periods were taken from the point where preparations commence in the provided locker room through to the point where a worker arrives in the designated processing area.

[259] But donning and doffing has to occur at multiple points along the way. It was also acknowledged that some of those activities can and are undertaken by workers as they walk.

[260] In short, walking to and from the locker room/cafeteria/smoking area to the processing area is a very different activity than would be the case if donning and doffing was not required at all. The plaintiffs have set up an elaborate infrastructure to facilitate these mandatory requirements. It would be artificial to regard the action of walking between relevant locations as irrelevant when considering whether these activities amount to work.

[261] A further preparatory point relates to which of the donning and doffing activities need to be considered for s 6 of the MWA purposes. The position is:

a) Donning and doffing occurs at the beginning and end of each shift. If it is work, s 6 applies.

b) Similarly, with regard to meal breaks. As I indicated earlier, work is not rest. If donning and doffing at a meal break is work, s 6 applies to the time devoted to that activity.

c) Similarly, if doffing and donning at the commencement and end of rest breaks is work, then again, the provisions of s 6 of the MWA apply. This is separate from the application of the *Lean Meats* principle, which applies to the period of the rest break itself.

[262] I make two further points before analysing the circumstances according to the three *Idea Services* factors. The first refers to Mr Smith's point regarding "micro periods" which he said were involved in each instance of either donning or doffing. That was a submission made in part with regard to his argument that walking time should be subtracted, which I have not accepted. As will become evident shortly, I do not consider that each individual instance of either donning and doffing takes place in a "micro period", or is "*de minimis*". But I also consider it is appropriate to cross-check individual assessments by considering the totality of the donning and doffing activities in each shift on a cumulative basis, since this is time devoted to the employer's requirements when the employee is not free to do as he or she pleases, whether at the start or end of a shift or a break.

[263] The second point relates to the evidence I touched on earlier concerning the fact that there is considerable flexibility as to the amount of time which an employee may in fact devote to these activities. The example cited related to employees who arrive at the work location early, using shower and cafeteria facilities before work.

[264] At this stage, the Court is proceeding on the basis of reliable evidence as to average times taken, which excludes this factor. I also note that the Court is not at this stage required to make findings with regard to particular individuals. What should be paid to individual workers for the purposes of the Union's counter-claim will be a separate matter.

[265] I now turn to consider the three *Idea Service* factors.

*Constraints placed on the freedom of the employee*

[266] The elaborate activities which are required to be undertaken at all relevant times impose significant constraints on the freedom of the workers involved. Although they may wear ordinary street clothing, the protective clothing which is required to be worn is extensive and must be worn correctly. For example, no street clothing may be visible; hair nets, beard nets, earmuffs, ear plugs and facial balaclavas must be worn according to prescribed requirements, ensuring that all hair is tucked under nets and that ears are fully covered. When entering a production area, all personnel must wash their gumboots in the boot wash, and their hands up to their

elbows, drying them appropriately. Gear is to be sterilised and washed according to prescribed procedures before the production areas are entered. Health and safety requirements are also engaged, for example, sharpening knives.

[267] When leaving the production area, there is also a range of prescribed requirements for the removal of gear or clothing. These are less time-consuming for breaks than is the case at the start and end of shifts, but even in the former case they are not insignificant.

[268] Mr Smith argued that because there was flexibility in donning clothing and equipment, particularly at the beginning of a shift, this indicated a minimal "constraint"; as did the fact that the activities take a "very short period of time", which he said limited potential constraints on an employee. I do not agree. Having regard to the times given by Mr Bayliss for each instance of donning and doffing, and the nature of the activities involved, I consider the constraints are in fact significant.

*Responsibilities of the employee*

[269] As described earlier, the activities arise within the context of an elaborate regime pertaining to hygiene and health and safety procedures. The plaintiffs have set up a careful infrastructure to achieve these ends, and it is the responsibility of employees to adhere to the relevant obligations, as the various CEAs and other documents require.

[270] Mr Smith said that this was no more than the responsibility of any employee who is required to wear specific clothing and equipment to work. I disagree. In this case, the employee's responsibilities are extensive. What might occur in other unspecified workplaces does not assist in resolving the present issues. He also argued that the employees' responsibilities were diminished by the fact that there are no strict time requirements for these activities to be completed, and that there was flexibility in the time taken, for instance, at the start of a shift. I have already referred to this, but the key fact is there are a range of responsibilities which each employee is duty-bound to discharge prior to entering and after leaving the processing areas. These obligations must be discharged properly, and according to the plaintiff's instructions, at each plant.

I find that the time taken, and the nature of the activities, are not insignificant to either the employees or employers involved.

*Benefit to the employers*

[271] The regulatory requirements are mandatory. The plaintiffs accept this. But Mr Smith argued that care needs to be taken in applying this factor, because its application could lead to absurd results. I am unconcerned with situations which may apply in other circumstances. In the present case, it is obvious that the donning and doffing activities are an essential aspect of the plaintiffs' businesses. Without proper adherence to hygiene procedures, and proper health and safety practices, the plaintiffs would be unable to operate their processing operations in accordance with the requirements of the applicable legislation and of the regulators.

[272] Standing back, I am satisfied that donning and doffing, whether considered with regard to each instance where it occurs, or whether considered cumulatively, is work.

[273] The circumstances of this case are rather different from those which were considered by the full Court in *Smith City*. However, applying the approach which was adopted in that case, I find that donning and doffing activities are plainly part and parcel of the plaintiffs' processing operations; they are essential aspects of each worker's responsibilities. I have had regard to relevant overseas decisions involving similar activities; these have reached similar conclusions, but it has not been necessary to rely on these for present purposes.[102] I find that the activities I have considered are work if considered on the basis of the approach adopted in *Smith City*.

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[102] For example, *Steiner v Mitchell*, above n 91, involving changing of clothes and showering, approximately 30 minutes per day; *Mitchell v King Packaging Co,* above n 92, knife sharpening time not specified; *Smiley v E1 Du Pont de Nemours and Co* 839 F3d 325 (2016), donning and doffing of uniforms and protective gear at manufacturing plants, 30 to 60 minutes per day. In each instance, these were regarded as activities which were part and parcel of the employee's work activities.

*Not paid less than minimum rate*

[274] The plaintiffs also argued that with some limited exceptions, employees are not paid less than the minimum rate; thus, there is no breach of the MWA. The single exception related to new starters at the Feilding and Gisborne plants, who are paid on a "base rate" before being deemed competent in a particular task. This was only for a short period of time.

[275] Mr Bayliss provided detailed calculations, the essence of which was to deduct the time spent on donning and doffing, for example, at the beginning of a shift from the base hourly rate which would be paid once processing commences. For example, he referred to a worker being paid a base rate of $15.05 per hour in January 2012, when the minimum hourly wage was $13. The average time for donning clothing and equipment at the commencement of a shift was three minutes and 15 seconds. This time, he said, should be deducted from the period to which the base rate applies, of 60 minutes. Therefore, even if the worker was found to be paid only for 56 minutes and 45 seconds, they would still receive a payment of $14.23, which was $1.23 over the minimum hourly wage at the time. This evidence suggested, he said, that after making that allowance, workers were still being paid more than the minimum hourly wage at the time, for that hour.

[276] Mr Smith said that this was not prohibited averaging, as discussed by the Court of Appeal in *Idea Services*.[103] That was because the problem considered by the Court of Appeal was whether averaging an employee's pay over an entire "pay period" was allowed, the problem being that such an approach would allow "any pay period to be chosen, no matter how short, extended or disadvantageous to an employee".[104] It was argued that considering an employee's earnings over an hour was distinct from the averaging approach rejected in *Idea Services*, because the employee would still be receiving the minimum rate "for each and every hour worked".[105]

103 *Idea Services Ltd v Dickson*, above n 24, at [32]-[33].
104 At [51].
105 At [26] and [32]-[33].

[277] In my view, this approach is inappropriate for reasons given by the Court of Appeal. As was observed, each "minimum rate" in the applicable MWO speaks of minimum rates which are referable to units of time worked. This approach is reinforced by the obligation to keep detailed wage and time records for hours worked each day, or days of the week worked.[106]

[278] The Court also emphasised that an important aim of the MWA was to ensure workers always received a minimum rate of wages "for every part of their work".[107]

[279] Under category (a) of the MWO, a worker is paid for each hour of work. If an employee works for 60 minutes, then the MWA and the MWOs made under it assume the worker will be paid for the 60 minutes of work. The plaintiffs' argument assumes that the period of time devoted to donning and doffing may be deducted, so that for the first and last hour, a reduced rate is received for processing work. This is averaging, the result of which is that in Mr Bayliss' example, a different rate is paid for the first and last hour of processing for each shift (or break) than for all other hours; alternatively, if a uniform rate is paid for each hour of processing, there is no payment for the period of donning and doffing. In my view, this conclusion is inconsistent with the objects of the Act which, as the Court of Appeal emphasised, was to counter "exploitation of vulnerable workers".

[280] Accordingly, I find that the plaintiffs' employees are currently not paid for donning and doffing. Nor am I satisfied that the hourly analysis advanced for the plaintiffs permits a conclusion there is compliance with s 6 of the MWA.

## Issue four: have there been insufficient breaks under Part 6D?

[281] The defendant submitted that the plaintiffs were in breach of Part 6D by not providing sufficient rest breaks at each plant.

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[106] At [34].
[107] At [40].

[282] There was no specific pleading in the statement of defence and counter-claim to this effect, although a general declaration is sought that "the plaintiffs have been and remain in breach of Part 6D of the ERA" was made. Also sought are "appropriate orders as to arrears".

[283] The factual position is clear:[108]

a) At Feilding, workers in the slaughter department and the boning department did not receive one 10-minute break per day, if their breaks are measured under the initial version of s 69ZD of the Act. However, they did receive rest breaks which totalled time in excess of their statutory entitlements.

b) At Gisborne, the same applied to workers in the slaughter department and boning department.

c) At Te Kuiti, workers did not receive a full 30-minute meal break, because donning and doffing occurred in that period.

[284] Mr Cranney also submitted that donning and doffing infringed agreed meal breaks or rest breaks, so that each plaintiff is in breach of the current provisions in Part 6D.

[285] However, because there is no specific pleading before the Court, it is not appropriate to make a declaration on this topic. Moreover, the plaintiffs argue that the total period given for rest breaks on any given shift was greater than the total allowed for under the statute so that no issue of compensation could arise.

[286] In any claim for arrears it would be necessary for the parties to address this issue. To this point, the Court has not received evidence and submissions which focus on causation. At the present stage, it is preferable that I make no further findings to allow the parties to discuss the relevant issues directly in light of the findings made in this judgment; if need be the issues can be properly pleaded for resolution by the Court.

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108 See Schedule A for the summarised evidence as to duration of breaks.

## Conclusion

[287] In summary, I make the following declarations:

a) the incorporation of paid rest breaks into piece rates is lawful under the provisions of the Act;

b) under the relevant CEAs, such payment was not incorporated in the agreed piece rates.

[288] Under its counter-claim, the Union seeks a compliance order and arrears orders. In fixing the arrears, the *Lean Meats* principle will apply. If remedies are to be pursued, a fully particularised statement of counter-claim will need to be filed in light of the Court's conclusions.

[289] I also declare that the donning and doffing of protective clothing and equipment is work for the purposes of s 6 of the MWA.

[290] If remedies in respect of those activities are to be pursued, a fully particularised statement of counter-claim will need to be filed and served.

[291] I have made some observations as to the sufficiency of rest breaks and meal breaks with regard to the initial version of Part 6D, and have noted that the Union also sought to argue that donning and doffing infringed agreed meal breaks or rest breaks under the current version of Part 6D, although particulars of this were not given. If remedies are to be sought in respect of these alleged breaches, they will need to be specifically pleaded.

[292] In light of these conclusions, I direct:

a) Any amended statement of counter-claim is to be filed and served by 15 February 2019.

b) A statement of reply to that counter-claim is to be filed and served by 15 March 2019.

c) Thereafter, the Registrar is to schedule a telephone directions conference with counsel, after conferring with them as to a suitable date. At that conference, I wish to hear from counsel as to whether the Court should direct the parties to attend mediation to discuss the outstanding issues; and will discuss the making of suitable procedural directions for the resolution of outstanding issues. A joint memorandum is to be filed prior to the conference, outlining proposed directions.

B A Corkill
Judge

Judgment signed at 2.30 pm on 17 December 2018

## SCHEDULE A
## Rest and Meal Breaks (Day Shift Only)

| FEILDING | DAY SHIFT BREAKS |
|---|---|

*Slaughter Department*

MB: 1 x 30

RB: 2 x 20

3 x 5

*Boning Department*

MB: 1 x 30

RB: 2 x 20

| GISBORNE | DAY SHIFT BREAKS |
|---|---|

*Slaughter Department*

MB: 1 x 30

RB: 2 x 20

1 x 15

2 X 5

*Boning Department*

MB: 1 x 30

RB: 2 x 15

| TE KUITI | DAY SHIFT BREAKS |
|---|---|

*Slaughter Department*

MB: 1 x 30

RB: 3 x 15

*Boning Department*

MB: 1 x 30

RB: 3 x 15

## SCHEDULE B
## SUMMARY OF EVIDENCE OF MR BAYLISS AS TO TIMING, EXPRESSED IN MINUTES AND SECONDS

| | Morning Donning | | Breaks Doffing | | Breaks Donning | | Evening Doffing | |
|---|---|---|---|---|---|---|---|---|
| | *Total* | *Walking* | *Total* | *Walking* | *Total* | *Waking* | *Total* | *Walking* |
| **FEILDING** | | | | | | | | |
| Slaughter Department | 3.15 | 1.30 | 1.30 | 24 | 1.25 | 24 | 3.00 | 1.15 |
| Boning Department | 4.00 | 2.00 | 1.30 | 21 | 1.30 | 21 | 3.30 | 1.45 |
| **GISBORNE** | | | | | | | | |
| Slaughter Department | 3.15 | 1.30 | 1.30 | 30 | 1.25 | 30 | 3.00 | 1.30 |
| Boning Department | 3.30 | 2.00 | 1.42 | 42 | 1.30 | 42 | 3.00 | 2.00 |
| **TE KUITI** | | | | | | | | |
| Slaughter Department | 3.30 | 1.30 | 1.30 | 30 | 1.25 | 30 | 3.00 | 1.30 |
| Boning Department | 4.25 | 2.00 | 2.00 | 1.00 | 2.00 | 1.00 | 3.30 | 1.30 |