IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA8/2021
[2021] NZCA 591

BETWEEN	SUHKJEET SANDHU First Appellant	
	HUIPING WU Second Appellant	
	SELLIAH NESUM NIRANJALA Third Appellant	
	ROSALINA LEANNA Fourth Appellant	
	SUTHARSHINI ANTHONY RUPS MIRANDA Fifth Appellant	
AND	GATE GOURMET NEW ZEALAND LIMITED First Respondent	
	SHAUN JOILS Second Respondent	

Hearing: 21 October 2021

Court: French, Gilbert and Goddard JJ

Counsel: P Cranney for Appellants
E J Butcher for Respondents

Judgment: 11 November 2021 at 11.00 am

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **We answer the approved question of law as follows:**

> **It is not lawful to make deductions from wages for lost time not worked at the employer's direction. The minimum wage is payable for the hours of work that a worker has agreed to perform, but does not perform because of such a direction.**

C **The orders made in the Employment Court are set aside, and the determination of the Employment Relations Authority is restored.**

D **The proceeding is referred back to the Employment Relations Authority to determine any outstanding matters in light of the decision of this Court.**

E **The first respondent must pay the appellants the usual disbursements in respect of the appeal to this Court.**

F **Costs before the Employment Court are to be determined by that Court in light of the outcome before this Court.**

REASONS OF THE COURT

(Given by Goddard J)

[1] The Minimum Wage Act 1983 provides that certain employees are entitled to be paid for their work at not less than the prescribed minimum rate. Does this protection apply only in respect of time actually worked by an employee? Or does it also apply in respect of hours that the employee has agreed to work, and is available to work, but does not work at the direction of their employer?

[2] The answer to this question is of particular significance in the context of the current COVID-19 pandemic. Many employers have been unable to operate their businesses in the normal way. Some have been required to close their premises. Others, though able to open, have suffered a downturn in business which means there is no work for their employees to do.

[3] Read in isolation, s 6 of the Minimum Wage Act is open to either interpretation. But when it is read in context, the answer is in our view clear. Section 7(2) of the Minimum Wage Act provides that no deduction in respect of time lost by any employee may be made from the wages payable to the employee under the Act, except for time lost by reason of the default of the worker, or by reason of the worker's illness or of any accident suffered by the worker. If s 6 only applied to hours actually worked, s 7(2) would serve no function: where time was "lost", the minimum wage would not be payable, and no question of deductions from that wage could arise. The only reading of s 6 that fits with the wider scheme of the Act, and in particular s 7(2), is that the minimum payment prescribed by s 6 applies to all hours that an employee has agreed to work, whether or not those hours are actually worked. If agreed hours are not worked — that is, if time is lost — the Act permits deductions from the minimum wage prescribed by s 6 if and only if that time is lost for one of the reasons specified in s 7(2).

[4] It follows that we agree with the conclusion reached by the Employment Relations Authority,[1] and by Chief Judge Inglis (dissenting) in the Employment Court.[2] The appeal must be allowed.

[5] Our reasons are set out in more detail below.

The Minimum Wage Act

[6] We begin by setting out in full ss 6 and 7 of the Minimum Wage Act, which are at the heart of this appeal:

> **6 Payment of minimum wages**
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> 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.

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1 *Sandhu v Gate Gourmet New Zealand Ltd* [2020] NZERA 259 [Authority determination].

2 *Gate Gourmet New Zealand Ltd v Sandhu* [2020] NZEmpC 237 [Employment Court decision] at [49]–[71].

> **7 Deductions for board or lodging or time lost**
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> (1) In any case where a worker is provided with board or lodging by his employer, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wage calculated at the appropriate minimum rate by more than the cash value thereof as fixed by or under any Act, determination, or agreement relating to the worker's employment, or, if it is not so fixed, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wages (as so calculated) by more than 15% for board or by more than 5% for lodging.
>
> (2) No deduction in respect of time lost by any worker shall be made from the wages payable to the worker under this Act except for time lost—
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> (a) by reason of the default of the worker; or
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> (b) by reason of the worker's illness or of any accident suffered by the worker.

[7] Sections 6 and 7(2) are in essentially the same terms as s 2(1) and (5) of the Minimum Wage Act 1945, which read as follows:

> **2.** (1) Notwithstanding anything to the contrary in any enactment, award, industrial agreement, or contract of service, every worker of the age of twenty-one years and upwards to whom this Act applies shall be entitled to receive from his employer payment for his work at not less than the appropriate minimum rate prescribed under this section.
>
> …
>
> (5) No deduction in respect of time lost by any worker shall be made from the wages payable to him under this section except for time lost by reason of the default of the worker, or by reason of his illness or of any accident suffered by him.

[8] Those provisions in turn are based on s 14(1) and (5) of the Agricultural Workers Act 1936. Similar provisions were also found in many Awards from the early 20th century onwards.

[9] The Minimum Wage Acts of 1945 and 1983 give effect to New Zealand's international obligations under the Minimum Wage-Fixing Machinery Convention 1928.[3] Under that Convention New Zealand is required to create and maintain machinery enabling minimum rates of wages to be fixed for workers in sectors

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[3] Convention Concerning the Creation of Minimum Wage-Fixing Machinery (ILO No 26) 39 UNTS 3 (adopted 16 June 1928, entered into force 14 June 1930). It was ratified by New Zealand on 29 March 1938.

"in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low".[4] The Convention provides that minimum rates of wages which have been fixed are binding on the employers and workers concerned "so as not to be subject to abatement by them by individual agreement, nor, except with general or particular authorisation of the competent authority, by collective agreement".[5]

[10] The Minimum Wage Act was described by a Full Court of the Employment Court in *Faitala v Terranova Homes & Care Ltd* as:[6]

> … a statute of fundamental importance in the sphere of employment law in New Zealand. It is a statute that is designed to impose a floor below which employers and employees cannot go. It is directed at preventing the exploitation of workers, and is a statutory recognition of the diminished bargaining power of those in low paid employment.

[11] On appeal, this Court endorsed that description of the Act.[7]

The background to these proceedings

[12] An agreed statement of relevant facts was filed in the Authority. The parties differ in their interpretation of that agreed statement of facts, and each party sought to place certain glosses on that statement of facts in the course of argument before us. Ultimately, the parties agreed that this appeal should be determined by reference to the "key facts" set out in paragraphs [9]–[21] of the Employment Court decision. The background set out below is based on those paragraphs.

The parties

[13] Gate Gourmet New Zealand Ltd (Gate) provides inflight catering services to passenger aircraft. In March 2020 it had over 130 employees, including the five appellants (the employees). The employees are all members of the Aviation Workers

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4 Article 1(1).
5 Article 3(2)(iii).
6 *Faitala v Terranova Homes & Care Ltd* [2012] NZEmpC 199, [2012] ERNZ 614 [*Faitala* (EC)] at [39].
7 *Terranova Homes and Care Ltd v Faitala* [2013] NZCA 435, [2013] ERNZ 347 [*Faitala* (CA)] at [28].

United Inc Union (AWU). The second respondent, Mr Joils, is the General Manager of Gate.[8]

The employees' employment agreements

[14] Each of the employees' employment agreements provides for full-time employment for a minimum 40-hour week. They are paid weekly. Prior to 30 March 2020 they were paid $17.70 per hour, which was the applicable minimum hourly wage. On 1 April 2020 the minimum hourly wage increased to $18.90 per hour: it is now common ground that this rate applies to the employees.[9]

COVID-19 impact on Gate's business

[15] The COVID-19 pandemic led to a number of restrictions being imposed in New Zealand in March 2020. International travel was severely restricted. The Government imposed a COVID-19 Alert Level 4 "lockdown" with effect from 26 March 2020. The lockdown prevented most domestic air travel within New Zealand. The Director-General of Health made an order requiring all premises to be closed, unless they came within certain exceptions. The exceptions included premises where essential services were performed. Gate was an essential service for this purpose, so was permitted to remain open for business throughout the lockdown. However Gate had very little work to offer employees, as there was almost no demand for inflight catering services.

Gate responds to the impact of COVID-19

[16] Following the imposition of the Level 4 lockdown Gate advised its employees and the unions representing them (including AWU) that, as a result of having very little work to offer employees, it would need to partially shut down operations.

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8 The appeal does not raise any issues in relation to the position of Mr Joils personally. The claim against him for a penalty before the Authority was dismissed, and there was no appeal from that decision.

9 There was an initial difference between Gate and its employees about whether the increase in minimum wage applied to employees who were not working at the time. However following correspondence with AWU, Gate agreed to apply the new minimum wage rate of $18.90 per hour to the employees from 1 April 2020, whether they were working or not. See Employment Court decision, above n 2, at [17]–[21].

[17] On 26 March 2020, Gate proposed to its employees:

(a) the implementation of a partial close-down;

(b) employees being paid 80 per cent of their normal pay, conditional on Gate receiving the Government wage subsidy; and

(c) employees could choose to use their annual leave entitlement to supplement the 80 per cent of normal pay being offered, meaning that an employee could receive 100 per cent of their pay by using one day of their annual leave per week.

[18] On 26 March 2020, Gate confirmed to its employees and to AWU that, if an employee had not been rostered on, and Gate had not asked them to come to work, that meant Gate had no work for them and they should stay at home. On the same day Gate applied for the Government wage subsidy for 132 employees.

[19] On 27 March 2020, Gate emailed all employees with a notice of close-down. In that notice Gate stated:

(a) It was an essential service and was able to keep operating.

(b) It was closing down part of its business.

(c) It was presenting a written offer setting out the three options that it was offering employees, namely:

(i) Option one — employees take all entitled annual leave until it is exhausted, at which point the employee could move to option two.

(ii) Option two — conditional on Gate receiving the wage subsidy, it would pay the employee at the rate of at least 80 per cent of their normal pay.

(iii) Option three — conditional on Gate receiving the wage subsidy, it would pay the employee at the rate of at least 80 per cent of their normal pay, and the employee could then use their annual leave entitlement to supplement their income in order that they receive 100 per cent of their normal pay.

[20] On 27 March 2020 AWU, on behalf of its members (including the employees) rejected option one and agreed to options two and three, subject to Gate complying with all applicable legislation.

[21] The employees have not worked much since the partial close-down of Gate's operations. One of them did some shift work at the beginning of Alert Level 4, and has worked since 28 April 2020.

The proceedings

[22] In April 2020 the employees, through AWU, filed a statement of problem with the Authority alleging that Gate had taken unilateral action in relation to employees and their terms and conditions of employment, and had failed to properly consult with AWU about the proposed changes. The employees also claimed Gate had acted unlawfully in paying them less than the minimum wage of $756 per week. The employees sought penalties against Gate and Mr Joils, a declaration that Gate acted unlawfully in paying them less than the minimum wage, and compliance orders under s 137 of the Employment Relations Act 2000.

Authority's determination

[23] The Authority's determination recorded that there was a difference of views between the parties about whether AWU on behalf of its members had agreed to Gate's proposed 80 per cent payment. However the Authority member considered that he did not have to reach a view on that issue, because it is not open to parties to contract out of the Minimum Wage Act. The issue that he needed to decide was whether that Act applied.[10]

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[10] Authority determination, above n 1, at [35].

[24] The Authority found that the employees were ready, willing and able to work.[11] The decision about whether or not they would work was made by Gate, not by the employees.[12] The employees were not working at the direction of Gate. In these circumstances, the Authority found that s 6 of the Minimum Wage Act applied. By paying the employees 80 per cent of their wages, Gate had breached the Act.[13]

[25] The Authority declined to impose a penalty on either Gate or Mr Joils. They had not acted in bad faith. The parties had found themselves in a difficult and complex situation as a result of the pandemic. A penalty was not appropriate.[14]

[26] The Authority made orders that to the extent that Gate had not paid the employees at the minimum wage for 40 hours per week, it was required to do so forthwith.[15]

[27] The argument before the Authority appears to have focused exclusively on s 6 of the Minimum Wage Act. There is no reference to s 7(2) in the Authority's determination. We understand from counsel that s 7(2) was not referred to by either party before the Authority.

Employment Court decision

[28] Gate and Mr Joils challenged the Authority's Determination before the Employment Court. The challenge was not brought on a de novo basis.[16] As the Employment Court observed, that meant the matters for the Court were significantly more limited than those that were before the Authority. The challenge proceeded on the basis of the facts as stated in the Authority's determination. The issue before the Court concerned the interpretation of the Minimum Wage Act, and its application to the employees at times when they were performing no work for Gate.[17]

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11 At [38].
12 At [41].
13 At [41].
14 At [42].
15 At [43].
16 Employment Relations Act 2000, ss 179 and 182(3)(b).
17 Employment Court decision, above n 2, at [5]–[6].

[29] We understand from counsel that the argument before the Employment Court initially focussed on s 6 of the Minimum Wage Act, without reference to s 7(2). However following the hearing the Court sought and received further submissions on the implications of s 7(2) for the question before the Court.[18]

[30] Judge Holden and Judge Beck, in the majority, found that when the employees stayed home, they were not working for the purposes of s 6 of the Minimum Wage Act. So the Minimum Wage Act was not engaged, and no statutory minimum wage entitlements arose.[19]

[31] The majority acknowledged that the relationship between ss 6 and 7(2) is not straightforward. However they concluded that it is only if wages are due under s 6 that the question of whether s 7 entitles the employer to make a deduction arises.[20] It followed that s 7(2) was not engaged in the present case. Gate was not making deductions from wages otherwise due under the Minimum Wage Act, as s 6 did not require wages to be paid in circumstances where the employee was not working.[21]

[32] Chief Judge Inglis dissented. She considered that when ss 6 and 7 are read together, the payment of minimum wages "is inviolable subject to very limited exceptions".[22] Deductions for time lost are permitted only in the circumstances set out in s 7. The approach to "payment for work" contended for by Gate could not be correct, as it would make the restrictions in s 7(2) redundant. In the present case, the reason why the employees could not work the contracted 40 hours had nothing to do with their default, illness or accident: so no deduction could be made from the minimum wage they would otherwise be entitled to receive.[23] The Chief Judge would have held that, having regard to the agreed statement of facts, there was a breach of the Minimum Wage Act, and would have dismissed the challenge on that basis.[24]

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18 At [29].
19 At [45].
20 At [38]–[39].
21 At [41].
22 At [54].
23 At [69].
24 At [71].

Leave to appeal

[33] The employees sought leave from this Court to appeal from the Employment Court's decision.[25] This Court granted leave to appeal on the following question of law:[26]

> Whether, in the absence of sickness, default, or accident, the minimum wage is payable for all of a worker's agreed contracted hours of work or whether it is lawful to make deductions from wages for lost time not worked at the employer's direction.

The parties' submissions on appeal

[34] Before this Court Mr Cranney, counsel for the employees, submitted that the approach of the Chief Judge of the Employment Court should be preferred. Her interpretation of s 6 was consistent with the statutory context, in particular s 7(2), and with the purpose of the legislation as summarised in the passage from the Employment Court decision in *Faitala* set out at [10] above.[27]

[35] Mr Cranney submitted that the Chief Judge's approach is also consistent with common law principles in relation to the obligation of an employer to pay an employee for their agreed hours of work, provided that the employee is ready, willing and able to work. A failure by the employer to provide work did not excuse the employer from payment as a matter of common law. Nor, Mr Cranney submitted, should it excuse an employer from the obligation to pay the minimum wage provided for in s 6 of the Minimum Wage Act.

[36] Ms Butcher, counsel for the respondents, supported the approach of the Employment Court majority. She referred us to previous decisions of this Court which have described s 6 as requiring payment for "actual performance of [the employee's] services", and for "time actually worked".[28]

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25 Employment Relations Act, s 214(1).

26 *Sandhu v Gate Gourmet New Zealand Ltd* [2021] NZCA 203 [Court of Appeal leave decision] at [19].

27 *Faitala* (EC), above n 6, at [39].

28 *Faitala* (CA), above n 7, at [18]; and *Karelrybflot v Udovenko* [2000] 2 NZLR 24 (CA) at [50].

[37] Ms Butcher submitted that the interests of workers who are ready, willing and able to work, but who are not provided with work by their employer, are protected by the provisions of their employment contract, statutory support for such contracts under the Employment Relations Act, and other legislation that forms part of the "minimum code" of employment rights in New Zealand including the Holidays Act 2003.

[38] Ms Butcher emphasised that on the approach contended for by the employees, in circumstances where there was no work available for the employee to perform it would be open to an employer and employee to agree to reduce the employee's contracted hours of work by 20 per cent, but not to agree to reduce the employee's agreed weekly remuneration by 20 per cent. Different results should not be reached based on a "legal fiction".

[39] Ms Butcher also cautioned against adopting an interpretation of the Minimum Wage Act that would prevent an employer and an employee agreeing that the employee would take leave without pay in circumstances where, through no fault of their own, the employer could not provide work. Arrangements of this kind, she emphasised, have the significant benefit for both parties of preserving the employment relationship until the position changes and there is work available for the employee.

Discussion

[40] The meaning of an enactment must be ascertained from its text and in the light of its purpose.[29] As the Supreme Court observed in *Commerce Commission v Fonterra Co-operative Group Ltd*:[30]

> [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 the 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 too may be the social, commercial or other objective of the enactment.

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29 Interpretation Act 1999, s 5(1).

30 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 (footnotes omitted).

[41] In that case, the Supreme Court was required to determine whether a reference in a provision to Fonterra's "cost of capital" was a reference to Fonterra's weighted average cost of capital, or to that company's cost of equity capital. If the relevant provision was read in isolation, either meaning was open. In those circumstances, context and purpose were "essential guides to meaning".[31] And once legislative context and purpose were taken into account, it would be illogical if the reference to "cost of capital" referred to capital other than equity capital.[32]

[42] This case raises a similar issue, albeit in a very different context. If s 6 of the Minimum Wage Act is read in isolation, the reference to "payment for his work" could plausibly be read either as a reference to work actually performed by the employee, or as a reference to work that the employee has agreed to perform under their contract of employment, whether or not it is actually performed. Indeed the former might appear to be the more natural of the two readings.

[43] However as the Supreme Court emphasised in *Fonterra*, the text of a provision must be read in the light of its immediate legislative context. Put another way, the section of an Act under consideration must be read in the light of the Act as a whole.[33] Sections 6 and 7 of the Minimum Wage Act form part of a coherent scheme. They must be read together, in a way that makes sense of that scheme.[34]

[44] Section 7(2) is concerned with "time lost": that is, time that was agreed to be worked, but is not in fact worked. It identifies the circumstances in which a deduction may be made from the minimum wage payable under s 6 for time lost. Outside those prescribed circumstances, deductions for time lost are not permitted: the minimum wage prescribed by s 6 must be paid.

[45] If s 6 only applied to time actually worked, s 7(2) would be superfluous. It would make no sense to include such a provision in the statute. Time lost would not

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31 At [24].
32 At [25].
33 See Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 335–339.
34 The origin of these provisions as subsections of the same section in the 1945 Act underscores the need to read them together as part of a single coherent scheme: see [7] above.

be time worked, so the minimum wage would not be payable in respect of that time. No question of deduction in respect of that time would arise.

[46] The only logical reading of s 6, in the context of the Act as a whole, is that it requires payment of the minimum wage for the whole of the time that the employee has agreed to work. If the employee does not work for some of that time — if time is "lost" — then s 7(2) prescribes the consequences and sets out the only circumstances in which payment of wages may be withheld in respect of that time.

[47] This reading of s 6 is also consistent with the purpose of the Act. As already mentioned, it sets a floor below which employers and employees cannot go: they cannot contract out of this basic protection. The Act is directed at preventing the exploitation of workers. It recognises the diminished bargaining power of those in low-paid employment.[35] It would be inconsistent with the purpose of the Minimum Wage Act, and the protections it seeks to provide for low-paid employees, if s 6 could be unilaterally disapplied by an employer simply by directing that the employee not attend work.

[48] Ms Butcher is of course right to say that there are other protections available to employees. The minimum code of employment rights in New Zealand today goes well beyond the limited protections that were in place in 1945 when the first Minimum Wage Act was enacted, or even for that matter in 1983 when the current Act was enacted. But the Minimum Wage Act continues to play a fundamental part in the scheme of protections available to employees. There is no warrant for treating s 7(2) as superseded by subsequent legislation. It is even more difficult to see how the meaning of the phrase "payment for his work" in s 6 could have changed since 1983 as a result of the developments to which Ms Butcher referred us. Read in context in 1983, s 6 clearly referred to time that was agreed to be worked, whether or not that time was actually worked. There is no reason to read the provision differently today.

[49] For completeness, we add that we do not consider that this Court's reference in *Faitala* to an employee's right "to receive a fixed amount periodically payable for

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35 See *Faitala* (EC), above n 6, at [39], quoted at [10] above.

actual performance of his or her services" sheds any light on the issue before us.[36] The question of entitlement to payment for time lost was not before the Court in that case. No reference was made to s 7(2). Rather, the focus was on what tasks or services amounted to "work" for the purposes of s 6. Likewise, the question of payment for time lost was not before this Court in *Karelrybflot v Udovenko*, where reference was made to payment of the minimum rate "only for time actually worked".[37] Read in context, neither decision provides any support for the respondents' position.

[50] It follows that an employer cannot reduce the amount that an employee will be paid below the minimum wage payable under s 6 for time that the employee has agreed to work, but has not worked, if the reason the employee did not work is that the employer had no work for them to perform and directed them not to come to work. Nor can an employer and an employee enter into an agreement to that effect: s 6 applies "[n]otwithstanding anything to the contrary in any … contract of service".

[51] We accept Ms Butcher's submission that an employee can agree with their employer to take leave without pay, or to reduce the agreed hours to be worked. If agreement is reached to take leave without pay, the Minimum Wage Act does not require any payment during the agreed period of leave. If an agreement is reached to reduce working hours, the Act applies only to the reduced hours of work.

[52] We do not see this difference in outcome as based on a technical distinction, let alone a "legal fiction". Where for example an employee agrees with their employer that they will take leave without pay, the employer cannot unilaterally revoke that leave and require the employee to work. The employee can plan on the basis that they are not required for work during the agreed period of leave. They might for example take on alternative work, or undertake study, or travel away from their place of work secure in the knowledge that they are not required to attend work. But as we understand the agreed facts, that was not the arrangement here. It was open to Gate to roster employees on during their normal hours of work, and they would then be

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36 *Faitala* (CA), above n 7, at [18].
37 *Karelrybflot v Udovenko*, above n 28, at [50].

required to work. The employees were not at liberty to engage in other activities that would prevent them working if called on to do so.[38]

Our answer to the approved question of law

[53] We set out again, for ease of reference, the question of law on which leave was granted:[39]

> Whether, in the absence of sickness, default, or accident, the minimum wage is payable for all of a worker's agreed contracted hours of work or whether it is lawful to make deductions from wages for lost time not worked at the employer's direction.

[54] We answer that question as follows:

> It is not lawful to make deductions from wages for lost time not worked at the employer's direction. The minimum wage is payable for the hours of work that a worker has agreed to perform, but does not perform because of such a direction.

[55] The agreed statement of facts does not record the existence of any agreement between the parties that would justify not paying the employees the minimum wage. More specifically, there is no reference to an agreement to take leave without pay. But it is not the function of this Court, on an appeal on a question of law, to determine any factual disputes that may remain unresolved between the parties. Rather, any remaining issues of that kind can be resolved before the Authority or the Employment Court, as appropriate.

[56] In light of our answer to the approved question of law, the appeal must be allowed. The decision of the Employment Court will be set aside, and the determination of the Authority restored.

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[38] We recognise, of course, that the ability to undertake such activities was severely restricted by the pandemic and the lockdown in 2020.

[39] Court of Appeal leave decision, above n 26, at [19].

Costs

[57] The employees do not seek an award of legal costs in this Court, as Mr Cranney represented them pro bono. They do seek an award of disbursements. That is plainly appropriate.

[58] We understand from counsel that costs were awarded to the employees in the Authority, and have been paid. No order has been made in the Employment Court in respect of costs in that Court, pending the outcome of this appeal. Costs in that Court will need to be determined by that Court in light of the outcome before this Court, if they cannot be agreed by the parties.

Result

[59] The appeal is allowed.

[60] We answer the approved question of law as follows:

> It is not lawful to make deductions from wages for lost time not worked at the employer's direction. The minimum wage is payable for the hours of work that a worker has agreed to perform, but does not perform because of such a direction.

[61] The orders made in the Employment Court are set aside, and the determination of the Authority is restored.

[62] The proceeding is referred back to the Authority to determine any outstanding matters in light of the decision of this Court.

[63] The first respondent must pay the appellants the usual disbursements in respect of the appeal to this Court.

[64] Costs before the Employment Court are to be determined by that Court in light of the outcome before this Court.

Solicitors:
Oakley Moran, Wellington for Appellants
BE Employment Law, Auckland for Respondents