IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA185/2022
[2024] NZCA 19

	BETWEEN	MOUNT COOK AIRLINE LIMITED Appellant
	AND	E TŪ INCORPORATED Respondent

Hearing:	18 April 2023
Court:	French, Miller and Katz JJ
Counsel:	J G Miles KC, S R Worthy and A M Kamphorst for Appellant P Cranney and E Griffin for Respondent
Judgment:	6 March 2024 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B We answer the question of law as follows:

> **Was the Employment Court correct in its interpretation of cl 4(d) of the Minimum Wage Order 2021 as it applies to part-time salaried employees?**
>
> **No. The Employment Court erred in its interpretation of cl 4(d) of the Minimum Wage Order 2021 as it applies to part-time salaried employees. The correct interpretation of the clause is set out at [72] of this judgment.**

C Any order as to costs that has been made in the Employment Court is set aside. Costs in the Employment Court are to be determined by that Court in light of this judgment.

D The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] Mount Cook Airline Ltd is an airline based in Christchurch. It employs both full-time and part-time cabin crew. E tū Inc is the union that represents Mount Cook's cabin crew. The collective agreement between Mount Cook and E tū provides for part-time cabin crew to perform two-thirds of the work of full-time cabin crew over a fortnightly pay period, in exchange for a pro rata salary (two-thirds of a full-time salary).

[2] E tū challenged this pro rata approach to calculating the salary of part-time cabin crew employees in the Employment Court, on the basis that it breaches the requirements of Minimum Wage Act 1983 (the Act). Judge K G Smith found in favour of E tū, holding that cl 4(d) of the Minimum Wage Order 2021 (the Order) required that Mount Cook's part-time cabin crew be paid at least the full fortnightly minimum

wage rate specified in the Order (a sum equating to 80 hours of work at the minimum hourly wage) regardless of the number of hours they actually work per fortnight.[1]

[3] Mount Cook has been granted leave to appeal the Employment Court's decision on the following question of law:[2]

> Was the Employment Court correct in its interpretation of cl 4(d) of the Minimum Wage Order 2021 as it applies to part-time salaried employees?

[4] The outcome of this appeal has significant implications for employers with part-time staff who are paid by way of a salary.

Background

[5] The key background facts are not in dispute. Our below summary is based largely on the evidence of Paul Crooke, who was the "Senior HR Business Partner Regional Airlines" for Mount Cook until June 2020 — a role that included human resources responsibility.

[6] Prior to the 2011 collective agreement between Mount Cook and E tū, Mount Cook did not employ part-time cabin crew. Rather, its cabin crew comprised a mix of permanent full-time employees, casual employees and temporary employees (when required). Mount Cook and E tū began discussing introducing part-time crew roles in 2006.[3] In most cases, cabin crew are medium to long-term employees and predominantly female. As their personal and work lives progressed, a part-time option was seen as providing more flexible work options. It was suggested to Mount Cook that a part-time salaried role could fill the gap between a full-time role, which involved work on nine days over a fortnight, and the more ad hoc role of a casual cabin crew employee.

[7] By late 2010, Mount Cook had agreed in principle to the introduction of a part-time cabin crew role. E tū were insistent on a pro rata approach to the salaries of part-time cabin crew. This would ensure that a day of rostered work for a part-time

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1 *E Tū Inc v Mount Cook Airline Ltd* [2022] NZEmpC 48, (2022) 18 NZELR 814 [Employment Court decision] at [102].

2 *Mount Cook Airline Ltd v E Tū Inc* [2022] NZCA 211 at [3].

3 E tū was then known as the Engineering, Printing and Manufacturing Union or EPMU.

employee would have an equal value to a day of work for a full-time employee, the only difference being that there were not so many days worked by part-time employees. E tū's position was that remuneration by way of salary, rather than payment by the hour or the day, was important to its members, to ensure they would receive a stable income. It was ultimately agreed that part-time employees would work two-thirds of a full-time employee's working days (six rostered days instead of nine each fortnight) in exchange for two-thirds of the salary of a full-time employee on the same pay step.

[8] Since the introduction of part-time cabin crew roles in 2012, successive collective agreements between Mount Cook and E tū have provided for part-time cabin crew to be paid on this pro rata basis. The collective agreement at issue in this appeal is the 2019 Collective Agreement.

The legislative history of minimum wage regulation in New Zealand

[9] The first minimum wage legislation in New Zealand (albeit of limited scope) was the Industrial Conciliation and Arbitration Act 1894, which established a Board of Conciliation and Court of Arbitration to resolve industrial disputes.[4] Later, the Industrial Conciliation and Arbitration Amendment Act 1936 required the Court of Arbitration to make a general order "fixing a basic rate of wages" for both adult male and adult female workers employed in any industry to which an award or industrial agreement related.[5] Section 3(5) of that Act provided that the rate of wages for an adult male worker was to be "sufficient to enable a man in receipt thereof to maintain a wife and three children in a fair and reasonable standard of comfort".

[10] On 29 March 1938, New Zealand ratified the International Labour Organisation's Minimum Wage-Fixing Machinery Convention, 1928.[6] The Convention required New Zealand to create and maintain machinery enabling minimum rates of wages to be fixed for workers in sectors "in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and

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4 Industrial Conciliation and Arbitration Act 1894, ss 30, 47 and 52. See also s 2 definitions of "industrial dispute" and "industrial matters".

5 Industrial Conciliation and Arbitration Amendment Act 1936, s 3(1).

6 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).

wages are exceptionally low".[7] The accompanying recommendation, R030, recommended that:[8]

> For the purpose of determining the minimum rates of wages to be fixed, the wage-fixing body should in any case take account of the necessity of enabling the workers concerned to maintain a suitable standard of living.

[11] The Minimum Wage Act 1945 (the 1945 Act) gave effect to New Zealand's international obligations under this Convention.[9] It was the first piece of legislation to provide for a minimum wage covering all employees. The Acting Minister of Labour, during the second reading of the Minimum Wage Bill in 1945, commented that:[10]

> This measure does not leave out anyone; it covers all the people, whether they are covered by an agreement or not …
>
> This problem of giving workers a wage to allow them the necessities of life, and nothing more than that, has exercised the minds of all worthwhile statesman in every civilised country …
>
> This Bill provides for an ordinary standard-of-living wage. No wealth is provided for — indeed, one might even call it a bread wage.

[12] The 1945 Act provided that every worker of the age of 21 years and upwards was entitled to receive "payment for his work" at not less than the appropriate prescribed minimum rate.[11] Three different categories of "minimum rates of wages" were prescribed: for workers paid by the hour or by piecework; by the day; or by the week in all other cases (with different rates applying to male and female workers).[12] The 1945 Act did not specify the number of hours included within a standard "day" or "week," or require any additional payment for work exceeding such hours. The statutory minimum rates of wages increased with the Minimum Wage Amendment Act 1947 and three further amendments in 1949, 1950 and 1951.[13] Each amendment used the same three categories for "minimum rates of wages" as the 1945 Act.[14]

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7 Article 1(1).

8 International Labour Organisation Recommendation R030: Minimum Wage-Fixing Machinery Recommendation, 1928 (No. 30) (adopted 16 June 1928, published 11th ILC session, 1928), art 3.

9 *Sandhu v Gate Gourmet New Zealand Ltd* [2021] NZCA 591, (2021) 18 NZELR 889 at [9]. See also *Victoria Law and Ors v Board of Trustees of Woodford House* [2014] NZEmpC 25 at [61].

10 (7 December 1945) 272 NZPD 458–461.

11 Minimum Wage Act 1945, s 2(1).

12 Section 2(2) and (3).

13 Employment Court decision, above n 1, at [66].

14 At [66].

[13] From 1952 onwards, responsibility for prescribing minimum wage rates was transferred from Parliament to the Governor-General, by Order in Council, albeit with reference to the same three categories as previously.[15]

[14] The Act was enacted in 1983 but made no material changes to the 1945 Act. Rather, the next material change took place in 1990, when the Minimum Wage Order 1990 included a requirement for payment for additional hours of work over a specified number of hours.[16] The prescribed daily rate was set at eight times the specified hourly rate and the prescribed weekly rate was set at 40 times the hourly rate.[17] The explanatory note to that Order indicated that its general effect was that workers paid by the day were entitled to receive the hourly rate for each hour worked in excess of eight hours per day, and workers paid by the week were entitled to receive the hourly rate for each hour worked in excess of 40 hours per week.

[15] Not long afterwards, the Minimum Wage Amendment Act 1991 inserted a new section into the Act, providing, in effect, for a maximum 40-hour, five-day work week to be the norm for employment agreements.[18]

[16] The next significant development appears to have been prompted by the "sleepover cases", which addressed the entitlement of workers to be paid for sleepover shifts undertaken during the course of their employment.[19] The first case was *Idea Services v Dickson*.[20] The plaintiff in that case, Mr Dickson, was a community worker who worked with intellectually disabled persons. Mr Dickson worked a number of daytime hours, for which he was paid an agreed hourly rate of $17.66, as required by the relevant collective agreement. He was also rostered for a number of "sleepovers" at a residential care facility, for which he was paid $34 for each sleepover (an average of about $4.00 per hour) with an additional payment of $17.66 per hour for any time spent during the night actively tending to the needs of residents.[21]

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15 Minimum Wage Amendment Act 1952, s 2(2).
16 Minimum Wage Order 1990, cl 2(b) and (c).
17 Clause 2(b) and (c).
18 Minimum Wage Amendment Act 1991, s 10. Section 10 inserted s 11B into the Act.
19 Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Amendment to the Minimum Wage Order 2014* (29 May 2014) [MBIE statement] at [13].
20 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522 at [10].
21 At [2].

[17] On appeal, this Court upheld the Employment Court's finding that the sleepovers constituted "work" for the purposes of the Act.[22] Clause 4(a) of the relevant Minimum Wage Order (which mirrors cl 4(a) of the Order) therefore applied and Mr Dickson was entitled to be paid the minimum wage for each hour worked. At the time this was $12.50 per hour.

[18] The second issue on appeal was whether the Act was breached only if an hourly employee's *average* rate of pay over a pay period was less than the prescribed minimum hourly rate. In other words, could the fact that Idea Services had paid Mr Dickson significantly more than the minimum hourly wage for his daytime shifts be taken into account when assessing compliance with the Act by, in effect, crediting the amounts paid in excess of the minimum wage for some hours to the sleepover hours where he had been paid less than the minimum wage? The majority of the Employment Court rejected that such an "averaging" approach could be taken in respect of workers paid by the hour.[23] For every hour he worked, Mr Dickson was entitled to receive the minimum hourly wage, regardless of whether he received more than the minimum wage for other hours worked. This Court upheld that decision on appeal.[24]

[19] Subsequently, in *Victoria Law and Ors v Board of Trustees of Woodford House*, the Employment Court considered the minimum wage entitlements of live-in boarding house matrons who were salaried employees paid an annual salary, generally by way of fortnightly instalments.[25] They fell within the "all other cases" category of the relevant Minimum Wage Order (cl 4(c)) which prescribed a minimum rate of wages per week, with an additional payment at the hourly minimum rate for each hour worked in excess of 40 hours.[26] The defendants argued that compliance with the Act should be assessed over the course of the entire year. On that basis, given that the matrons performed minimal duties during the school holiday periods, it was likely that "on average" they would have received the specified minimum rate of wages per week

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22 At [10].
23 *Idea Services Ltd v Dickson* (2009) 7 NZELR 121 (EmpC).
24 *Idea Services Ltd v Dickson*, above n 20, at [53].
25 *Victoria Law and Ors v Board of Trustees of Woodford House*, above n 9, at [118].
26 At [71].

— in other words, if their total annual remuneration was divided by 52 weeks.[27] The Court rejected such an approach, finding instead that compliance had to be assessed across the weekly period specified in cl 4(c), and could not be averaged across an entire year.[28] The effect of the *Woodford House* decision was that one week was the longest permissible period of time across which compliance with the Act could be assessed for employees on a salary.

[20] Following the *Woodford House* decision, the then current Minimum Wage Order, the Minimum Wage Order 2014, was amended to include a new "in all other cases" category of a fortnight, to apply to all cases where a worker was not paid by the hour, the day or the week.[29] MBIE explained the rationale for adding a new category to the Minimum Wage Order 2014 as follows:

> 16 [The *Woodford House*] ruling does not give employers enough flexibility to determine the hours their salaried employees work. This is because, even if they work fewer hours in one week to make up for having worked more hours the week before, they must still be paid at least the minimum weekly rate for the week they work less.
>
> 17 As a result, it could impose additional costs on affected employers. These costs arise from:
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> a. the administrative burden of ensuring compliance when the hours their employees work may be variable from week to week may, and
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> b. being required, in certain situations, to pay their employees for more hours than they have actually worked.
>
> 18 In response to this, employers may move their employees into different working arrangements to avoid these extra costs, perhaps paying them an hourly wage instead of a salary. These different working arrangements may disadvantage employees. For example, receiving an hourly wage instead of a salary could mean an inconsistent pay packet (and low pay during periods of less work) making it more difficult to manage regular payments, and greater difficulty understanding and calculating entitlements to various kinds of leave (eg holidays, sick leave).

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27 At [216].

28 At [210] and [218].

29 MBIE statement, above n 19, at [50]. We record that counsel did not refer us to this part of the regulatory history. We did not seek submissions on this material because we would have answered the question of law in the same way had we not considered it.

[21] Of the four options considered by MBIE, amending the Minimum Wage Order 2014 to include a fortnightly minimum wage rate was seen as striking the best balance between the needs and interests of employers and employees.[30]

[22] The then Minister of Labour, Simon Bridges, stated in the announcement of the amendment to the Minimum Wage Order 2014:[31]

> By including a fortnightly minimum wage rate, employees will still be paid for every hour they work, and the expectation is that employers must continue to keep an accurate record of hours worked and wages paid. But employees will continue to benefit from the certainty and stability that a salary can offer.
>
> While some groups advocated for a monthly or longer pay period to be included, a fortnightly pay period balances the need for employers to have some flexibility in the hours their salaried employees work with the need for employees to be protected from being required to work long hours for long periods without appropriate remuneration.
>
> It also aligns with the most common pay period for employees who receive an annual salary …

Hence, since 2014, annual Minimum Wage Orders have included four categories of minimum adult rates of wages, rather than the previous three categories. Specifically, the "all other cases" category (as set out in cl 4(d) of the Order) is now a fortnightly rate rather than a weekly rate.

The statutory scheme

[23] The Act provides that the Governor-General may, by Order in Council, prescribe a minimum adult rate of wages payable to workers aged 16 years or older.[32] The Governor-General may also prescribe minimum rates of wages for starting-out workers and trainees.[33] This appeal, however, is solely concerned with adult workers

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30 At [51].

31 Simon Bridges "Fortnightly Minimum Wage Order made" (press release, 29 May 2014). As with the MBIE statement, above n 19, we record that counsel did not refer us to this statement. Again, we did not seek submissions on this material because we would have answered the question of law in the same way had we not considered it.

32 Minimum Wage Act 1983 [1983 Act], s 4(1)(a).

33 Sections 4A and 4B.

and we do not consider the position of starting-out workers and trainees further. In respect of adult workers:

(a) The minimum rate of wages must be prescribed as a monetary amount.[34]

(b) Each worker is entitled to "receive from his employer payment for his work at not less than that minimum rate".[35]

(c) The responsible Minister must, by 31 December each year, review the prescribed minimum adult rate.[36]

(d) Following that review, the Minister may make recommendations to the Governor-General regarding any adjustments that should be made to that minimum rate.[37]

(e) The Governor-General may then, by Order in Council, prescribe a new minimum rate.[38]

[24] Clause 4 of the Order provides that:

> **4 Minimum adult rates**
>
> The following rates are the minimum rates of wages payable to an adult worker:
>
> (a) for an adult worker paid by the hour or by piecework, $20 per hour:
>
> (b) for an adult worker paid by the day,—
>
> (i) $160 per day; and
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> (ii) $20 per hour for each hour exceeding 8 hours worked on a day:
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> (c) for an adult worker paid by the week,—

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34 Section 4(2).
35 Section 6(1).
36 Section 5(1). The Minister for Workplace Relations and Safety is currently the responsible Minister.
37 Section 5(2).
38 Section 4.

(i) $800 per week; and

(ii) $20 per hour for each hour exceeding 40 hours worked in a week:

(d) in all other cases,—

(i) $1,600 per fortnight; and

(ii) $20 per hour for each hour exceeding 80 hours worked in a fortnight.

[25] The explanatory note to the Order states:

> This order, which comes into force on 1 April 2021, revokes and replaces the Minimum Wage Order 2020.
>
> This order increases the minimum rates of pay for adult workers, starting-out workers, and trainees. The new minimum hourly rates of pay are as follows:
>
> - $20 per hour for adult workers (increased from $18.90 per hour); and
> - $16 per hour for starting-out workers and trainees (increased from $15.12 per hour).

[26] Clause 4(d) of the Order ("in all other cases") applies here, as cabin crew are paid by the fortnight.

The Employment Court decision

[27] The Employment Court interpreted cl 4(d) of the Order as requiring a minimum payment of $1,600 per week to part-time cabin crew, regardless of the number of days (or hours) actually worked during their fortnightly pay period.[39] The Court found the expression "rate" of pay to mean a fixed amount payable for a unit of time, with the relevant units of time being those set out in the Order:[40]

> [101] The language in cl 4 of the order is clear and does not suggest that what is payable can be a part or portion of those units of time. Such an outcome would dilute or undermine the effect of a minimum wage. The clause begins by saying that "the following rates are the minimum rates of wages" which unambiguously introduces cl 4(a)–(d). The words indicate that what follows is mandatory even if a rigid demarcation between each category was not intended.

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39 Employment Court decision, above n 1, at [101]–[102] and [113]–[114].

40 Footnote omitted.

> [102] Mr Thompson's submissions [for Mount Cook] required attributing a meaning to cl 4(d) so that it is a statutory fortnightly rate where the employee works at least 80 hours. For fewer hours, it followed on his analysis, the rate is proportionate to the actual work performed. So long as the rate is paid for each hour actually worked, compliance would be achieved. I am not persuaded that this approach is the correct way to interpret cl 4(d), as if it creates a unit of time of a fortnight. Clause 4(d) is introduced with the words "in all other cases" which indicates it applies in those situations where the employee is not employed by the hour, day, or week. It applies to other intervals of time and the way in which Mr Thompson approached the matter would deprive the clause of that broader meaning. It will also have consequences for cl 4(a)–(c) inclusive. If the only issue to assess is whether payment for each hour actually worked satisfied the minimum hourly rate, there would be no need to specify other rates for a day or a week. It would be sufficient if the order had stated that remuneration complied when converted to an hourly rate so long as it was more than a stipulated dollar amount.

[28] In the Court's view, it did not follow from the fact that the full-time salary complied with the Order that "it is appropriate merely to pro-rata that salary to arrive at the remuneration payable to a part-time employee".[41] Rather, "[t]he part-time salary must still comply with the [Order]".[42] Accordingly, employees in the "in all other cases" category, whether full-time or part-time, were entitled to a minimum fortnightly wage of $1,600, regardless of the number of hours actually worked.[43]

[29] The Court rejected Mount Cook's submission that this Court's decisions in *Hopper v Rex Amusements, Ltd*,[44] and *Sandhu v Gate Gourmet New Zealand Ltd*,[45] supported Mount Cook's position.[46]

[30] *Hopper* is considered in detail below at [37]–[42]. We will, however, briefly refer to one aspect of this Court's decision in *Sandhu* at this point. In *Sandhu*, certain employees were told by their employer not to come to work during COVID-19 lockdowns, as no work was available for them. The key issue was whether the employees' minimum wage entitlements were limited to the hours they had actually worked, or whether they were also entitled to the minimum wage for the hours they had contractually agreed to work, but had not worked because their employer

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41 At [113].
42 At [113].
43 At [114].
44 *Hopper v Rex Amusements, Ltd* [1949] NZLR 359 (CA).
45 *Sandhu v Gate Gourmet New Zealand Ltd*, above n 9.
46 Employment Court decision, above n 1, at [104] and [108].

had directed them not to come in to work.[47] The key finding of *Sandhu* was that "[t]he minimum wage is payable for the hours of work that a worker has agreed to perform, but does not perform" because of a direction by their employer.[48]

[31] It is therefore not in dispute in this appeal that part-time cabin crew are entitled to be paid for the hours they have agreed to work and are available to work, even if they are called on to work for fewer hours than that. For ease of reference, however, we will use the phrase "hours actually worked" as shorthand for the hours actually worked or the hours an employee has agreed to work (whichever is greater), unless the context requires otherwise.

Submissions

[32] There are two competing interpretations of cl 4(d) of the Order:

(a) The "minimum rate of wages" of $1,600 per fortnight is a fixed minimum sum that all employees who are not paid by the hour, day, or week, whether they are full-time or part-time, must be paid for each fortnight that they work, regardless of how many hours they actually worked during the relevant fortnight. This is the Employment Court's interpretation, which is supported by E tū on appeal.

(b) The "minimum rate of wages" of $1,600 per fortnight is a *rate* of wages, rather than a fixed amount. The rate is based on a standard full-time working week of 40 hours, or 80 hours per fortnight. Because it is a rate of payment, rather than a fixed sum, it must be prorated to reflect the actual hours worked by a part-time employee relative to a full-time employee. We will refer to this as the "pro rata" interpretation. It is advanced by Mount Cook on appeal.

[33] Mr Miles KC, counsel for Mount Cook, submitted that the Employment Court erred in holding that cl 4(d) of the Order requires Mount Cook to pay all part-time salaried cabin crew a minimum of $1,600 per fortnight rather than the pro rata amount

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47 *Sandhu v Gate Gourmet New Zealand Ltd*, above n 9, at [1].
48 At [54].

set out in the 2019 Collective Agreement. He submitted that the scheme of the Order is clearly based on an hourly rate, an eight-hour day, a 40-hour full-time week and an 80-hour full-time fortnight, with a requirement to pay the minimum hourly rate for any hours in excess of those amounts. The goal of minimum wage legislation is, in essence, to ensure that an employee receives at least the minimum hourly wage for all of the time they have actually worked. The pro rata interpretation, he argued, meets this objective. Minimum wage legislation was not intended to provide a windfall for part-time employees, relative to their full-time counterparts. Mr Miles further submitted that this Court's decisions in *Hopper*, *Idea Services*, and *Sandhu*, support the pro rata interpretation.

[34] Mr Cranney, counsel for E tū, supported the Employment Court's reasoning and conclusion. He submitted that the wording of cl 4 of the Order is unambiguous. Payment of the minimum amount of wages set out in cl 4(d) of the Order is mandatory. The pro rata interpretation, he submitted, dismantles cl 4 into a single "paid by the hour" category. Mr Cranney did not accept that the Order bases its scheme on an hourly rate, an eight-hour day and a 40-hour week. Rather, the requirement to pay for hours worked in excess of eight per day (cl 4(b)) or 40 per week (cl 4(c)) are simply the trigger points for an hourly overtime entitlement. They have nothing to do with daily or weekly rate and do not affect or limit it. The full amounts set out in the Order must be paid, without deduction. A pro rata approach, Mr Cranney submitted, would remove the distinction between the four categories in cl 4 (hourly/daily/weekly/all other cases) and render sub-cls (b), (c) and (d) surplus and of no effect.

What is the correct interpretation of cl 4(d) of the Order?

Relevant principles of interpretation

[35] The meaning of an enactment must be ascertained from its text and in the light of its purpose.[49] As the Supreme Court observed in *Commerce Commission v Fonterra Co-operative Group Ltd*:[50]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 [the predecessor to the Legislation Act 2019, s 10] makes text and purpose the

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49 Legislation Act 2019, s 10.

50 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR

> 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.

[36] The Order is secondary legislation, made pursuant to s 4 of the Act. When interpreting secondary legislation, the enabling Act will form a crucial part of the legislative context in which the words of the secondary legislation must be construed.[51] For example, courts will assume that the legislative purpose underlying delegated legislation is consistent with that of the enabling Act.[52]

The Hopper decision

[37] In *Hopper*, a full bench of this Court considered the correct interpretation of the predecessor provision to cl 4(d) of the Order.[53] The provision before the Court was s 2(2) of the 1945 Act, which stated that:

> (2) For male workers the minimum rates of wages shall be the following:—
>
> > (a) If paid by the hour or by piecework, two shillings and ninepence an hour or an amount equivalent thereto having regard to the rate of production of the worker:
> >
> > (b) If paid by the day, one pound two shillings a day:
> >
> > (c) In all other cases, five pounds five shillings a week.

[38] The wages paid to Mr Hopper, a "performance worker" who sold tickets at a movie theatre, complied with the relevant award. Mr Hopper claimed, however, that his wages did not meet the minimum wage requirements of s 2(2) of the 1945 Act.

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767 (footnotes omitted).

51 Diggory Bailey and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, London, 2020) at 128.

52 At 128.

53 *Hopper v Rex Amusements, Ltd*, above n 44.

The Court considered two questions of law, by way of case stated from the Arbitration Court:[54]

(a) whether Mr Hopper's employment fell within the provisions of s 2(2)(a), (b) or (c) of the 1945 Act; and

(b) if Mr Hopper's employment fell within s 2(2)(c), whether he was:

> … entitled to be paid the full amount of £5 5s. for each week in the period covered by the claim … or would the requirements of the Act have been met by the payment of any proportion of the amount of £5 5s. for each week of the period aforesaid; and, if so, what proportion?

[39] On the first question, the Court found that Mr Hopper was paid by the hour and therefore came within s 2(2)(a) of the 1945 Act.[55] The Court then went on to consider the second question (which is essentially the same as the interpretation issue raised by this appeal). The Court stated that even if Mr Hopper were treated as falling within the "all other cases" category in s 2(2)(c) "we do not think that this claim could succeed".[56] The Court set out its reasons for this conclusion as follows:[57]

> What the Act prescribes are minimum *rates* of pay. For the hourly worker, an hourly rate is prescribed, which means that, if he works only half an hour, then he gets half the hourly rate, and is properly described as being paid at that rate per hour. …
>
> The same principle must surely apply in considering a weekly rate. If there is a weekly rate of £5 5s., a man who works a week and a half would be entitled to only £7 17s. 6d. Similarly, if his contract was to work for half a week, his proper remuneration would be £2 12s. 6d. …
>
> … [B]y the award under which [the employee] works the weekly hours of work … shall not exceed thirty-six. It seems reasonable, therefore, that a weekly rate of wages for him should be considered as for a week of thirty-six hours, and for the purposes of the Minimum Wage Act, 1945, he is to be regarded as entitled to recover as a minimum a proportion of the weekly rate calculated according to the number of hours per week he works — that is, in this case, 21/36ths of £5 5s. a week. What he has actually been paid exceeds that amount, and, consequently, he cannot claim any more.

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54 At 368.
55 At 368.
56 At 368.
57 At 368–369 (emphasis in original).

[40] The *Hopper* decision therefore found firmly in favour of a pro rata interpretation. The Court rejected the alternative interpretation, namely "that every person who comes under para. (c) is entitled to be paid £5 5s. in respect of each period, however short, that he works in any calendar week", stating that "[w]e cannot think that such a result was intended by Parliament, and a Court would only accept it if there were no other construction possible".[58]

[41] Although the *Hopper* decision was obiter on the interpretation issue, in the absence of any conflict with another appellate decision, a decision of a full bench of this Court on the precise issue raised in a later appeal will, of course, usually be highly persuasive. The Employment Court, however, was of the view that *Hopper* conflicted with this Court's more recent decision in *Idea Services*, and also had other concerns about aspects of the Court's reasoning.

[42] Before turning to consider the parties' submissions on the correct interpretation of cl 4(d) of the Order, we make two further observations regarding the *Hopper* decision:

(a) First, we note that if Parliament had concerns regarding the *Hopper* interpretation it could have amended the Act to clarify the position. However, although a number of amendments have been made to minimum wage legislation over the last 70 years or so (as summarised above), the statutory wording that was before the Court in *Hopper* was carried over, unchanged in key respects, from the 1945 Act to the current Act and then, from the 1952 Amendment Act onwards into annual Minimum Wage Orders.

(b) Second, we note that the *Hopper* pro rata interpretation does not appear to have given rise to any difficulties in practice. On the contrary, the collective agreements for part-time workers that are before us in evidence — collective agreements for nurses, primary school teachers and secondary school teachers — are all structured in accordance with the pro rata approach set out in *Hopper*. We have not been provided

[58] At 369.

with copies of any collective agreements that take the alternative approach supported by E tū in this appeal.

The plain meaning of cl 4 of the Order

[43] Although the competing interpretations advanced by the parties are both potentially open, it is our view that the pro rata interpretation accords more closely with the plain meaning of the clause than the Employment Court's interpretation.

[44] Clause 4 opens with the statement: "[t]he following *rates* are the minimum *rates* of wages payable to an adult worker".[59] Clause 4 then prescribes specific rates:

(a) "per hour" for an adult worker paid by the hour or by piecework;

(b) "per day" for an adult worker paid by the day;

(c) "per week" for an adult worker paid by the week; and

(d) "per fortnight" in all other cases.

[45] The key issue is determining what the word "rate" means in this context. The Oxford online dictionary relevantly defines "rate" as:[60]

> The relationship by which the amount or number of one thing corresponds proportionally to the amount or number of another, typically stated as a particular numerical amount per unit (esp. a unit of time).

[46] In our view, this definition accords with the commonly understood meaning of the word "rate". Hence, a typist with a typing rate of 80 words per minute would be expected to type 40 words in 30 seconds; 80 words in a minute; or 800 words in 10 minutes. Similarly, a heart rate of 60 beats per minute would equate to one beat per second or 3,600 beats per hour. The word "rate" therefore envisages a proportional relationship between two things, with one of those things often being a unit of time, as in this case.

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59 Emphasis added.

60 *Oxford English Dictionary* (online ed, Oxford University Press), definition of "rate".

[47] On this approach, payment for work at the "rate" of $20 per hour would equate to $10 per half hour; $40 for two hours; and $50 for two and a half hours. Similarly, a "per day" payment rate would need to be doubled for a person that worked two days and halved for a person who worked half a day. This pro rata approach accords with the *Hopper* interpretation.

[48] This gives rise to the question, however, of precisely what is meant by the terms "per day", "per week" or "per fortnight" in the context of the Order? What precise units of time are the specified "rates" are linked to? It is apparent from the wording of the Order that the unit of time that is intended to equate to a "day" for the purposes of the Order is not 24 hours, but eight hours, worked over the course of a one-day (24 hour) period. This is apparent from:

(a) the fact that the daily rate is stated as $160, which equates to eight times the hourly rate of $20 per hour; and

(b) the requirement that a worker be paid at least the minimum hourly rate, in addition to the daily rate, for each hour worked in excess of eight hours per day.

[49] Similarly, the minimum weekly wage rate is set at $800 per week (40 hours x $20) plus $20 per hour for each hour exceeding 40 hours worked in a week; and the minimum fortnightly rate is $1,600 per fortnight (80 hours x $20) plus $20 per hour for each additional hour. Clearly, like the daily rate, the weekly and fortnightly minimum wage rates are also mathematically derived from the minimum hourly wage rate of $20 per hour. Hence, as this Court observed in *Idea Services* (at which time the minimum hourly rate was $12.50):[61]

> The essential feature of each of the categories seems to be that workers, no matter how they are paid, must receive $12.50 for each hour worked. The drafter of the order has assumed, for instance, that a worker "paid by the day" will be working at least eight hours a day, for which he or she will receive $12.50 an hour. So too the drafter has assumed that those in category (c) will be working at least a 40-hour week, in respect of which the worker must receive $12.50 an hour.

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61 *Idea Services Ltd v Dickson*, above n 20, at [31].

[50] The base unit of time of a "week" in the Order therefore equates to a 40-hour working week (the default full time working week specified in s 11B of the Act) and the base unit of time of a "fortnight" in the Order equates to 80 hours worked over a fortnight.

[51] The difficulty with the Employment Court's interpretation, in our view, is that it effectively interprets the word "rate" as being a fixed sum or amount. As explained above, however, a "rate" is not a fixed amount, but a way of expressing a proportional relationship between two things.

[52] Accordingly, in our view, the plain meaning interpretation of cl 4(d) is that the minimum wage rate of $1,600 per fortnight must be paid to a person who works a full fortnight (a unit of time which the Order envisages as being 80 hours worked over a two-week period). The minimum wage entitlement of a part-time worker who works only part of a full fortnight (for example, 40 hours over two weeks) will be proportionate to the entitlement of a full-time worker.

Statutory context

[53] In our view this interpretation is further supported by the statutory context (summarised at [23]–[25] above), which suggests the Act envisages that a *single* minimum rate of wages will be prescribed for adult workers, not several different rates of wages. For example, the Governor General may prescribe "*a* minimum adult rate of wages" and annual adjustments may be made to "*that* minimum rate".[62] As noted above, the Order must be interpreted consistently with this statutory context. Further:[63]

> Where an enabling provision is in the nature of a power to fill in the details or supplement a legislative scheme set out in the parent Act, delegated legislation made under it cannot without clear authority extend the scope or general operation of that Act.

Considered in isolation, this aspect of the statutory context would carry only limited weight, given that s 19 of the Legislation Act 2019 provides that words in the singular

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62 1983 Act, ss 4(1) and 5(2) (emphasis added).

63 *Bennion, Bailey and Norbury on Statutory Interpretation*, above n 51, at 129.

include the plural. Here, however, the practice appears to accord with the (singular) statutory wording, with the prescribed minimum rate of wages for adult workers being prescribed as an hourly rate, as set out in the Explanatory Note to the Order.

[54] The four "categories" set out in the Order are, in essence, different ways of expressing this prescribed minimum hourly wage rate across different time periods: $20 per hour; $160 per 8-hour day; $800 per 40-hour week; or $1,600 per 80-hour fortnight. The underlying aim, however, as this Court observed in *Idea Services*, is to ensure that workers receive at least the minimum wage for each hour worked.[64] The different time periods in cl 4 of the Order simply provide a framework for assessing compliance with that requirement. The first three categories are linked to how a worker is paid (by the hour, by the day, or by the week) with the minimum fortnightly payment applying in all other cases (for example, workers who are paid by the fortnight or the month). This dovetails with the requirement in the Employment Relations Act 2000 to keep records of the hours worked by an employee during each pay period, the wages paid to the employee for that pay period, and the method of calculation.[65] Linking the categories with how workers are paid enables employers, or Labour Inspectors, to readily assess whether minimum wage entitlements have been met across a pay period (up to a maximum period of a fortnight).[66]

[55] Section 6(1) of the Act reinforces the need for a link between minimum pay entitlements and the hours actually worked by employees, which relevantly provides that "every worker … shall be entitled to receive from his employer *payment for his work* at not less than that minimum rate".[67]

[56] Mr Cranney submitted that if the statutory intent were simply to ensure that workers received at least the minimum hourly wage for each hour they worked, this would render the other three categories in the Order surplus.[68] We do not accept that

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64 *Idea Services Ltd v Dickson*, above n 20, at [31].
65 Employment Relations Act 2000, s 130.
66 Section 223A provides that the role of Labour Inspectors includes monitoring and enforcing compliance with employment standards, including those set out in the Act.
67 Emphasis added.
68 We note that the Employment Court expressed a similar concern. See Employment Court decision, above n 1, at [102].

submission. The different categories specified in the Order have a clear role to play, by providing a framework for assessing compliance with minimum wage entitlements.

[57] Compliance with the requirement to pay (at least) the minimum hourly wage cannot be assessed in a vacuum. Assessing compliance in respect of workers paid by the hour is likely to be relatively straightforward. Salaried workers, however, are not paid by the hour, or even by the day. They are paid an agreed annual sum by way of fixed regular instalments (usually weekly, fortnightly or monthly). The number of hours worked by a salaried employee may not be consistent across these pay periods. Their hours may vary from day to day, week to week, or month to month. This is normal, and even required in some cases, for example with seasonal work such as farming. Similarly, shift workers may be called upon to work a different number of hours each week.

[58] To enable an employer or Labour Inspector to ensure that salaried employees have been paid at least the minimum hourly wage for all the hours they have worked, a period across which compliance is to be assessed must be specified. To give an example, if compliance with the requirement to pay a minimum wage of $20 per hour was assessed across the entire year to which an annual salary relates — an approach rejected in both *Idea Services* and *Woodford House*[69] — compliance would be achieved if the employee worked 80 hours per week for the first six months and then did not work at all for the second six months. Such an approach, however, would require the employee to work extremely long hours for an extended period without appropriate remuneration at the time their work is performed. If compliance was assessed on a weekly basis, however, the 26 weeks when no work was undertaken (but weekly salary payments were still made) would be compliant, but the other 26 weeks would not, as the employee would have been paid only $10 per hour for each hour worked during the 80-hour work weeks. The period across which compliance is assessed can therefore make a very real difference.

[59] The time periods specified in the Order therefore provide a framework for assessing compliance with minimum wage requirements that is broadly linked to an

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69 *Idea Services Ltd v Dickson*, above n 20, at [33]; and *Victoria Law and Ors v Board of Trustees of Woodford House*, above n 9, at [217]–[218].

employee's pay period, up to a maximum period of a fortnight. This balances the interests of employers in having a degree of flexibility when allocating work to employees, with the interests of such employees in being protected from unduly onerous work requirements.

Statutory purpose

[60] As is apparent from the legislative history set out above, one purpose of minimum wage legislation is to alleviate poverty by assisting workers and their families to maintain an adequate standard of living. However, that is not the sole purpose. In *Faitala v Terranova Homes & Care Ltd* a Full Court of the Employment Court described the Act as:[70]

> … 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. …

[61] This Court endorsed that description of the Act on appeal,[71] and more recently made similar observations in *Sandhu*.[72] Although the Act covers all workers, in practical terms the protection it offers will impact most strongly on low paid workers. Many of these, including recent immigrants, workers with low skills or qualifications, and those who do not have the benefit of collective bargaining arrangements, are likely to be particularly vulnerable to exploitation.

[62] In our view, the pro rata interpretation of cl 4(d) is more consistent with this statutory purpose than the Employment Court's interpretation. On the pro rata interpretation, all salaried cabin crew employees will receive at least the minimum hourly rate for each hour worked. Part-time cabin crew will receive a salary that is directly proportional to their full-time colleagues. Such an approach does not involve any exploitation or unfair treatment of part-time employees.

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70 *Faitala v Terranova Homes & Care Ltd* [2012] NZEmpC 199, [2012] ERNZ 614 at [39].
71 *Terranova Homes and Care Ltd v Faitala* [2013] NZCA 435, [2013] ERNZ 347 at [28].
72 *Sandhu v Gate Gourmet New Zealand Ltd*, above n 9, at [10].

[63] On the Employment Court's interpretation, however, part-time employees would be paid much more, for hours actually worked, than their full-time colleagues. For example, a part-time employee paid weekly, who contracted to work 20 per cent of the hours of a full-time worker on minimum wage, in exchange for 20 per cent of the salary, would have to be paid the same salary each week as the full-time employee in order to comply with the Act. Calculated on an hourly basis, the part-time employee would receive five times as much for each hour worked as the full-time employee. Similarly, a part-time employee who agreed to work two days a week and was paid $40,000 per annum by way of fortnightly instalments (based on a pro rata share of a full-time salary of $100,000) would be paid below the minimum wage.[73]

[64] These types of outcomes, in our view, are not consistent with the statutory purpose. Requiring employers to pay fixed amounts to part-time employees, regardless of how many hours they have actually worked, could distort the relativity between part-time employees and full-time employees, potentially discouraging employers from offering part-time salaried roles. A reduction in the availability of part-time salaried roles would be to the detriment of employees who seek a degree of flexibility in their employment arrangements, combined with the regular income that a salary provides. This could disadvantage employees who need to take on second jobs, students, those returning to the workforce, and those with childcare commitments.

Previous case law

[65] The Employment Court was of the view that this Court's decision in *Idea Services* conflicts with *Hopper* because "[i]n [*Idea Services*], the Court of Appeal held that rate of pay means an amount for a unit of time and did not mention [*Hopper*]".[74] As we have explained at [45]–[46] above, while the phrase "rate of pay" is linked to specific units of time, this supports rather than undermines the pro rata interpretation, because the term "rate" indicates a proportional relationship between two things, rather than a fixed amount.

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73 $40,000 per annum equates to approximately $1,538 per fortnight, which is below the minimum fortnightly rate of $1,600 provided by cl 4(d) of the Order.

74 Employment Court decision, above n 1, at [107].

[66] *Idea Services* concerned an hourly worker, so is not analogous to the present case, which concerns part-time workers who are paid on a fortnightly basis. Nevertheless, the Court made an obiter observation that if Mr Dickson had fallen in the "all other cases" category (which at that time was a weekly category) it was arguable that his entitlement would "be *tested* neither by the hour … nor by the fortnight … but rather, effectively by the week".[75] This accords with our interpretation of cl 4(d). Further, this Court's statement in *Idea Services* (as set out in in the quote at [49] above) that the scheme of the Order is that workers, no matter how they are paid, must receive at least the minimum wage for each hour they work, clearly supports the pro rata interpretation.[76]

[67] We found the other cases referred to by counsel to be of limited assistance. In *Karelrybflot AO v Udovenko*, a full bench of this Court considered a case concerning the application of the Act to sailors.[77] The Court observed that under the relevant Minimum Wage Order both an hourly worker and a daily worker had to be paid the minimum rate only for time actually worked.[78] The Court went on to assess working hours for the sailors to calculate the minimum payments owed. That decision therefore favours the pro rata interpretation, but carries limited weight given the very different factual context and the fact that there was no challenge to the correctness of the *Hopper* decision and the Court was not therefore required to engage in a detailed analysis of the issue.

[68] The Employment Court considered that this Court's decision in *Sandhu* broadly supported E tū's position.[79] We disagree. The facts of *Sandhu* (briefly summarised at [30]–[31] above) were very different to this case. We note, however, that in the course of its analysis the Court commented that an:[80]

> employee can agree with their employer to take leave without pay, or to reduce the agreed hours to be worked. … If an agreement is reached to reduce working hours, the Act applies only to the reduced hours of work.

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75 *Idea Services Ltd v Dickson*, above n 20, at [28] (emphasis added).
76 At [31].
77 *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 (CA) at [50].
78 At [50], citing *Hopper v Rex Amusements, Ltd*, above n 44, at 368–369.
79 Employment Court decision, above n 1, at [108]–[109].
80 *Sandhu v Gate Gourmet New Zealand Ltd*, above n 9, at [51].

[69] This obiter observation appears to be broadly consistent with the pro rata interpretation.

Conclusion

[70] For the reasons outlined above, it is our view that the pro rata interpretation of s 2(2) of the 1945 Act taken by a full bench of this Court in *Hopper* is correct and applies equally to cl 4 (d) of the Order. The pro rata interpretation accords with the plain meaning of cl 4 (d) including the word "rate", which envisages a proportional relationship between two things. The pro rata interpretation is further supported by the statutory context (as set out at [53]–[59] above) and the statutory purpose (as set out at [60]–[64] above). Previous appellate case law, while not directly on point (with the exception of *Hopper*) also broadly supports the pro rata interpretation. Finally, the legislative history is also relevant, to the extent that it assists in identifying the statutory purpose and also casts light on the rationale for including a fourth category to Minimum Wage Orders from 2014 onwards (as now reflected in cl 4(d) of the Order). As stated in footnotes 29 and 31 above, however, we would have reached the same conclusion regarding the correct interpretation of cl 4(d) even without reference to any background material regarding the 2014 amendment. The reason for that is that the other matters we have referred to above overwhelmingly support the conclusion that the pro rata interpretation is correct.

[71] In conclusion, the question of law before us is:

> Was the Employment Court correct in its interpretation of cl 4(d) of the Minimum Wage Order 2021 as it applies to part-time salaried employees?

[72] The answer to that question is "no". The Employment Court erred in its interpretation of cl 4(d) of the Order as it applies to part-time salaried employees. The amount set out in cl 4(d) of the Order is a *rate* of payment per fortnight, based on a full-time worker who works 80 hours over a two-week period. The minimum wages entitlement of a part-time salaried employees must be prorated. Specifically, the entitlement of a part-time salaried employee will be x/80 multiplied by the relevant

sum specified in cl 4(d) of the Order, where x equals the number of hours of work the employee has either:

(a) performed during the relevant fortnight; or

(b) agreed to perform, but did not perform due to a direction by their employer,

whichever is greater. [81]

Result

[73] The appeal is allowed.

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

> Was the Employment Court correct in its interpretation of cl 4(d) of the Minimum Wage Order 2021 as it applies to part-time salaried employees?
>
> No. The Employment Court erred in its interpretation of cl 4(d) of the Minimum Wage Order 2021 as it applies to part-time salaried employees. The correct interpretation of the clause is set out at [72] of this judgment.

[75] Any order as to costs that has been made in the Employment Court is set aside. Costs in the Employment Court are to be determined by that Court in light of this judgment.

[76] The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

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[81] The wording in (a) and (b) reflects this Court's decision in *Sandhu v Gate Gourmet New Zealand Ltd*, above n 9, as summarised at [30]–[31] above.