

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2022] NZEmpC 75
EMPC 303/2021**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN TRANZURBAN HUTT VALLEY
LIMITED
Plaintiff

AND NEW ZEALAND TRAMWAYS & PUBLIC
PASSENGER TRANSPORT EMPLOYEES
UNION WELLINGTON INC
Defendant

Hearing: 1 and 2 March 2022
(Heard at Wellington)

Appearances: D Vincent, counsel for plaintiff
P Cranney, counsel for defendant

Judgment: 9 May 2022

JUDGMENT OF JUDGE B A CORKILL

Introduction

The issue

[1] The issue in this case involves the provision of rest and meal breaks for bus drivers when working split shifts – that is, where an employee undertakes a phase of work for a period, then there is an interval of time where no work duties are required, which is then followed by another phase of work. The question is whether, under the applicable legislation relating to authorised breaks, time continues to run for the purposes of calculating such breaks.

[2] The proceeding had its origins in a relationship problem brought by the New Zealand Tramways and Public Passenger Transport Employees Union Wellington Inc (the Union) against Tranzurban Hutt Valley Ltd (Tranzurban) alleging that Tranzurban was not providing rest and meal breaks that complied with the legislation.

[3] Tranzurban operates buses used for public transport throughout the Hutt Valley area. The Union represents members that are employed to drive for Tranzurban.

[4] Part 6D of the Employment Relations Act 2000 (the Act) sets out a regime for the taking of 10-minute paid rest breaks and 30-minute unpaid meal breaks during work periods. The number of those breaks is determined in accordance with the hours worked by the employee in any such period.

[5] The legal issue turns on what Parliament intended when it introduced the concept of “work period” in the Act.¹

[6] The Employment Relations Authority concluded that “the term *work period* covers all time between an employee’s initial commencement and final cessation on any given day”.²

[7] Tranzurban now seeks a judgment by way of a *de novo* challenge asserting that the Authority erred. It argues that it is a question of fact as to whether distinct shifts worked on the same day are to be treated as separate “work periods”, or one “work period”, for the purposes of determining rest and meal breaks.

[8] The Union opposes the challenge on the basis that the Authority reached a correct conclusion in law.

¹ Employment Relations Act 2000, s 69ZC.

² *New Zealand Tramways and Public Passenger Transport Employees Union v Tranzurban Hutt Valley Ltd* [2021] NZERA 342 at [32] (Member Loftus).

Background

Facts

[9] On 5 December 2018, Parliament enacted the Employment Relations Amendment Act 2018, which replaced earlier provisions relating to the taking of rest and meal breaks.

[10] Briefly, such provisions were originally introduced in 2009.³ In 2015, Parliament considered that the original provisions were too prescriptive; consequently, a more flexible version of rest and meal break provisions were introduced.⁴

[11] Then, a later Parliament determined it would be appropriate to revert to a more prescriptive set of provisions. It is these which fall for consideration in the present case. The amendments were enacted on 5 December 2018 and came into force on 6 May 2019.

The current rest and meal break provisions

[12] The relevant provisions are:

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 at which, in accordance with an employee's terms and conditions of employment, an employee starts work; and
 - (ii) ending with the time at which, in accordance with an employee's terms and conditions of employment, an employee finishes work; and
- (b) 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).

³ Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008, ss 2(2) and 6.

⁴ Employment Relations Amendment Act 2014, ss 2 and 49.

69ZD Employee's entitlement to, and employer's duty to provide, rest breaks and meal breaks

Entitlement and duty

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

Work period between 2 hours and 4 hours

- (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.

Work period between 4 hours and 6 hours

- (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.

Work period between 6 hours and 8 hours

- (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.

Work period over 8 hours

- (5) If an employee's work period is more than 8 hours, the employee is entitled to the rest breaks and meal breaks in accordance with subsections (6) and (7).
- (6) During the work period of 8 hours, the employee is entitled to—
- (a) two 10-minute paid rest breaks; and
 - (b) one 30-minute meal break.
- (7) During the work period beyond 8 hours (the **subsequent period**), the employee is entitled to the following:
- (a) if the subsequent period is 2 hours or more but not more than 4 hours, to one 10-minute paid rest break:
 - (b) if the subsequent period is more than 4 hours but not more than 6 hours, to—
 - (i) one 10-minute paid rest break; and
 - (ii) one 30-minute meal break:
 - (c) if the subsequent period is more than 6 hours but not more than 8 hours, to—
 - (i) two 10-minute paid rest breaks; and
 - (ii) one 30-minute meal break.

69ZE Timing of rest breaks and meal breaks

Timing of breaks as agreed

- (1) If an employee and employer have agreed on the times at which the employee is to take rest breaks and meal breaks during the employee's work period, the rest breaks and meal breaks are to be taken at those times.

Timing of breaks in absence of agreement

- (2) In the absence of an agreement, the rest breaks and meal breaks are to be taken in accordance with the applicable provision in subsections (3) to (7).

Work period between 2 hours and 4 hours

- (3) If 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.

Work period between 4 hours and 6 hours

- (4) If 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.

Work period between 6 hours and 8 hours

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

- (a) a rest break halfway between the start of work and the meal break; and
- (b) the meal break in the middle of the work period; and
- (c) a rest break halfway between the meal break and the finish of the work period.

Work period over 8 hours

- (6) If section 69ZD(5) and (6) apply, an employer must, so far as is reasonable and practicable, provide the employee with—

- (a) a rest break halfway between the start of work and the meal break; and
- (b) the meal break in the middle of the work period; and
- (c) a rest break halfway between the meal break and the finish of the work period.

- (7) If section 69ZD(5) and (7) apply, an employer must, so far as is reasonable and practicable, provide the employee with the breaks as follows:

- (a) if the subsequent period is 2 hours or more but not more than 4 hours, the rest break in the middle of the subsequent period;
- (b) if the subsequent period is more than 4 hours but not more than 6 hours,—
 - (i) the rest break one-third of the way through the subsequent period; and
 - (ii) the meal break two-thirds of the way through the subsequent period:

- (c) if the subsequent period is more than 6 hours but not more than 8 hours,—
 - (i) a rest break halfway between the start of the subsequent period and the meal break; and
 - (ii) the meal break in the middle of the subsequent period; and
 - (iii) a rest break halfway between the meal break and the finish of the subsequent period.

...

69ZG Relationship between Part and employment agreements

- (1) This Part does not prevent an employer from providing an employee with enhanced or additional entitlements to rest breaks and meal breaks (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.
- (2) An employment agreement that excludes, restricts, or reduces an employee's entitlements under section 69ZD or 69ZE or fails to comply with section 69ZEA or 69ZEB—
 - (a) has no effect to the extent that it does so; but
 - (b) is not an illegal contract under subpart 5 of Part 2 of the Contract and Commercial Law Act 2017.
- (3) [*Repealed*]

The introduction of the rest and meal break provisions in 2019

[13] Tranzurban drivers are required to work what the company describes as “split shifts” as part of its operation. These shifts require a driver to work for a defined period in the morning, cease work for a period of between two and four hours, then return to work later that day for a further period of work.

[14] Prior to the amended provisions coming into force, a Memorandum of Understanding (the MOU) was entered into between a number of parties including Tranzurban, the Union, the Council of Trade Unions, the Minister of Transport, the Minister of Workplace Relations and Safety and representatives of the Wellington Regional Council. The aim was:⁵

... to achieve the smoothest possible transition to the implementation of the amended rest and meal break provisions of the Employment Relations Act 2000. This will ensure bus drivers receive the rest and meal breaks they are entitled to while minimising service disruption and safety risks, and costs to councils, bus operators and the Government.

⁵ Memorandum of Understanding: Rest and meal breaks for bus drivers, 28 April 2019, cl 5.

[15] The parties agreed there would be a 12-month transitional period from 6 May 2019 to 6 May 2020, so as to provide an opportunity for implementing the new legal requirements, and to allow a degree of flexibility concerning the scheduling of breaks.

[16] For the purposes of the transitional period, an Order in Council was introduced in April 2019 to cover the 12-month period, named the “Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019” (the Rule). The objective of the Rule was to provide short term measures to enable operators of scheduled passenger services to schedule the timing of 10-minute rest and meal breaks efficiently and safely, while minimising disruption to services.⁶

[17] The parties to the MOU agreed to a set of principles for buses being operated in the greater Wellington area. These were expressed as follows:⁷

Breaks will be scheduled according to the following principles:

- (a) Wherever possible not in the first or last hour of a work period.
- (b) During peak travelling times within 90 minutes of the prescribed times in the [Act] and outside of peak times within 60 minutes of the prescribed times in the [Act], as far as is reasonable and practical.
- (c) At the end of a trip or prior to a trip starting, with a full 10 minutes allocated, in addition to any repositioning or recovery time already scheduled.

[18] The parties were, however, unable to agree how the statutory definitions should apply to split shifts, which resulted in the employment relationship problem being raised. When evidence and submissions were prepared for the Authority’s investigation, the Rule was still in force. Thus, the issue before it related to the meaning of “work period” in the context of the Rule. That said, the definition of that term in the Rule mirrored the definition given in s 69ZC of the Act.

⁶ Land Transport Rule: Work Time in Large Passenger Service Vehicles 2019, cl 3.

⁷ *New Zealand Tramways and Public Passenger Transport Employees Union v Tranzurban Hutt Valley Ltd*, above n 2, at [9].

Evidence

[19] Tranzurban called two witnesses. The first was Ms Renee Snelgrove, Human Resources and Legal Director for the Tranzit Group, of which Tranzurban is a part. She is responsible for incorporating the required rest and meal breaks into bus drivers' shifts. After describing the background to which I have already referred, she referred to the collective employment agreement (CEA) which currently applies.

[20] It is appropriate to cite two clauses from that CEA:⁸

8. DAYS AND HOURS OF WORK

Roster

A plan outlining the employee's shifts to be worked, including days and hours of work and rostered days off.

Shift

A workplan for the day detailing duties to be completed. An employee may be allocated multiple shifts during a workday. A shift may include multiple work periods.

8.1 This agreement acknowledges the requirements of a scheduled and semi scheduled bus driving operation and that the roster will be set over seven days per week with the starting and finishing times being determined by the company in accordance with operational requirements

...

11. MEAL BREAKS AND REST PERIOD

11.1 Rest and meal breaks will be scheduled in accordance with the employee's entitlement within relevant legislation. The employee agrees to take their rest and meal breaks at the times scheduled within their work period as set out in the shifts provided to the employee by the Company. In providing agreement the employee recognises that:

11.1.1 Break times will change from shift to shift. The Company will endeavour to schedule breaks at regular portions throughout each shift or work period; however, the timing of breaks will be subject to any industry principles that the company has accepted, following facilitated meetings commissioned by NZTA. Where this is not possible, breaks may be scheduled at the outset or at the end of a work period as the operational requirements of a scheduled and semi-scheduled bus driving operation allows,

⁸ Tranzurban Hutt Valley Ltd and New Zealand Tramways and Public Passenger Transport Employees Union Inc Collective Agreement 1 April 2020 to 30 June 2021.

- 11.2 The Company will provide tea, coffee, milk and sugar at all Tranzurban depots. Where the employee is required to have a break away from the depot, provisions will be supplied.
- 11.3 If an unpaid meal break is required to be taken away from the employee's home depot, the employee will be paid a meal allowance in accordance with Schedule 2.

[21] Then Ms Snelgrove analysed current split shifts. She said Tranzurban has a policy that all work periods should be divided by at least two hours. Currently in the Hutt Valley, Tranzurban operates 197 shifts, 65 of which are split shifts.

[22] Thirty-five of those contain an interval of two to three hours between one work period and the next; and 28 of them have an interval in that period of three to four hours.

[23] She cited a particular example which concerned the work of a school bus driver, who would work from approximately 7.45 am until 9.15 am, taking children to school; the driver would then resume work from 2.45 pm to 4.15 pm. She explained that under the interpretation favoured by the Authority, the entire period from 7.45 am to 4.15 pm would be included in the "work period". Such an interpretation would add an additional two 10-minute paid breaks (to be taken at 9.52 am and 2.07 pm) and one 30-minute unpaid break (to be taken at 12.00 pm). She said that these rest breaks and meal breaks were during a period when the driver would not be performing work duties.

[24] Ms Snelgrove also said that Tranzurban has been working to reduce the impact of split shifts, dubbed by some as "ugly shifts". The company proposes to schedule more services between peak hours in order to provide more paid time for drivers and consistency of work, rather than having their days split into two work periods.

[25] Mr Benjamin McFadgen, Chief Executive Officer for the Bus and Coach Association of New Zealand, gave evidence which focused on issues concerning the broader bus industry. He had conducted a limited survey of eight significant operators in the Wellington and Auckland public transport sectors, the majority of which favoured treating each part of a shift as distinct work periods.

[26] The Union called Mr Kevin O’Sullivan, Secretary of its Wellington Branch. He referred to the practice where a “shift” would incorporate the period from when a driver first reports for work, through to the period when that driver finally ceases work for the day.

[27] Mr O’Sullivan then referred to a particular split shift which had operated during the transitional period. It had commenced at 7.10 am and finished at 7.41 pm, a span of 12 hours and 31 minutes, the driver being unpaid from 8.46 am to 11.42 am, and from 2.38 pm to 3.08 pm. There were two 10-minute paid rest breaks. He referred to the first which occurred at 2.28 pm, seven hours and 18 minutes after the commencement of the shift. He said this illustrated that work could be structured in a manner that could deprive staff of paid breaks. It was the Union’s position that in such a case “the work period” should span from 7.10 am to 7.41 pm and include all authorised breaks whether paid or unpaid.

Overview of the parties’ cases

[28] Mr Vincent, counsel for the plaintiff, submitted:

- (a) The starting point for interpreting any statutory provision is the natural and ordinary meaning of the language used. The definition of “work period” uses plain language to describe the term. Section 69ZC of the Act states a “work period” commences when an employee starts work “in accordance with the employee’s terms and conditions of employment” and ends when the employee ends work in accordance with those terms.
- (b) Rest and meal breaks are to be calculated by reference to actual hours of work duties, and the period(s) to which they relate. There is nothing in the language of the Act to suggest that the starting and ending of work cannot happen more than once in any particular period.
- (c) The determination of the scope of a “work period”, is one involving an issue of fact in light of what the parties have agreed. The determination of that issue is a matter of common sense.

- (d) Purpose is evident from extrinsic materials and case law. Rest and meal breaks are to provide for a better work/life balance.
- (e) The breaks are periods of time within a working period rather than periods of time between working periods.
- (f) The proposition that the breaks regime would be open to abuse were such an approach to be adopted is not correct. Were an employer to cynically employ staff for two-hour periods, with a gap between them so as to avoid providing any rest or meal breaks, there would be a potential grievance, which would engage the good faith provisions of the Act. The Court will always look to substance over form. It would be open to the Court when considering such a case to characterise the gap between work duties as rest or meal breaks if that is in substance what they are and thereby include them in the work period.

[29] Mr Cranney, counsel for the defendant, submitted in summary:

- (a) “Work period” is defined by reference to a “beginning” and an “ending”. The definition does not say that it is the period during which the worker is working. There will be times in the work period when the worker is not working or required to work, but which are still part of the work period; for example, under s 69ZC(b) of the Act, there is an authorised break (whether paid or unpaid) which is either provided to the employee during the work period, or to which the employee is entitled during the work period.
- (b) In each instance, the beginning and the finishing are issues of fact. It is the first start and last finish that matters. That interpretation is in accordance with the words of the Act and its purpose. It is also in accordance with *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc*.⁹

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

- (c) Clause 11.1 of the CEA preserves and contractualises the employees' rest and meal break entitlements; it allows the plaintiff to change breaks from "shift to shift". Clause 8 of the CEA provides that an employee "may be allocated multiple shifts during a work day". However, because there is no agreement as to times, the plaintiff is required to follow s 69ZE(3)–(7) of the Act. Mr Cranney noted that the CEA states that a shift "may include multiple work periods" but in practice this is not done, and a split shift is rostered as a single split shift.
- (d) If the provisions were to be construed as advocated for the plaintiff, it would indeed be possible for an employer to establish a series of two-hour work periods, with no rest breaks or meal breaks. This would not engage good faith, because it would be lawfully permissible to organise a work day in that way.
- (e) The statutory scheme has effect despite any provision to the contrary in any employment agreement: s 238 of the Act, and any employment agreement that were to exclude, restrict or reduce the entitlements would be of no effect: s 69ZG(2) of the Act.
- (f) The scheme is to enable a worker to receive an entitlement of rest, and in the case of breaks, paid rest. To some extent, the issue in this case is about money, because if people do not receive their paid rest breaks as required by the statute, their labour is cheaper. This is a human dignity provision, because it ensures rest as an aspect of work, and to a limited extent, an employee is entitled to rest on pay.

Analysis

[30] The meaning of an enactment must be ascertained from its text and in light of its purpose.¹⁰ In determining purpose the Court may have regard to the immediate and

¹⁰ Interpretation Act 1999, s 5; Legislation Act 2019, s 10(1).

general legislative context as well as a social, commercial, or other objective, of the enactment.¹¹

Text

[31] It is convenient to begin with the expression used in s 69ZC(a) of the Act that requires consideration of the meaning of “work period” to be “in accordance with an employee’s terms and conditions of employment”.

[32] I accept Mr Cranney’s submission that recourse to the terms and conditions of employment will normally establish when work duties start and when they finish.

[33] However, such provisions may not necessarily be determinative. That is because minimum requirements are prescribed by the statute, and not necessarily by the parties in the agreement. Consequently, were the parties to refer to the concept of “work period” in a way that had the effect of excluding, restricting, or reducing an employee’s entitlements for breaks, such provisions would come up against s 69ZG(2). To the extent the relevant terms of the employment agreement did not meet the minimum requirements of pt 6D, they would be ineffective.

[34] Thus, the statement in the CEA to the effect that “an employee may be allocated multiple shifts during a workday”, is not necessarily determinative. What is more significant for present purposes is the acknowledgment of the statutory regime in cl 11, where the parties agreed that rest and meal breaks would be scheduled in accordance with the employees’ entitlements under the legislation.

[35] In summary to this point, I consider that the text used by Parliament in s 69ZC(a), when read alongside s 69ZG(2), makes it clear that the terms and conditions will assist in determining the start and finish times of work, but those terms and conditions do not, in and of themselves, establish whether the work period is to include a rest break where there is a split shift.

¹¹ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

[36] That consideration is informed in part by s 69ZC(b), which confirms that the work period includes all authorised breaks, paid or unpaid, provided to an employee, or to which that person is entitled in the period between the start and finish of work. It is reasonably apparent that Parliament intended there would be a link between ss 69ZC(b) and 69ZD(1). Two concepts were allowed for: those of *provision* and of *entitlement*.

[37] This was necessary since the Act was providing for minimum entitlements, as underscored by s 69ZG(2); as noted, an employment agreement cannot exclude, restrict, or reduce entitlements. Thus, an employee would be *provided* with breaks consistent with the statutory provisions; if they were not provided, the employee would be *entitled* to them in any event.

[38] Section 69ZD(2)–(7) goes on to describe work periods in multiples of two hours, from two hours to four hours, from four hours to six hours, and from six hours to eight hours; and then for any work period beyond eight hours. For the purposes of that last period, the cycle of entitlements is repeated.

[39] It is significant that each subsection of s 69ZD(2)–(7) is contiguous. The clear implication from those subsections is that the work period continues for each of the intervals so described. The section does not allow for an entitlement, an obligation, or a duty to be provided in any interval which is not a work period.

[40] In my view, the provisions of s 69ZD(2)–(7) are periods of time within a working period, rather than periods of time between working periods.

[41] The full Court made a similar point in *Greenslade v Jetstar Airways Ltd*,¹² although it must be acknowledged that it was dealing with a previous iteration of the rest break and meal break provisions.¹³

[42] The Court of Appeal, also dealing with a previous iteration of the rest break and meal break provisions, proceeded on the basis that breaks would likely arise when

¹² *Greenslade v Jetstar Airways Ltd* [2014] NZEmpC 23, [2014] ERNZ 157 at [35].

¹³ The finding was not referred to, one way or the other, by the Court of Appeal in its judgment of *Jetstar Airways Ltd v Greenslade* [2015] NZCA 432, [2015] ERNZ 71.

work duties were being performed. In *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc*, that court was required to consider payment during rest breaks. It said:¹⁴

... The word “paid” is not qualified or explained. Theoretically a payment of one cent could meet the requirement as there would be a sum “paid”. Obviously that is not the intended meaning. On the other hand the section concerns the “employee’s work period”. The entitlement for a “paid rest break” arises when an employee has been working for more than a certain period of time. *Given that the required “break” is from the employee’s “work” and it is to be “paid”, a natural inference is that what is to be paid for the break is that which was being paid for the work at the time.* The worker is paid through the break as if it had not been taken.

(Emphasis added)

[43] As the words in italics emphasise, the apparent intention was that breaks would be contiguous with work duties.

[44] It follows that under s 69ZD, authorised breaks fall within a work period.

[45] I conclude that a proper interpretation of the words used establishes that rest and meal breaks are to be calculated with reference to hours when an employee has work responsibilities. A work period includes those hours, as well as the authorised breaks which are referred to in s 69ZD(b).

[46] A work period is not a concept which refers to a period when the employee is not engaged for work, except when the worker has an authorised break, either as provided, or to which that person is entitled. Section 69ZC does not say otherwise. Nor does it say that a work period is to be defined by reference to a unit of time such as a work day.

[47] Finally, in this analysis of the text, I agree with both counsel that what constitutes a work period is an issue of fact undertaken in light of the information contained in the terms and conditions of employment, as discussed earlier.

¹⁴ *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc*, above n 9, at [12] (footnotes omitted).

Purpose

[48] It is reasonably well established that the purpose of the subject provisions was to introduce minimum standards for rest and meal breaks, and thereby to provide for better work/life balance.

[49] So, in *Jetstar Airways Ltd v Greenslade*, the Court of Appeal described the background to the introduction of pt 6D in these terms:¹⁵

[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.

[50] Later in the same judgment the Court of Appeal stated:¹⁶

... [W]e are satisfied Parliament's intention was to provide for the wellbeing of employees by requiring them to take specified rest and meal breaks during the work period as defined by s 69ZC of the [Act].

[51] A common theme in each of the speeches given by the Minister for Workplace Relations and Safety when the Bill was before Parliament related to the provision of rest, refreshment, and the opportunity to eat during working hours.¹⁷

[52] Mr Cranney urged the Court to recognise a broader purpose, particularly with regard to split shifts.

¹⁵ *Jetstar Airways Ltd v Greenslade*, above n 13.

¹⁶ At [35].

¹⁷ In the first reading the Minister said that the provisions would "give employees enough time to rest, refresh, and eat during working hours and be able to continue to work safely": (1 February 2018) 727 NZPD 1648. In the second reading the Minister said that the provisions would "ensure employees have time to rest, refresh, and eat during working hours and to be able to continue to work safely": (27 November 2018) 735 NZPD 8269. In the third reading the Minister said that the provisions would "give employees enough time to rest, refresh, and eat during work hours and to be able to continue to work safely": (5 December 2018) 735 NZPD 8585. A similar point was made in a Cabinet paper which preceded the introduction of the Bill: "100-Day Commitments: A Fairer Workplace Relations System": (1 February 2018) at [22].

[53] He acknowledged that during an interval which might arise where there was a split shift, an employee could obtain the advantage of a break. But he said that if the work period was to be regarded as continuing, so that it gives rise to a paid rest break, the employee should be remunerated accordingly.

[54] He went on to say, as noted earlier, that were the individual not to receive a break which is required by the statute, the worker's labour would be cheaper. He said that the entitlement arose from a "human dignity provision" which provided that rest is an aspect of work, for which the employee is entitled to receive pay, albeit to a limited extent.

[55] There are two points to be made about this submission. First, his point would apply to rest breaks which are paid, but not to meal breaks which are not. Any calculation which might bestow a meal break during the intervening period of a split shift, does not bestow any obvious benefit on the employee – except possibly to contribute to a calculation as to when any subsequent break might arise when work duties recommence. It is not obvious that Parliament had such a scenario in mind.

[56] But the second and more significant point is that Parliament's purpose was squarely focused on the provision of "time to rest, refresh and eat during working hours".¹⁸ There is no evidence in the materials to which I was directed that there was any economic consideration by which an employee would receive remuneration if not engaged for work purposes.

[57] In short, the emphasis of the rest and meal break regime was on "providing time to rest, refresh and eat during working hours", as stated by the Minister, or for "wellbeing" as it has been put by the Court of Appeal.¹⁹

[58] Mr Cranney suggested that were such a conclusion to be reached, there would be an anomaly. An employer would be legally entitled to establish work periods which circumvented the rest and meal break obligations. He said that this would not be an

¹⁸ Above n 17.

¹⁹ Above n 16.

issue of good faith because an employer would be legally justified in taking such a step.

[59] Whilst Mr Cranny may well be correct in stating that an employer could in theory proceed in this way, it does not mean that the relevant provisions should be construed so as to avoid this outcome. If by means of a somewhat extreme approach to the structuring of work periods employers are seen to be abusing the provisions, that is a scenario that Parliament may need to consider.

[60] A further problem with regard to an interpretation that would define work periods by the first start and last finish of a particular work day, as advanced for the Union, is that it is unclear what would occur if work commenced on one day, and continued into another, for instance overnight.

[61] The short point is that s 69ZC does not state that a “work period” is to be confined to a “work day” or to any other unit of time.

Result

[62] A proper interpretation of the words used establishes that rest and meal breaks are to be calculated with reference to the actual hours that employees are required to be available to work, which includes those authorised breaks. The statements of purpose I have reviewed support this interpretation.

[63] Although the proceeding was heard on a *de novo* basis, it is appropriate to conclude that the Authority was incorrect when it determined that “the term *work period* covers all time between an employee’s initial commencement and final cessation on any given day”.²⁰ The Act does not rule out the possibility of the parties agreeing via their terms and conditions that an employee may undertake work duties during more than one period in a given work day, or across particular work days.

[64] Whether distinct shifts worked are separate work periods is a question of fact, calculated:

²⁰ Above n 2.

- (a) by reference to the actual hours an employee is required to perform work duties, which will include authorised rest and meal breaks in that period; and
- (b) in light of what has been explicitly agreed between the parties in their employment agreement, providing the minimum standards provided for in pt 6D of the Act are observed.

[65] Accordingly, if as a matter of fact, the parties have agreed that distinct shifts are to be undertaken, the period between them will not constitute “an authorised break” for the purposes of s 69ZC(b) unless the employee’s work duties are contiguous to the prescribed breaks as provided, or for which there is otherwise an entitlement.

[66] The challenge is allowed.

[67] I reserve costs. The parties are to discuss this issue in the first instance. I express the provisional view that costs should follow the event on a 2B basis, but there may be costs not known to the Court which should be considered. Any necessary application should be made within 21 days, with a response given in a like period.

B A Corkill
Judge

Judgment signed at 12.10 pm on 9 May 2022