

IN THE EMPLOYMENT COURT
AUCKLAND REGISTRY

IN THE MATTER

an application for compliance orders

BETWEEN

New Zealand Meat Workers & Related Trades Union Inc

First Plaintiff

AND

Roberta Kerewai Ratu and others

Second Plaintiffs

AND

AFFCO New Zealand Limited

Defendant

Appearances: P Cranney, counsel for the plaintiffs
P Wicks QC, counsel for the defendant

Minute: 16 August 2017

MINUTE TO THE PARTIES OF JUDGE B A CORKILL

Introduction

1. In my minute of 31 July 2017, I indicated that I would resolve certain issues relating to the plaintiffs' claims for interest on unpaid wages, on the papers.¹
2. I do so in this minute, but indicate that the below conclusions will be incorporated in the judgment which is to be issued in respect of the 87 workers in intake 1, and for the uncontested elements of the claims of the 53 workers in intakes 2 and 3. That judgment will lie in Court until further order of the Court.²

¹ Paras 3 – 5.

² Minute of 31 July 2017, para 12.

Pleading point

3. In his memorandum of 18 July 2017, Mr Wicks QC submitted that there had not been proper compliance with reg 11(1)(f) of the Employment Court Regulations 2000 (the regulations), which requires that plaintiffs must specify in their statement of claim any claim for interest, and a method of calculation.

4. Mr Wicks noted that whilst the amended statement of claim dated 5 January 2016 sought a compliance order requiring that arrears of wages be paid for the duration of the asserted illegal lockout, there was no claim for interest on any arrears as a prayer for relief or remedy, and nor was the method of calculation indicated.

5. Mr Wicks referred to cases where interest had been declined because interest had not been sought with sufficient particularity.³

6. In response, Mr Cranney submitted that the cases relied on were very different from those currently before the Court. He said that in any event cl 14 of sch 3 of the Employment Relations Act 2000 (the Act) confers power on the Court to award interest as it sees fit, the only limitation being a bar on awarding interest on interest.

7. This case is both unusual and of some complexity. I refer briefly to the relevant chronology:

- a) As already noted, in the amended statement of claim of 5 January 2016, a compliance order that arrears of wages be paid was sought, and no claim for interest was pleaded. The second plaintiffs were at that stage locked out, so that it may have been considered that it was premature to claim interest.
- b) In my judgment of 11 February 2016,⁴ I determined liability issues, adjourning the plaintiffs' application for compliance orders. At that stage, the lockout continued. The affected plaintiffs returned to work subsequently on 23 February 2016.

³ *Smith v Practical Plastics Ltd* EmpC Auckland AC104/99, 9 December 1999; *Ora Ltd v Kirkley* [2010] NZEmpC 6.

⁴ *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2016] NZEmpC 7, [2016] ERNZ 20.

- c) In that judgment I requested counsel to confer and file a joint memorandum, or individual memoranda, for the purposes of calculating loss of remuneration.
- d) By May 2016, counsel agreed there were preliminary legal issues which were relevant to the calculation of quantum.⁵ The focus at that stage was on a number of potentially difficult matters which would need resolution before any attempt could be made to calculate individual entitlements; not the least of those issues was the date from which any liability for lost wages would commence.
- e) The agreed issues were eventually heard on 24 August 2016, and became the subject of judgment (No 2), issued on 8 September 2016.⁶ I recorded at the end of that judgment that there were further disclosure issues, and a possible quantum issue. These were to be discussed at a further telephone directions conference.⁷
- f) It then became necessary to resolve a dispute between the parties as to the methodology for the calculation of wages lost as a result of the unlawful lockout. In anticipation of a hearing which was set down from 16 February 2017, counsel filed submissions as to the methodology which they contended should apply.
- g) In his first memorandum as to methodology, of 9 October 2016, Mr Cranney referred to the final step which would need to be taken, stating that the sum to be paid for each second plaintiff should include interest.
- h) On 27 January 2017, a memorandum was filed by Mr Cranney which again referred to the possibility of interest being awarded.⁸
- i) In the judgment which I subsequently delivered, I found that the methodology advanced by AFFCO was essentially correct, although calculations would need to be provided for public holidays, holiday pay and interest.⁹

⁵ Joint memorandum of counsel of 11 May 2016.

⁶ *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2016] NZEmpC 117.

⁷ At [40].

⁸ At para 37.

- j) Following this judgment, counsel were required to file memoranda outlining the outstanding issues, it being anticipated by the Court that once these had been resolved, final quantum calculations could be undertaken.
- k) On 31 May 2017, Mr Cranney filed a memorandum which again referred to the issue of interest on unpaid weekly wages.¹⁰
- l) On 1 June 2017, Mr Wicks filed a memorandum which addressed the question of the appropriate methodology for calculating interest.¹¹ No issue was raised as to whether the claim for interest was properly before the Court.
- m) The pleading point was raised for the first time in the submission which was filed for AFFCO on 18 July 2017.

8. Mr Wicks correctly points out that the amended statement of claim which has underpinned the extended process I have described does not refer to a claim for interest. But as already mentioned, it was filed during the lockout and at a point where the possibility of interest being paid could not have realistically been in contemplation, given the various events which had yet to take place.

9. Following the issuing of the liability judgment, there has been an elaborate process involving regular communications between counsel, and the Court, with a view to relevant quantum issues being identified on a staged basis; each of these has then been resolved.

10. Whilst it would have been appropriate for the claim for interest to be particularised as required by the regulations, in my view the present circumstances are such that the issue should be dealt with under s 221(b) of the Act. The circumstances are unusual. Notice of an intended claim for interest was given at the point when that possibility potentially became relevant: on 9 October 2016. When the methodology of such a claim became relevant, the plaintiffs' position on that topic was outlined: on 3 July 2017. In my view, appropriate notice was given of the claim for interest at the relevant points in the process.

⁹ *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2017] NZEmpC 33 at [77].

¹⁰ At para 29.2.

¹¹ At paras 11 – 12 and 17.

11. There is no evidence of any prejudice to AFFCO if the claim for interest is advanced now, at the stage where it is finally possible to establish what the extent of unpaid arrears of wages will be for most claimants. I also note that even then, the appropriate judgment will lie in Court.

12. In my view, the interests of justice therefore require the Court to proceed on the basis that the claim for interest is properly before the Court.

How should interest be calculated?

13. The next dispute as to interest relates to the period within which interest should be paid. The difficulty relates to the commencement date of any calculation of interest. Mr Cranney says this should be from the date each weekly payment was due.¹² Mr Wicks says the appropriate calculation is to award interest on any total sum payable to the plaintiffs between two set periods of time.¹³

14. The starting point is, as Mr Cranney submitted, cl 14 of sch 3 of the Act which provides:

14 Power to award interest

(1) Subject to subclause (2), in any proceedings for the recovery of any money, the court, may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment.

(2) Subclause (1) does not authorise the giving of interest upon interest.

15. Although s 87 will be repealed for most purposes as from 1 January 2018, it will continue to apply to transitional claims such as this one: Interest on Money Claims Act 2016, cl 1, sch 1.

¹² Memorandum of 3 July 2017, para 3 and memorandum of 25 July 2017, paras 17 and 18.

¹³ Memorandum of 18 July 2017, para 6.

16. The leading authority as to the payment of interest in this Court is *Attorney-General v N*.¹⁴ Although the Court of Appeal in that case considered the extent of the Court's discretion as to interest under the Employment Contracts Act 1991, the principles which they discussed apply equally under the current Act. Briefly:

- a) In the absence of any express limiting provision the discretion is to be exercised as the justice of the case requires.¹⁵
- b) There is no fixed rule as to the commencement date for interest. Generally justice may require interest to run from the date the cause of action arose down to the date of payment in accordance with the judgment.¹⁶
- c) Generally a cause of action in contract accrues on breach.¹⁷
- d) In that case, salary had been unpaid for six months; and under the relevant agreement were payable weekly. Rather than make separate calculations in respect of each week of the six months, the Court concluded that the just approach was to order that interest run on the total sum due from the halfway point.¹⁸ I infer from this conclusion that this approach meant that it was unnecessary to make multiple calculations, but such an approach would produce a similar result.

17. In "*Aspects of Damages: The Award of Interest on Money Claims*," the Law Commission stated:¹⁹

Damages are compensation intended to restore plaintiffs to the position they would have been in if a wrong or breach of contract had not been committed ... as a matter of general principle, therefore, people kept out of pocket should be able to recover interest on money owed to them from the date they were entitled to the

¹⁴ *Attorney-General v N* [2001] 1 NZLR 651 (CA).

¹⁵ At [26].

¹⁶ At [26].

¹⁷ At [26].

¹⁸ At [27].

¹⁹ *Law Commission Aspects of Damages: The Award of Interest on Money Claims* (NZLC R28, 1994) at 4.

money until it is paid in full. The law should compensate plaintiffs realistically for the loss they suffered.

18. This dicta is consistent with many judicial statements, for example as found in *Day v Mead*.²⁰

19. It is appropriate in this case to take into account the findings that have been made as to the circumstances giving rise to the lockout; as the parties know, the full Court made the significant finding that AFFCO had acted in breach of its duty of good faith in several respects.²¹

20. Given these contextual matters, I consider that the interests of justice require payment of interest. I adopt the pragmatic approach which the Court of Appeal considered was appropriate in *Attorney-General v N*. That is, rather than making separate calculations in respect of each week where there was a default, a just approach in the present circumstances is to order that interest run on the full amount to which each plaintiff is entitled, from a date which is the halfway point of the period of unpaid wages for each claimant. That entitlement will continue to the date of payment in accordance with the Court's judgment. The applicable interest rate will be five per cent.²²

21. Because the date of payment cannot be specified with certainty at present, I invite counsel to agree a nominal date for the purposes of any calculation which is to be referred to in the judgment that is to lie in Court. Counsel will need also to consider the position which should apply thereafter. One option would be for the parties to agree a daily rate for each claimant; and to record that rate either in the judgment which is to lie in Court, or in a later judgment if that is preferable. There may be other options in this regard. I reserve leave to apply on this point.

22. I reserve costs with regard to the issues raised in this minute.

²⁰ *Day v Mead* [1987] 2 NZLR 443 (CA) at 463.

²¹ *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204, (2015) 10 NZELC 79–057 at [201] – [209].

²² Judicature (Prescribed Rate of Interest) Order 2011, cl 4.

23. In terms of paragraph 13 of my minute of 31 July 2017, I request counsel to file a joint memorandum for the purposes of the judgment sums which can now be calculated, by 30 August 2017; or such later date as counsel may agree.

B A Corkill

Judge