

# 2023 EMPLOYMENT LAW UPDATE

## RECENT CASES OF INTEREST

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# Agenda

- Focus - cases of interest for payroll professionals (aka “what we get calls about most often”)
- **Holidays Act 2003:**
  - “otherwise working day” test
  - “discretionary payments”....change on the horizon?
- **Minimum Wage Act 1983:**
  - *Mt Cook Airlines*...interplay between part-time salary and minimum wage requirements
  - “on call work” – a ticking time bomb?
- **Wages Protection Act 1983:** consultation about deductions



# Holidays Act 2003

An aerial photograph of a river winding through a vibrant green landscape. The river is the central focus, with its banks lined with dense trees and a few buildings, including a prominent house with a red roof. The water reflects the surrounding greenery, creating a shimmering effect. The overall scene is bright and clear, suggesting a sunny day.

## Recent cases

“Otherwise working day”

“Discretionary payments”

Future reform?



# “Otherwise working day”: case 1

- *Unite Union Inc v Wendco (NZ) Limited* [2023, Authority]
- **Issue:** whether certain days over Xmas/NY period were “OWDs”, such that PH entitlements applied
- **Held:**
  - Variable roster meant the OWD determination is not always clear
  - Co should have applied factors in s12 HA 2003: “an objective, personalised assessment”
  - Co’s requirement that an OWD only arose if Ee specifically volunteered to work on that date incorrect – the Ee’s work pattern is the key factor
  - Co’s position that 25 Dec could never be an OWD, because never open, was incorrect: reason why it was not open was because of public holiday

# “Otherwise working day”: case 2

- *Arohanui Hospice Service Trust v NZNO* [2022, Court]
- **Issue:** CA provided for specific approach to determine OWDs for p/time Ee’s without “fixed” days of work. Hospice argued this approach was inconsistent with business common sense.
- **Held:**
  - Interpretation of clause meant that p/time Ee’s who did not work on a PH, and never intended to work on a PH, nonetheless benefited from being paid for an extra day above their agreed number of shifts.
  - That is what the CA provided for, and had been applied for many years.
  - Hospice’s “business common sense” argument did not change outcome; possible to provide *more benefits* than are available under HA.

# “Otherwise working day”: case 3

- *Zink v Board of Trustees, Southland BHS* [2022, Court]
- **Issue:** whether PHs during Christmas closedown period were OWDs, such that Z should receive payment for PH not worked?
- Z’s IEA required him to take annual holidays during Christmas holidays after end of term 4 – accepted this was a “closedown”
- **Held:**
  - the exercise of assessing whether the PHs were OWDs must be undertaken as if the closedown were not in effect.
  - Z normally worked and was available to work Monday to Friday.
  - Putting aside closedown, PHs fell on days within Monday to Friday and therefore were OWDs.

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# “Discretionary payments”

- After CA decision in *Metropolitan Glass*, law appears to be more settled
- Key = ability to withhold payment, even if all relevant targets or criteria are met
- If HA Taskforce recommendations eventually make their way into law, would become a moot point (as all incentive and bonus payments would become part of “gross earnings”)

# Minimum Wage Act 1983

## Part-time salaries vs minimum wage

*The Mount Cook Airline case*

## On-call work

A ticking time bomb?





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# *Mount Cook Airline case*

- **Issue:** Whether p/time cabin crew were entitled to the fortnightly minimum amount payable under the Minimum Wage Order, even though they worked less than 80 hours per fortnight?
- **Held:** Regardless of hours worked, the p/time cabin crew entitled to fortnightly minimum amount, because they were paid fortnightly.
- **Current status:**
  - Appeal in Court of Appeal: hearing took place on 18 April 2023
  - Appeal judgment still pending
  - ***Labour Inspector v Jeon [2023, Authority]***: demonstrates application of Mt Cook Airlines methodology in the meantime

# On-call work: a ticking time bomb?

## What is “on call” work?

An arrangement where Ee’s are required to be available to work and respond quickly to workplace demands.

## What legal issues can arise?

- **Interplay with the Minimum Wage Act 1983:** what if time spent on-call amounts to “work”?
- **Interplay with rules relating to availability provisions in the Employment Relations Act 2000:** does the employment agreement *allow* the employer to require the employee to be available to perform such work?





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# On-call work: key cases

- *Sanderson*

- **Issue:** Whether anaesthetic technicians were ‘working’ for the purposes of the MWA while on-call from 8:30pm – 7am.
- **Held:**
  - Assessed the constraints and responsibilities on the technicians during this time as well as benefits to Er.
  - Technicians had to live away from home (sometimes in DHB provided accommodation), respond promptly to call outs, and undertook significant responsibility.
  - Er largely benefitted from the technicians’ availability, it would be impractical if they were unavailable, as patients would have to be flown to other parts of the country for surgeries.

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# Where to next?

- Several occupations where there is significant expectation of “on call” work e.g., IT, healthcare
- Very few cases analyse whether different on-call arrangements amount to “work”
- Requires close analysis of relevant employment agreements and on-call arrangements to determine if time on-call is “work”
- Also very little case law assessing whether time spent on-call should be treated as “work” and/or whether this requires an “availability provision” analysis under the ERA
  - Availability provision requirements still relatively untested, but starting to see more and more cases



# Wages Protection Act 1983

All the rules about deductions....



# Deductions: recent cases

- Requirement to consult under section 5(1A)

- *Santra*:

- “Consultation” requires specificity/clarity so Ee can meaningfully consider the request. Insufficient to explain “in general terms” why and for what period the deduction was to be made.
    - Wage arrears in amount of deduction.

- *McLeod*:

- Cannot just rely on an Ee’s “general knowledge” of a situation. Consultation requires discussion of specific proposed deduction.
    - Wage arrears in amount of deduction, and penalty of \$1,500.

- Requirement to comply with any clause

- *IAY v Mathis Farming*:

- Overpayment made, and IEA required prior consultation with Ee before deduction made in reliance on deductions clause.
    - No prior consultation – deduction simply made to recoup prior overpayment.
    - Penalty of \$2,000 (no wage arrears, as overpayment had been made)



# Last slide – any questions?



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### QUALIFICATIONS

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