

NEW ZEALAND'S EMPLOYMENT COURT MANDATES FORTNIGHTLY RATE REGARDLESS OF HOURS WORKED: 3 CONSIDERATIONS FOR EMPLOYERS WITH PART-TIME WORKERS

Insights
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A recent decision by New Zealand's Employment Court regarding an airline and its cabin crew creates broader implications for all employers with part-time workers in New Zealand. In *E Tū Incorporated v Mount Cook Airline Limited*, the Employment Court held that part-time employees paid on a fortnightly basis (for every 14 days of work) must be paid the full fortnight rate regardless of the number of hours they work. The Court, however, held that the cabin crew's overnight stopovers were not "work" and thus the employer did not need to pay the cabin crew for that time. New Zealand employers with employees with stopovers, overnight stays, or similar activities should continue reading for further details on three steps you should take to make sure your business is in compliance.

Employment Dispute Over Working Hours

The dispute involved Mount Cook Airline and the E Tū union representing Mount Cook's cabin crew staff. Mount Cook employs both a full-time and part-time cabin crew. The full-time cabin crew was scheduled to work nine days within each fortnight. The part-time crew was scheduled to work six days within each fortnight and works on average seven hours per day. Due to flight schedules, the crew sometimes finished work for the day away from home. When they did so, they were required to stay overnight and start the next working day from the away location.

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Per the collective agreement, Mount Cook paid its part-time cabin crew a salary that is two-thirds of the full-time salary. During labor negotiations, E Tū insisted the part time cabin crew salary be pro-rated as opposed to hourly or daily to maintain equal status for part-time and full-time employees. Despite its involvement in designing the pay structure for part-time employees, E Tū nevertheless sued Mount Cook, arguing the part-time cabin crew was being paid less than the Minimum Wage Order required. The union also argued that the cabin crew's stopovers due to flight schedules should be considered work and therefore should be paid.

Part-Time Workers Entitled to Full Fortnight Rate

In New Zealand, the Minimum Wage Order sets the minimum rates of wages payable to workers and is categorized by pay period:

- if paid by hour or by piecework: \$21.20 per hour
- if paid by day: \$169.60 per day + \$21.20 per hour for each hour exceeding 8 hours worked
- if paid by week: \$848 per week + \$21.20 per hour for each hour exceeding 40 hours worked
- in all other cases: \$1,696 per fortnight + \$21.20 per hour for each hour exceeding 80 hours worked (Prices have increased since the decision.)

Prior to the Employment Court's decision, employees whose pay arrangements did not perfectly fit the above categories were generally given a pro-rated version of the wage rates. Mount Cook used this method of compensation for their part-time cabin crew members, whose wages per fortnight ranged from \$1,049.27 to \$1,161.42.

E Tū argued that these part-time employees properly fell within the "in all other cases" category and therefore must be paid a minimum of \$1,600 per fortnight (currently \$1,696). Mount Cook countered that the purpose of the minimum rate legislation was to protect a minimum hourly rate for actual work performed and the daily, weekly, and fortnightly rates were mathematically derived from the minimum hourly wage rate. The "in all other cases" should accordingly be interpreted as a fortnightly rate where the employee works at least 80 hours, and the rate should be proportionate to actual work performed if the employee

worked fewer hours. Mount Cook accordingly reasoned they were in fact compliant with the Minimum Wage Order where the part-time employees' rate of pay did not fall below the minimum hourly rate and they were paid for actual hours worked.

In siding with E Tū, the Court reasoned the Minimum Wage Order contained mandatory language that required employees not falling under the hourly, daily, or weekly categories to be paid the fortnight rate. As the facts indicated Mount Cook paid its part-time employees fortnightly, the wages needed to meet the minimum threshold for employees "in all other categories" irrespective of the actual hours worked.

Are Stopovers Work?

The second issue involved whether the crew members' stayovers between scheduled flights should be considered "work." Unlike the first issue, the Minimum Wage Order does not have a provision defining "work" and thus the Court turned to factors that have been established by case law. These factors include the constraints placed on the employee, the responsibilities of the employee, and the benefit to the employer.

After considering the pertinent factors, the Court concluded the overnight stays were not work and therefore did not need to be paid. Although the Court noted that the employees benefited Mount Cook by being in the necessary location for the next flight, the employees had no constraints during the stay that they would not also have at home before a flight and Mount Cook gave them no additional responsibilities.

The Court differentiated the cabin crew's stopovers from other cases where employees that had overnight stays were deemed to be working. Those employees, such as a matron at a boarding school watching over a group of girls or technicians that had to be within 10 minutes of a hospital, had responsibilities and constraints. For the Mount Cook cabin crews however, the Court found that "after one duty day ends and before the next one begins the employees are free to do as they please."

How Does This Decision Affect My Business? 3 Issues to Consider

Given the holding of *E Tū Incorporated v Mount Cook Airline Limited*, employers in New Zealand should consider these three steps to stay in compliance.

1. Ensure Payment by Fortnight Meets the Minimum Wage Requirements

New Zealand employers who are currently pro-rating part-time employees' wages should make sure that the wages comply with the rates set within the Minimum Wage Act. The Employment Court's decision makes clear that an employer must pay employees a minimum of \$1,696 on a fortnightly basis – regardless how many hours the employee works.

2. Consider the Impact of Overnight Stays

While the Court's analysis for overnight stays was fact-dependent, other employers should consider whether they have employees with similar downtime activities that should be labeled as "work." Employers should work with counsel to evaluate the constraints placed on the employee, the responsibilities of the employee, and the benefit to the employer from the downtime activities to determine whether their employees should be paid for this time to avoid possible litigation.

3. Do Not Rely on Collective Agreements

Although the method for determining salary for part-time employees was set forth in the collective agreement between Mount Cook and E Tū, the collective agreement did not trump the Minimum Wage Act. Employers cannot rely on their collective agreements to avoid litigation if their employees are not paid in compliance with the minimum wage provisions.

Conclusion

If your organization does business or employs individuals in New Zealand, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [International Practice Group](#) to learn more about the implications of this decision.

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