IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 73
ARC 96/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NZ AMALGAMATED ENGINEERING PRINTING AND MANUFACTURING UNION INC Plaintiff
AND	SCA HYGIENE AUSTRALASIA LIMITED Defendant

Hearing: 26 April 2010
(Heard at Auckland)

Appearances: Anne-Marie McInally, Counsel for Plaintiff
David France, Counsel for Defendant

Judgment: 10 June 2010

JUDGMENT OF JUDGE B S TRAVIS

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[1] This is a challenge to a determination of the Employment Relations Authority dealing with how particular employees should be paid for public holidays over the Christmas/New Year period when the enterprise in which they worked has been shut down during that period. In particular, the Authority identified two issues for determination in that forum. The first was whether the days in question would otherwise have been working days for the employees pursuant to s 49 of the Holidays Act 2003 (the Act). The second question, which also arose under s 49, was, if they would otherwise have been working days, what was the relevant daily pay for those days?

[2] The Authority found there was a notional work pattern during the shutdown which made the public holidays days that would otherwise have been working days and the defendant (SCA) had correctly paid the relevant daily pay. The plaintiff union has challenged this determination and in response SCA has argued that the public holidays which fell during the shut down were not days that would otherwise have been working days and therefore there was no requirement to determine and pay the relevant daily pay.

The agreed facts

[3] The parties have reached an agreed statement of facts from which the following summary is taken. Until earlier this year SCA operated a plant manufacturing disposable nappies at Swanson, described as the "diaper site", to which this dispute relates. At the Swanson site there were essentially two groups of hourly paid employees. The first group comprised approximately 38 employees who were employed five days per week, Monday to Friday for eight hours a day.

[4] The second group, which is affected by the present dispute, comprised approximately 58 employees who worked 12 hours per shift. Some worked a fixed day roster, others worked a fixed night roster. These were all worked on a four day/night on, four day/night off rotating roster, except for four electricians who rotated shifts between day and night. Each shift cycle took eight weeks to complete on the four on four off pattern. In some weeks a person would work 36 hours and in others 48 hours. On average they worked 42 hours per week over the eight week cycle and this was managed by equalising their wages at 40 ordinary hours plus two hours at 1.25 overtime rate per week.

[5] The Swanson site began 12 hour shifts in 1993 and before that the employees had worked on a five day per week, eight hour per day roster. When the 12 hour x4 x4 roster was introduced in 1993 an appendix was negotiated into the collective employment contract covering how the diaper site would operate in the future. This was known as the "Swanson Road Variance" (appendix A). This appendix was carried forward into each subsequent collective contract or collective agreement, with a further clause being added during the 2001 round of negotiations (clause 6.8.4

of appendix A). The most recent collective agreement to which appendix A is annexed is the SCA Hygiene Australasia – Treasures Babycare Swanson Collective Employment Agreement 2008-2011 (the CA). Appendix A has simply been rolled over as it had been in previous years and apparently there have been no negotiations concerning the effect of the 2003 Act.

[6] Appendix A provides for an annual close down during the Christmas period. At the start of the close down period the roster is suspended and at the end of the close down period the roster is reinstituted from the point at which it had been suspended. No employee is required to work during the close down period and they have only done so in exceptional circumstances on agreed terms. All days taken as annual leave by 12 hour workers during the Christmas close down period are deemed, by appendix A, to be of eight hours duration rather than 12 and the employees' leave balances are debited by eight hours for each day. Outside of that period, days taken as leave by 12 hour workers would be debited by 12 hours for each day.

[7] Appendix A also provides for each of the four public holidays during the close down period to be paid at eight hours per day.

[8] In February 2007 the union raised a dispute claiming that the 12 hour workers should be paid at the rate of 12 hours per day as the relevant daily pay for each of those annual holidays.

The statutory and contractual provisions

[9] Relevant sections of the Holidays Act 2003 that must be interpreted and applied to the facts are:

> **6 Relationships between Act and employment agreements**
>
> (1) Each entitlement provided to an employee by this Act is a minimum entitlement.
>
> (2) This Act does not prevent an employer from providing an employee with enhanced or additional entitlements (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.

(3) However, an employment agreement that excludes, restricts, or reduces an employee's entitlements under this Act—

(a) has no effect to the extent that it does so; but

(b) is not an illegal contract under the Illegal Contracts Act 1970.

…

9 Meaning of relevant daily pay

(1) In this Act, unless the context otherwise requires, **relevant daily pay**, for the purposes of calculating payment for a public holiday, alternative holiday, sick leave, or bereavement leave,—

(a) means the amount of pay that the employee would have received had the employee worked on the day concerned; …

…

(4) However, an employment agreement may specify a special rate of relevant daily pay for the purpose of calculating payment for a public holiday, alternative holiday, sick leave, or bereavement leave if the rate is equal to, or greater than, what would otherwise be calculated under subsection (1) or subsection (3).

…

Closedown periods

29 Meaning of closedown period

In this section and sections 30 to 35, **closedown period** means a period during which an employer customarily—

(a) closes the employer's operations or discontinues the work of 1 or more employees; and

(b) requires his or her employees to take all or some of their annual holidays.

30 Frequency of closedown periods

(1) For the purposes of sections 31 to 35, the employer may have only 1 closedown period in any 12-month period.

(2) However, subsection (1) does not prevent an employer and employee from agreeing—

(a) that the employer may close his or her operations and discontinue the work of the employee at other times; and

(b) on the arrangements that will apply during those times.

(3) If subsection (2) applies, sections 32 to 35 do not apply.

31 Employer may have different closedown period for each part of business

To avoid doubt, an employer may have different closedown periods for each separate part of the employer's business.

32 Requirement to take annual holidays during closedown period

(1) An employee who is entitled to annual holidays at the commencement of a closedown period must, if required to do so by his or her employer, take annual holidays during the closedown period whether or not the employee agrees to take the holidays.

(2) An employee who is not yet entitled to annual holidays at the commencement of a closedown period must, if required to do so

by his or her employer, discontinue the employee's work during a closedown period.

(3) If this section applies, the employer must give the employee not less than 14 days' notice of the requirement to take the annual holidays or to discontinue the work (as the case may be).

…

40 Relationship between annual holidays and public holidays

(1) A public holiday that occurs during an employee's annual holidays must be treated as a public holiday and not as part of the employee's annual holidays.

(2) Subsection (3) applies if –

(a) the employment of an employee comes to an end; and

(b) the employee is entitled to annual holidays; and

(c) the employee has not taken the annual holidays or has taken only some of them.

…

Payment for public holidays

49 Payment if employee does not work on public holiday

If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay for that day.

…

Determination of what would otherwise be working day

12 Determination of what would otherwise be working day

(1) This section applies for the purpose of determining an employee's entitlements to a public holiday, an alternative holiday, to sick leave, or to bereavement leave.

(2) If it is not clear whether a day would otherwise be a working day for the employee, the employer and employee must take into account the factors listed in subsection (3), with a view to reaching agreement on the matter.

(3) The factors are—

(a) the employee's employment agreement:

(b) the employee's work patterns:

(c) any other relevant factors, including—

(i) whether the employee works for the employer only when work is available:

(ii) the employer's rosters or other similar systems:

(iii) the reasonable expectations of the employer and the employee that the employee would work on the day concerned.

(4) For the purposes of public holidays, if an employee would otherwise work any amount of time on a public holiday, that day must be treated as a day that would otherwise be a working day for the employee.

[10] The following are the relevant provisions of the CA and appendix A:

1.1 Objects of the Agreement

To provide stable and secure industrial and bargaining arrangements that meet the objectives of both employer and employee

Appendix A

5. Public Holidays

This clause stands in lieu of the provisions contained in the agreement 12.1.1 – 12.1.3 inclusive.

5.1 Except for any Public holidays that fall during the Christmas shut period (provision for which is made in 6.[8] below, the following shall apply:

…

5.2 Observance and payment for any public holiday that falls during the Christmas shut shall be detailed in Clause 6.[8] below.

6. Annual Leave

…

6.8 **Annual Shut**

6.8.1 The diaper operation shall be closed for a two calendar week period (14 days) at Christmas.

6.8.2 For the duration of this closure, the provision of this roster shall be suspended. At the conclusion of the 14 days closure, the roster will be resumed exactly at the point that it was left off.

6.8.3 For the duration of the closure, all employees shall be deemed to be "five days per week, eight hours per day" employees. Accordingly any public holidays that may occur shall be paid on this basis and any leave days taken during this 14 day closure shall be reckoned at eight hours per day, and deducted appropriately from the individual's accumulated annual leave entitlement.

6.8.4 If the Company requires production during the shutdown period due to the needs of the business and/or marketplace, the parties agree to use their best endeavours to arrange for sufficient employees to enable the companies' operations to continue.

[11] The relevant public holidays affecting this case were 25 and 26 December and 1 and 2 January.

Submissions

[12] In accordance with an agreed timetable the parties filed their summary of submissions in advance. Ms McInally for the plaintiff submitted that the affected employees, who worked 12 hour shifts, should have their relevant daily pay based on a 12 hour day and not on an eight hour day. She submitted that SCA's payment calculations relied on cl 6.8.3 of the appendix, which predated the Holidays Act and now breach that Act. She relied on s 6 of the Act and the contention that the 12 hour shift workers were being denied their minimum entitlement. Under s 49 they were entitled to be paid, she submitted, not less than the relevant daily pay and, in accordance with s 9, that meant the amount of pay they would have received had they worked on the day concerned. She contended that the proviso in s 9(4) meant that the rate which had been provided in the appendix was not equal to or greater than what otherwise would have been calculated under s 9 by excluding the close down period.

[13] Ms McInally relied on s 40 which expressly deals with the situation where the public holiday occurs during a period of annual leave and requires it still to be treated as a public holiday and not part of the annual holiday. She submitted that the suspension of the roster over the holiday season could not defeat the clear Parliamentary intention that employees should be paid the relevant daily pay for the public holidays falling during the closedown. She submitted that this was clear even under the 1981 Act as a result of the decision of the Court of Appeal in *Ports of Auckland Ltd v NZ Waterfront Workers Union Inc*[1] and since that time the legislation has become more precise as to what is to be included in the relevant daily pay. She submitted that the basic principle that public holidays are not to be paid at less than the true value of a working day, remains.

[14] Ms McInally submitted that the employment agreement created a legal fiction, deeming a working day to be eight hours when in reality it was invariably of 12 hours duration for the shift workers. She submitted that the Act requires the calculation of relevant daily pay to be grounded in reality and therefore 12 hours was

[1] [1996] 2 ERNZ 25.

the correct rate of pay. She submitted the literal application of the Act did not permit any lesser amount to be paid for the public holidays falling within the shutdown period and that the application of cl 6.8.3 of the appendix must give way to the plain intention of the legislature. She submitted the five day arrangement in cl 6.8.3 identified the working days but must be viewed as having no effect in relation to the relevant daily pay for those days, which must be payable on the basis of 12 hour working days.

[15] Mr France for the defendant submitted that cl 6.8 of appendix A complied with the Act. It showed that for two calendar weeks over the Christmas period the roster is suspended. Employees are not required to work and have no expectation of working on any of the days that fall during the shutdown, including the public holidays. He submitted that for this reason the public holidays that fall during the Christmas closedown period are not otherwise working days for the purpose of ss 9 and 49 of the Act. In explaining the context of the provisions of the appendix he noted that the defendant's roster is set in advance for the entire year. He relied on the objects provision of the CA itself, the first of which was "to provide stable and secure industrial and bargaining arrangements that meet the objective of both employers and employees" (cl 1.1).

[16] Mr France submitted that the appendix provided certainty for the parties and a stable rostering situation which made it clear that the roster was suspended completely during the Christmas closedown and then resumed exactly at the point it was left off at the conclusion of the 14 days (cl 6.8.2).

[17] Mr France submitted that the appendix did not exclude, restrict or reduce an applicable employee's entitlement under the Act in terms of s 6. He observed that the SCA Swanson Road Plant is not a 365 day a year operation. Every 12 months SCA closes its entire operations and discontinues the work of its employees for the two week calendar period over Christmas. Mr France submitted that, in accordance with s 29(b) and s 32(1) of the Act, during this time the defendant requires its employees to take some of their annual holidays.

[18] Mr France accepted under s 40(1) that the public holidays which occur during the annual closedown, these being 25 and 26 December and 1 and 2 January, are not to be and are not deducted from an employee's annual holiday entitlement. But, he submitted, this section does not provide that it is mandatory for all employees to be paid for public holidays that fall during the close down. To be entitled to payment for a public holiday that day must "otherwise be a working day", for an employee in terms of s 49 of the Act.

[19] Mr France then turned to the factors that are to be taken into account in determining whether a particular day is "otherwise a working day" under s 12 of the Act. These include

a) The agreed terms and conditions of the parties' collective agreement;

b) The work patterns of employees during the closedown period;

c) SCA's roster system and in particular the suspension of that roster system over the closedown period;

d) The expectations of both parties that employees are not required to work on any of the public holidays that fall during the closedown period or indeed any of the other days which fall during that period.

[20] Mr France submitted that the following supported the submission that public holidays falling during the shutdown were not otherwise working days because:

a) The diaper plant was not a 365 day a year operation;

b) For two weeks the roster was suspended;

c) During that two week period the employees did not expect to work and could not be required to work;

d) When there was a need to continue production or conduct maintenance during the two week period, SCA sought volunteers.

> The terms were then negotiated for the work to be performed during that period.

[21] Mr France relied on *Progressive Meats Ltd v Meat and Related Trades Workers Union of Aotearoa Inc*[2] where the Court was required to determine whether employees who were not required to work on a Queens Birthday public holiday should have been paid their relevant daily pay, in light of their particular patterns of work. The Court found that, had the particular day not been a public holiday, it was likely that the employer would have paid annual leave to employees who were not required to work (if they were entitled to annual leave), and for the remainder of the employees, the employer would have treated the day as unpaid leave. The Court held that none of the employees in that case were entitled to receive their relevant daily pay, as it would not otherwise have been a working day for them. In that case, as in the present, the parties' collective arrangements set the relevant rate of pay for a public holiday not worked in those circumstances. Mr France submitted that the case was particularly persuasive when considering the present situation because in both cases there was no reasonable expectation by either party that employees would work on the day or days in question and even if the particular day was not a public holiday employees would not be required to work on it.

[22] Mr France also submitted there was some support to be found in the Court of Appeal's decision in *NZ Fire Service Commission v NZ Professional Firefighters Union.*[3] There, by contrast, was a 24 hours a day, 365 days a year fire fighting service. The Court of Appeal held that whether a day would otherwise be a working day was an intensely practical question which required in the first instance employers and employees having to agree on the answer. Here, Mr France submitted, the parties had so agreed in the appendix. He also submitted that on these factors and principles and their application to the circumstances of the particular case including the agreed variation to employees' rostered work patterns during the closedown, 25 and 26 December and 1 and 2 January would not "otherwise be working days" for any of the employees concerned.

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[2] (2008) 5 NZELR 219.
[3] [2006] ERNZ 1109.

[23] As an alternative argument if the Court found as the Authority did that the public holidays were "otherwise working days", Mr France submitted that SCA had still complied with its obligations under the Act and that the amount agreed to be paid under the appendix in terms of s 9(1) was the amount of pay that the employee would have received had the employee worked on the day concerned. He observed that all employees were deemed to be five days per week, eight hours per day employees and would only be entitled to payment for a public holiday during the closedown if they were "rostered to work on that particular day" and, if they were not so rostered, would not be entitled to any payment.

[24] Mr France turned to the remedies sought by the plaintiff that the public holidays be paid on the basis of each day being 12 hours duration and a declaration that appendix A was of no effect to the extent that it could reduce that relevant daily pay by four hours per day. He submitted that granting those remedies would have the effect of requiring some form of notional rostering during the closedown period and, if that were so, many of the affected employees would not have been rostered to work on the statutory holidays and therefore not be entitled to any payments. Further the 12 hour employees were receiving the benefit of having only eight hours debited to their annual holiday entitlements during the closedown period.

Conclusion

[25] I accept Mr France's primary submission. The Holidays Act contemplates closedown periods as ss 29-35 demonstrate. The SCA customarily closed the relevant operations at Swanson for 14 days at Christmas. It had done so since at least 1993. It also required its employees to take annual holidays during the closedown. No employee was required to work during the closedown period and the rostered arrangements were suspended. At the conclusion of the 14 days closure the roster resumed exactly at the point that it was left off.

[26] Section 12 applies for the purpose of determining what would otherwise be a working day. On the face of it, it was clear that none of the 14 days of the closedown period had otherwise been working days. However, if it was unclear, SCA and its employees through the union had reached agreement on the matter as

embodied in appendix A. The factors that were taken into account must have included the provisions of the employment agreement, the work patterns, whether work was available, the rostering system, and the reasonable expectation as to whether the employer would work on the day concerned. Here all of the arrangements between the parties had been carried on without objection for many years and demonstrated that days falling within the two calendar week period of the closedown were not otherwise working days.

[27] Turning to s 40, the public holidays that occurred during an employee's annual leave were treated as public holidays and not part of, and therefore reducing, the employee's entitlement to annual holidays.

[28] Turning then to the requirements of s 49, I find the employees did not work on the public holidays falling during the closure but those days would not otherwise have been working days for the employee. There was therefore no obligation for SCA to pay to the employee not less than the employee's relevant daily pay for that day. For this reason I do not determine what would have been the relevant daily pay if the days had otherwise been working days.

[29] In spite of not being required to pay the relevant daily pay for those public holidays falling in the closure period, I note that SCA reached an agreement with the union, as embodied in its appendix A to the various collective agreements, which ensured that the employees would still be paid for those public holidays, but on the basis of an eight hour working day. This gave those employees the right to be paid on all four public holidays and not merely on the days when they might have been notionally rostered during the close down period. It also gave the 12 hour employees the advantage of having only eight hours per day deducted from their accumulated annual leave entitlements instead of 12 hours per day.

[30] In a very real sense, appendix A has provided the affected employees with more than the minimum entitlement of the Act, in terms of s 6(1), and there is no basis to find that appendix A has reduced those entitlements in terms of s 6(3). The challenge is therefore dismissed.

Costs

[31] At the request of the parties costs are reserved. If they cannot be agreed the first memorandum is to be filed and served within 30 days of this judgment, with a further 21 days to reply.

B S Travis
Judge

Judgment signed at 4 pm on Thursday 10 June 2010