

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN David Stuart Milne, Labour Inspector (Applicant)
AND Elders Stock Limited & Wrightson Limited t/a Associated
Auctioneers (Respondent)
REPRESENTATIVES David Milne, For the Applicant
Craig Rowlandson, For the Respondent
MEMBER OF AUTHORITY Ken Anderson

DATE OF DETERMINATION 25 August 2005

DETERMINATION OF THE AUTHORITY - ON THE PAPERS

The Matter to be Determined

- [1] The Labour Inspector, Mr David Milne, acting on behalf of Mr Graham Potter, seeks to recover holiday pay of the gross sum of \$290.00, being two day's ordinary pay. It is claimed that Mr Potter was entitled to be paid this sum under the relevant provisions of the Holidays Act 1981, for the public holidays of Christmas Day 2003 and New Year's Day 2004.

Background

- [2] Associated Auctioneers was established as a trading entity in 1988 by Elders Stock Limited and Wrightson Limited. These two companies provide goods and services to the farming industry, including the sale and purchase of livestock. Associated Auctioneers conduct livestock sales at saleyards throughout New Zealand. Mr Potter was employed at the Tuakau saleyards by Associated Auctioneers – Central ("Associated Auctioneers"), where stock sales were usually held on a Thursday of each week, with some special sales taking place, from time to time, on a Wednesday or Friday. Mr Potter was employed on a casual basis in that he only, more often than not, worked on the days that there were stock sales.
- [3] The stock sales are pre-set for each year and shown on a sales calendar produced by Wrightson Limited. Therefore, the farming community and employees associated with the stock sales, know when and where the sales will take place for the calendar year. The sales at Tuakau usually take place on a Thursday but if that day happens to be a public holiday, then the sale would take place on an alternative day.
- [4] Christmas Day 2003 was a Thursday hence the last sale day at Tuakau for 2003 was Thursday 18 December. New Year's Day 2004 was also a Thursday and so the next sale day was the following week, Thursday 8 January 2004.

- [5] Mr Potter says that because Thursday 25 December 2003 (Christmas Day) and Thursday 1 January 2004 (New Year's Day), were days that he would have usually worked, had they not been public holidays, he should be paid for those two days in accordance with the provisions of section 7A of the Holidays Act 1981.
- [6] But, Associated Auctioneers say that Mr Potter is not entitled to be paid for those two days because:
- (a) He was employed on a casual basis and worked as and when necessary with no guarantee that "ongoing" work would be available; and
 - (b) The sale days at Tuakau are notified by calendar a year in advance and any sales that would clash with a public holiday are assigned a different day.

Associated Auctioneers also say that in January 2003, this issue arose at another sales yard and a legal opinion obtained at that time, supported their position that there is no entitlement to payment for such public holidays.

Analysis and Conclusions

- [7] The Holidays Act 1981("the Act") applied at the relevant times regarding Mr Potter's claims.¹ Section 7A of the Act provides that:

"(1) Every employment agreement shall provide, in relation to every worker bound by it, for the grant to the worker in each year of not less than 11 whole holidays which shall, **where they fall on days that would be otherwise working days for the worker**, be holidays on pay, in addition to annual holidays." (Emphasis added.)

- [8] The 11 holidays are well known and of course, include Christmas Day and New Year's Day. The substance of Mr Potter's argument for payment for those days is that they were days that that he would have otherwise worked had they not been public holidays. And, because the two sale days were not reassigned to alternative dates, he has been deprived of two day's pay.
- [9] In the absence of any evidence of an employment agreement existing between the parties or any other written record of the terms of Mr Potter's employment, the Authority is left to apply the above emphasised words of the Act to his circumstances. It follows that the question that needs to be asked is: Were the two days that Mr Potter claims payment for, "**days that would be otherwise working days**" for him?
- [10] The time sheets of Mr Potter for the total time that he worked for Associated Auctioneers show that he worked on the majority (79%) of the Thursdays that were available to be worked, hence if it was just on the basis of a probability analysis, then one could conclude that it was a reasonable expectation on the part of Mr Potter that he would have worked on the two days in question, if they had not been public holidays.
- [11] However, there is a particular and possibly somewhat unique factor applying to the circumstances pertaining to Mr Potter's employment. That factor is that the live stock sales are pre-set one year in advance, as evidenced by the calendars provided to the Authority. Not surprisingly, stock sales are not held on Christmas Day or New Year's Day each year. Indeed, there is a pattern that stock sales are not held from approximately 20 December in one year until approximately one week into January the next year. This apparently allows for a seasonal holiday break to be traditionally taken at that time of the year as is customary in New Zealand.

¹ The transitional provisions of the Holidays Act 2003 relating to entitlements under the Holidays Act 1981 also apply.

[12] The effect of this “break” in the sales calendar is that regardless of which day Christmas Day or New Year’s Day falls on in any particular year, there is never any intention to have a stock sale during a period of approximately two working weeks. Hence, the outcome for Mr Potter is that those days are not days that would otherwise be working days for him and he has no entitlement to be paid for them.

Determination

Mr Potter is not entitled to be paid pursuant to section 7A of the Holidays Act 1981 for Christmas Day 2003 and New Year’s Day 2004 because the public holidays did not fall on days that would otherwise have been working days for him.

Costs

As the parties do not appear to have incurred any costs there is no order.

Ken Anderson
Member
Employment Relations Authority