

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Amalgamated Workers Union (Southern) Inc (Applicant)

AND Works Infrastructure Limited (Respondent)

REPRESENTATIVES Peter Costello, Advocate for Applicant
John Watson, Advocate for Respondent

MEMBER OF AUTHORITY Paul Montgomery

SUBMISSIONS RECEIVED 08 November 2004 and 29 March 2005

DATE OF DETERMINATION 29 September 2005

DETERMINATION OF THE AUTHORITY

The Problem

[1] The parties were signatories to a collective employment agreement with a term of currency from 21 November 2002 to 20 November 2004. A dispute has arisen over the interpretation of the collective agreement in respect to the correct payment for an employee taking leave on a statutory holiday and how the overtime provisions of the agreement are to be applied.

The Actual Situation

[2] An employee covered by the collective employment agreement worked the week prior to Easter 2003 completing the following hours:

- a. Monday 9 hours
- b. Tuesday 11 hours
- c. Wednesday 9.5 hours
- d. Thursday 8.5 hours.

[3] The question is, what is the appropriate rate for payment on Good Friday, a statutory holiday.

[4] The applicant says that the 8 hours on Good Friday form part of the ordinary hours of work but as the total hours in the week are 46 and therefore exceed 40 hours by 6 hours, those 6 hours should be paid at overtime rates.

[5] The respondent says it correctly applied the terms of the collective agreement in paying the employee at ordinary rates for the statutory holiday.

The Relevant Clauses

[6] The clauses bearing on this matter are contained in two documents; the Collective Employment Agreement, Alexandra Branch, and the 'Terms of Settlement, Alexandra Works

Infrastructure Limited Collective Employment Agreement' signed by the parties on 28 January 2003.

[7] Clause 5 of the collective employment agreement reads

Clause 5 Hours of Work

5.1 Ordinary hours of work shall not exceed 40 hours per week, or 10 per day to be worked between 5:00am and 7:00pm Monday to Friday. A minimum of 8 hours will be available for each day that is required to be worked as ordinary hours. The number of hours worked in each day and the start and finish times each day will be at the discretion of the employer.

[8] Section 4 of the collective employment agreement sets out the interpretation of certain terms employed in the collective employment agreement

Clause 4.5 'Overtime'

Work authorised by the relevant supervisor and performed in excess of either 10 hours daily or 40 hours weekly.

[9] The second paragraph of the Terms of Settlement clearly refers to clause 5 of the collective agreement and reads

Clause 5 Hours of Work

All authorised leave (annual, statutory, sick) shall be calculated as part of the ordinary hours of work (40 hours) in the calculation of overtime, if unpaid (ie. Driver's Lieu Day) the day off shall not contribute to the calculation of overtime.

The Applicable Law

[10] In determining this matter I have been mindful of the principles of interpretation as set out in the case law to which the parties have referred me, in particular the Employment Court decision in *Association of Staff in Tertiary Education v. Hampton* (unreported AC 23A/02) which cites *Canterbury Golf International Limited v. Yoshimoto* in the matter of *Parkes v. Carter Holt Harvey Limited* (unreported CA57/03) 20 May 2003.

'[23] Nevertheless, if the words are clear and can have only one possible meaning, that should generally determine the matter. The court will need to be very sure of what business common sense requires before so interpreting a contract if that does not accord with the clear words. Sometimes there can be two views and care must be taken not to stretch the meaning of words in a way which one of the parties regards as eminently sensible but which the other finds entirely unreasonable. Sometimes the concept of the commercial purpose of an agreement is not always straightforward. Whereas in a partnership or joint venture parties do have a common end in view, in other cases (including in particular employment agreements) parties have their own separate purposes which are not readily reconcilable. It is necessary to be careful not to treat as the commercial purpose of the agreement what seems to the court to be the decent thing to do. It is not the court's task to re-write an agreement.'

[11] For the avoidance of any doubt I have paid particular attention to and have read jointly both Section 5 of the Collective Employment Agreement and the second paragraph of the Terms of Settlement relating to Clause 5. I have also taken into consideration Section 4.5 of the Collective Employment Agreement in my determination.

The Determination

[12] Clause 5 sets out that all authorised leave ... *shall be calculated as part of the ordinary hours of work (40 hours) in the calculation of overtime.*

[13] Section 4 of the Collective Employment Agreement , Alexandra Branch relates to the interpretation to be applied to the document. At Clause 4.5 it is clear that overtime is defined as 'work' authorised 'and performed'.

[14] At the end of the day on Thursday 17 April 2003 the employee had accrued 37 hours at ordinary rates and 1 hour at time-and-a-half (overtime rate). That overtime hour was for work authorised and performed by him in the course of his working week.

[15] In exercising his entitlement to take Good Friday off as a statutory paid holiday the employee did not perform work on that day and as a consequence I find was not entitled to be paid on the balance of the 40 hours at any rate other than the ordinary time rate.

[16] Clause 5 of the Terms of Settlement does not alter this position. The clear meaning of this clause I find, is that all authorised leave, including statutory leave is to be calculated as '*part of the ordinary hours of work (40 hours) in the calculation of overtime*'. The respondent in calculating the employee's entitlement in this particular week namely that of Easter 2003 is as required under the agreed terms of the Collective Employment Agreement.

[17] My view is reinforced by the court of appeal decision in *Ports of Auckland Limited v. New Zealand Waterfront Workers Union [1996]* to ERNZ 25 at page 31 '*Third, if the focus is on pay for the ordinary working day anything which is clearly payable only in defined circumstances or at a defined times is excluded. Overtime, bonuses, and allowances of varying kinds are usually add-ons and ... productivity and incentive based payments which are dependent on actual working results need not be notionally calculated and paid.*

[18] There is nothing in the wording of the relevant clauses in the documents presented to the Authority to persuade me to depart from the principles established in the *Ports of Auckland* case. However, the events which led to this particular dispute took place under the currency of the Holidays Act 1981. I note the applicant's submission uses the phrase '*relevant daily rate*' for the public holiday. This term does not appear in the Holidays Act 1981 but a similar phrase '*relevant daily pay*' appears and is defined in Section 9 of the Holidays Act 2003 which came into effect on 1 April 2004, almost 12 months after the week in question.

[19] The applicant is unsuccessful in its application on this matter.

Costs

[20] Costs are reserved. I urge the parties to attempt to resolve this issue between themselves particularly as the matter has been determined on the papers.

Paul Montgomery
Member of Employment Relations Authority