Determination Number: AA 6/05
File Number: AEA 1246/03

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	New Zealand Amalgamated Engineering Printing (Applicant)
AND	Air New Zealand Ltd (Respondent)
REPRESENTATIVES	Simon Mitchell, Counsel for Applicant Kevin Thompson, Counsel for Respondent
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	17 November 2004
DATE OF DETERMINATION	12 January 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The New Zealand Amalgamated Engineering Printing and Manufacturing Union ("the union") and Air New Zealand are parties to the Aircraft Engineering Employees collective employment agreement ("the CEA"). The union and Air New Zealand are also parties to the 'AMS Hangar Avionics and Mechanical Shift Variation to the [CEA]' ("the shift variation"). Such variations are permitted under the CEA.

[2] The parties dispute the calculation of the payment to employees employed under the shift variation for time off in lieu when work has been done on a statutory holiday. Air New Zealand has made such payment at a rate which excludes a penal loading set out in the shift variation. The union says payment should include the penal loading.

[3] A further claim for the incorporation of other allowances into the time off in lieu payment was withdrawn.

[4] It was common ground that the Holidays Act 2003 addresses the calculation of payment for time off in lieu in respect of the period commencing 1 April 2004. Hence no reference is made to that Act and this determination applies in respect of the period to midnight on 31 March 2004.

Background

[5] Clause 6 of the CEA deals with leave.

[6] Clause 6.1.3 and 6.1.4 provide for transferred public holidays and say that such transferred holidays are credited at the employee's 'ordinary rate of pay.' The notes to clause 6.1 include:

"1. For the purposes of this clause the term 'ordinary rate of pay' means the composite hourly rate for the employee's daily number of ordinary hours excluding overtime.

'Composite rate' means the wage rate as published in this Agreement plus hourly allowances. For the purposes of the calculation of the ordinary rate of pay it includes, where appropriate, penal allowances as provided in clause 4.2.4 and 4.10.2 but excludes all other claimable allowances."

[Clause 4.2.4 provides that where Saturday and Sunday form part of the agreed ordinary hours of work for day employees, payment for all ordinary hours on those days is at T11/2. Clause 4.10.2 makes similar provision for shift workers.]

[7] Clause 4 of the shift variation provides that the variation be read 'in conjunction with' the CEA.

[8] The shift arrangements under the CEA and its predecessors provided for shifts of 8 hours per day, with penal rates for shifts worked on Saturdays and Sundays and overtime for work in excess of 8 hours in a shift, and with further additional payments in respect of night work. A number of allowances were also payable.

[9] The shift variation set up a system of 12-hour shifts worked over an 8 week cycle. There is also a 4 week cycle, but it is outside this employment relationship problem. Without the remuneration system contained in the variation, employees' fortnightly pay calculated under the CEA could vary depending on factors such as the number of Saturdays and Sundays worked during a cycle. Accordingly, in the interests of providing a stable income, the parties agreed on a remuneration system expressed to be based on taxable earnings for standard rostered hours and averaged to provide a standard fortnightly base pay. A penal loading, incorporating penal and overtime and certain other rates from the CEA, as well as specified allowances were payable on top of that. Overtime remained payable when shifts in excess of 12 hours were worked.

[10] Clause 7 of the shift variation sets this out as follows:

"7.1 Principles …

A stable income for 12 hour 8 week cycle employees covered by this variation will be paid, based on the taxable earnings for standard rostered hours and averaged to provide a standard fortnightly sum.

7.1.1 Non taxables, overtime and statutory holidays are calculated separately under [CEA] provisions.

7.1.2 Each day of leave taken for which the ordinary rate of pay applies (eg sick, special leave) will incur a deduction from the fortnightly average pay of the average penal loading, shift and band allowances for a shift length of twelve hours. If a part day is taken both the deduction and the average hours will be prorated.
Note: 'Ordinary pay' as defined for sick leave and special leave is exclusive of penal rates, overtime and other non composite allowances….

7.2 Calculations for each 8 week shift cycle

7.2.1 [calculations]

… Therefore the hours paid per fortnightly base pay will be 84.65.

7.2.2 Penal loading

34.82% loading based on 117 penal hours per shift cycle.

[shift allowance and band allowance set out]

7.2.5 Deduction rate for leave paid at ordinary pay only (sick leave and special leave)
((Ordinary rate x penal loading) x average hours per shift) + average daily shift allowance + (band allowance x average hours per shift)
therefore

((Ordinary rate x 34.82%) x 12) + $4.50 + (0.73 x 12)
Note: 'Ordinary pay' as defined for sick leave and special leave is exclusive of penal rates, overtime and other non-composite allowances. (See clause 6.7.2 of the [CEA])

7.4 Overtime

7.4.1 …

7.4.2 All time additional to the shift roster is overtime. Overtime will be calculated as per [CEA's]"

[11] Clause 8 of the shift variation provides in part:

"8.1 Statutory holidays
Days in lieu will be applied as per the [CEA's]."

[12] I was also provided with representative details of payments for time off in lieu made to an aircraft engineer working under the shift variation. They confirm that payment for time off in lieu of statutory holidays was calculated by deducting the penal loading in respect of the relevant time off from the payment otherwise calculated.

Determination

[13] Section 7A of the Holidays Act 1981 provided for the grant of whole holidays which, when they fell on days that were otherwise working days for an employee, were to be 'on pay'. Cases heard in the 1990s decided this meant that, if an employee worked on one of those days, further time off in lieu 'on pay', was required. Regarding the meaning of 'on pay', the Court of Appeal in **Ports of Auckland Limited v NZ Waterfront Workers Union Inc** [1996] 2 ERNZ 25, said:

> "It may fairly be assumed that the purpose of s 7A and s 25 is to enable workers observing statutory holidays falling on what would otherwise be working days to have the pay they would have earned on an ordinary working day. … Any lesser remuneration is something less than 'pay' using that word in its ordinary sense. (p 30)"
>
> "Four consequences follow from this interpretation.
> First, … the inquiry is not what the employee would receive if he or she worked on the particular holiday. The inquiry is what is payable for an ordinary working day.
> Second, there is no scope for bargaining for a lesser special rate for the purposes of calculating statutory holiday pay. …
> Third, if the focus is on pay for the ordinary working day, anything which is clearly payable only in defined circumstances or at defined times is excluded. …
> Fourth, the work pattern and remuneration arrangements may have reached the point under the employment contract where, instead of a traditional separation between ordinary time rates and other payments referable to particular times and conditions, a composite rate made up of a number of components applies generally and covers the ordinary working day. In such a case the composite rate will have become the wages for an ordinary working day within s 25 and the rate for calculation of holidays on pay with s 7A. It will be a matter of interpreting the particular employment contract to determine what side of the line the particular case falls. That will require distinguishing allowances which have been incorporated into a global rate or are payable as of course from those payable only in particular circumstances, even if they recur regularly and even if they would have been payable if the employee had worked that day." (p 30 – 31)

[14] An underlying purpose of the shift variation was to provide for shifts of 12 hours' duration instead of the generally more common 8 hours. Twelve-hour shifts were to become the norm for employees working under the variation, so that the employees' ordinary working day was to be 12 hours long. This had a number of consequences which included the decision to address the method of calculating their remuneration.

[15] I regard it as apparent from the evidence and the wording of the shift variation that the penal loading in the variation was paid as a matter of course for an ordinary working day. The payment

was not referable to particular times and conditions, and in that sense can be said to have become part of the wages for an ordinary working day.

[16] A similar conclusion was reached in respect of a penal and overtime loading in **Wilson v Airways Corporation of New Zealand Limited** (30 April 1997, Judge Palmer, CEC 14/97). A broadly comparable conclusion was reached in **Nelson Pine Industries Limited v Barton & Ors** (5 February 1997, Chief Judge Goddard, WEC 5/97), where 12 hour shifts were worked although 4 of the hours in each shift were paid at overtime and penal rates. Although it did not address the relevant calculations the Employment Court found that payment should be made for a day in lieu of a statutory holiday on the basis of the 12 hour shift, since an ordinary working day was 12 hours, rather than 8 hours at ordinary rates.

[17] In contrast to the penal loading in the shift variation here, clause 7.4 of the variation provides for the payment of overtime for time worked in addition to the shift roster. Payment under that clause is referable to a particular time or condition and cannot be said to have become part of the wages for an ordinary working day. It probably falls on the 'other side of the line' from payment of the penal loading.

[18] Both parties addressed the construction of the CEA and the shift allowance. While their submissions in that respect are capable of shedding light on what amounts to the pay for an ordinary working day in terms of the **Ports of Auckland** judgment, it is not open to them to go further and urge a construction that is not consistent with s 7A of the Holidays Act. In other words, this employment relationship problem falls to be determined primarily by applying the Holidays Act obligations to the facts, and against that background gaining assistance from the CEA and shift variation where necessary or appropriate.

[19] Another unreported decision of the Employment Court, **Labour Inspector v Greenlea Premier Meats Limited** (7 May 2002, Judge Shaw, AC 25/02) highlights the dangers in relying on a clause which purports to identify the rate of pay for a statutory holiday. There the relevant clause provided that payment was to be made at the ordinary hourly rate specified in the agreement, when the workers concerned were actually paid at a 'specified rate for wage grades' when they worked. Her Honour found the provision for payment at the ordinary hourly rate was an attempt to contract out of clause 7A and that the specified ordinary hourly rate did not reflect the ordinary pay received by the employees concerned.

[20] The shift variation and the CEA contain attempts to specify how payment for time off in lieu of a statutory holiday is to be calculated. On their face, without reference to any particular set of facts, the relevant provisions in the CEA appear to follow the outcome of the **Ports of Auckland** judgment and do not appear to offend against the principles set out in it. An aspect of the present dispute is that the shift variation refers back to those provisions in material respects, but does not appear to take into account the effect of the blending of other provisions in the CEA which led to the setting of the penal loading. The result is that, **w**hile the logic of Air New Zealand's argument in support of a construction which excludes the penal loading has some appeal in the abstract, I find the outcome in practice offends against the requirement that 'on pay' be calculated with reference to the pay for an ordinary working day. It also offends against the prohibition on bargaining for a lesser rate for the purposes of calculating statutory holiday pay.

[21] For these reasons I conclude that the penal loading is payable in respect of payment for time off in lieu of a statutory holiday.

Costs

[22] Costs are reserved. The parties are invited to agree on the matter. If they seek a determination from the Authority they should file and serve memoranda setting out their positions.

R A Monaghan
Member of Employment Relations Authority