

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Meat and Related Trades Workers Union of Aotearoa Inc (Applicant)
AND Progressive Meats Limited (Respondent)
REPRESENTATIVES Simon Mitchell for the Union
Craig Hickson for the Company
MEMBER OF AUTHORITY P R Stapp
SUBMISSIONS 30 August, 26 September, 4 October, 2, 3 & 16 November 2005
INVESTIGATION MEETING Napier, 19 December 2005
DATE OF DETERMINATION 22 December 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Meat and Related Trades Workers Union of Aotearoa Inc (the Union) and Progressive Meats Limited (Progressive/the company) are parties to a collective employment agreement that expired on 1 May 2005, but by virtue of section 53 (3) of the Employment Relations Act remains enforceable.

[2] The union's members covered by the collective employment agreement are employed by Progressive at its Kelfield Place processing plant located at Hastings.

[3] Progressive has five core departments at its Hastings processing plant, including the lamb slaughter day and night shift and the lamb processing/boning day and night shift, both of which are relevant in this matter.

[4] Progressive decided that employees in the lamb slaughter department on the day shift and in the lamb boning department on the day and night shifts would not have worked on Queen's Birthday 2004 to be paid the relevant daily rate of pay because of the seasonality of their work. The

employees were paid the non production rate of \$10 per hour for eight hours. The employees claim that they are entitled to be paid the relevant daily rate of pay.

[5] This matter has come before the Authority as a dispute on the interpretation of the Holidays Act and the provisions of the parties' collective employment agreement. The parties have had the benefit of a decision from a Department of Labour, Labour Inspector. I considered whether or not there had been any attempts to resolve the matter by mediation. I was satisfied that mediation would not contribute constructively to resolving the matter because the parties had received a decision from the Labour Inspector and were polarised on an issue, which was most likely only to be resolved following an investigation and determination from the Authority. This is not a review or an appeal of the Inspector's decision. Initially the Authority was requested to determine the matter on the papers. However, following further submissions, the union requested an investigation meeting to clarify the issues. I agreed and the result has been that the Authority is required to make a determination.

The issue

[6] The issue relates to the meaning of the words "*would otherwise be a working day for the employee*".

Section 49 of the **Holidays Act 2003** states:

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.

[7] Where the employee and employer cannot agree whether a day would otherwise be a working day the following criteria are relevant to determine the matter under section 12 (3) of the Holidays Act:

- What the employment agreement says.
- The employee's work patterns.
- The employer's rosters or other similar systems.
- The reasonable expectations of the employer and employee as to whether the employee would work on the day concerned.
- Whether the employee works for the employer only where work is available.
- Any other relevant factors.

[8] The provisions of the collective agreement provide for:

Schedule A Lamb Slaughter Hours and wages

1. Hours

1.1 Step 1 Hours (Day Work and Night Shift)

1.1.1 *The production hours shall be up to fifty (50) per Monday to Friday week inclusive, to be worked on a shift basis.*

1.2 Step 2 Hours (Day Work, Nightshift and Weekend Shift)

1.1.1 *The following step 2 provisions would apply when customer throughput demand exceeds the throughput capability provided for in step 1.*

1.2.1 *The production hours shall be forty (40) per week, worked as follows:*

- *Day work of ten (10) hours production per day Monday to Thursdays inclusive; ...*

And

Schedule B Lamb and Venison Boning Hours and Wages

1. Step 1 Hours (Day and Nightshift)

1.1 *The production hours shall be up to forty five (45) per Monday to Friday Inclusive, to be worked on the basis of up to nine (9) hours production per shift per day Mondays to Fridays.*

1.2 *Under Step 1 overtime will be paid on a daily basis after eight (8) hours of work (which includes 30 minutes refreshment breaks) and for voluntary Saturdays, Sundays or Public Holidays work.*

1.3 *A total of one (1) hour per day shall be allowed for refreshment breaks Monday to Fridays and one twenty (20) minute refreshment break will apply for 5 hours worked on Saturdays. All refreshment*

breaks are to be taken as agreed. Accordingly, up to a ten (10) hour day, inclusive of production hours and refreshment breaks, shall apply Mondays to Fridays. Smoko's shall be taken in order of one before and one after the meal break.

1.4 Shift changes will occur around 3:30 to 5:00pm Mondays to Fridays as agreed...

2 Step 2 Hours (Day Work, Night Shift and Weekend Shift)

2.1 The following step 2 provisions will apply when customer throughput demand exceeds the throughput provided in step 1.

2.2 The Production hours shall be thirty six (36) per week, worked as follows:

- Day work of nine (9) hours production per day, Monday to Thursdays inclusive; and*
- A night shift of nine (9) hours production per day, Tuesdays to Thursdays inclusive; and*
- A weekend shift of nine (9) hours production per day, comprised of day work on Fridays, Saturdays and Sundays and a night shift on Mondays.*

3. Wages

3.1 Non-processing rate (NPR)

3.1.1 An NPR of \$10 per hour only shall apply and will be payable:

- When processing has temporarily stopped eg during a mechanical breakdown.*
- For work before or after processing*
- For meeting, working parties etc.*
- For refreshment breaks (excluding meal breaks taken. Up to a total of 30 minutes of refreshment breaks per shift per day will be paid.*
- Calculation of 40 hour equivalent.*

[9] Clause 9 in the agreement provides for wages as follows:

9. Wages

9.1 *The employer will pay to the employee remuneration as provided for in Schedules “A”, “B”, “C”, or “D” whichever is applicable.*

[10] Clause 11 of the collective agreement provides for public holidays:

11.2. Public Holidays

11.2.1 *The following public holidays shall be allowed for all employees in accordance with the Holidays Act 1981 and its amendments.*

Christmas Day, Boxing Day, New Year’s Day, Jan 2nd (or some other day in its place), Waitangi Day, Good Friday, Easter Monday, ANZAC Day, Queen’s Birthday, Labour Day, Anniversary Day of Province (or some other day in its place).

11.2.2. *Public Holidays shall be paid at \$10 per hour.*

11.2.3 *Where boning or lamb slaughter employees volunteer to work on any of the above holidays, he/she shall be entitled to be paid at overtime rates as per schedules A and B.*

Contract venison slaughter staff already have overtime allowances in the flat contract rate.

In addition, a day in lieu, paid at \$10 per hour, shall be granted at another time to be agreed. Payments prescribed in this clause shall not be in addition to any other payment.

The Union’s submissions

[11] All the criteria in s 12 (3) of the Holidays Act should be taken into account. The Authority was requested to determine whether it is necessary to establish that on a particular day the public holiday fell, an employee would have been provided work, or whether it is only necessary to establish that the day of the week would normally be a working day? It was submitted that the evidence supports the criteria because of the Monday to Friday work in the employment agreement.

The work patterns include Monday. The option for the availability of work satisfies work patterns and roster arrangements. The workers do work for the employer only when work is available but go to work to make up the minimum rate of pay. It was accepted by the union that it has some difficulty in meeting the criterion on the availability of work on the day to satisfy any reasonable expectations of the employer and employee as to whether the employee would work on the day concerned, because there was no work that day.

The employer's submissions

[12] The employer agrees that the matter rests on the interpretation of the Holidays Act for the meaning of what "*would otherwise be a working day*". It relies upon a ruling of a Labour Inspector who found for the company. The processing employees in the lamb slaughter day shift and the lamb boning day and night shift were paid the non production rate of pay of \$10 per hour under schedule A clause 3 for the holiday, and Schedule B NPR, but not the relevant daily rate, because Queen's Birthday was not an otherwise working day for them due to the unavailability of stock. Furthermore the Respondent has relied upon the seasonal variability of work for production and that previous Queens Birthday holidays were not worked in other seasons. In addition my attention was drawn to the requirement under the employment agreement for hours of work *up to* the number provided.

[13] Both parties agreed that on Mondays leading up to Queens Birthday workers elected to take annual leave, had leave without pay or went into work to make up their minimum where there was no production. In the circumstances the employment relationship problem relates to the issue of whether or not relevant daily pay should be paid for the Queens Birthday holiday Monday, but underlying it will be the different circumstances that relate to each worker and their entitlement, which will need to be separately calculated. That is another matter.

What "*would otherwise be a working day*" mean?

[14] I agree with the union that all the criteria under s 12 (3) of the Holidays Act, whilst they are not exhaustive, need to be taken into account in any determination of what *would otherwise be a working day* means. It is only necessary to establish that the day of the week would normally be a working day for the provision under the Act to apply.

[15] The employment agreement provides in Schedule A and B that the lamb slaughter and lamb boning employees work *per Monday to Friday inclusive* (see clause 1.1.1 of Schedule A and 1.1 of Schedule B). Schedule B clause 3 provides for an NPR of \$10 per hour. Wages are paid under Schedule A (clauses 2 and 3 of the schedule) and Schedule B (clause 3 of the schedule): also see clause 9 of the agreement, and clause 11.2 for holidays. Nothing in clause 2 and 3 of schedule A precludes the payment of the relevant daily rate as opposed to the hourly rate for non production. There is no provision enabling the employer not to provide work on a Monday even if stock is unavailable. The agreement provides for work and pay on the basis of days: *per Monday to Friday inclusive*, and the hours to be worked (including production hours if any). Clause 11.2 makes provision for public holidays to be paid at \$10 per hour.

[16] Generally the employees are required to work on Mondays or at the very least opt to work. The employment agreement provides for it. They are paid if they attend work. Some of the workers take annual leave and others take leave without pay.

[17] The employees are required to be available for work for up to a certain number of hours per week Monday to Friday inclusive, subject to any layoff (which is not a feature of this matter). Rosters are applied having regard to the shift arrangements where the employees have an expectation of work on a Monday even if stock was not available or shifted to another day. There is an option for make up to the minimum rate of pay. It is reasonable to conclude not that the employer would have chosen to provide work to the employees on the Monday on which Queen's Birthday fell if stock was available, but that work would have been generally provided on the Monday where the employee was entitled to receive the benefit of a public holiday and receive their relevant daily pay. Under the Holidays Act the parties cannot contract out of the pay entitlement. Therefore, I conclude that the provision in Clause 11.2 is ineffective where the day would otherwise be a working day.

[18] In this case the employer was not intending to offer work on Queen's Birthday Monday 2004. This is accepted by the union. However, the employees could reasonably expect to be required to work and make themselves available, and at the very least, if they opted to. This is consistent with the employment agreement that makes provision for work up to a certain number of hours per week (including production hours), *per Monday to Friday inclusive* and the entitlement of 11 public holidays, and not solely on the basis of what would have happened on any given day given the non availability of production work.

[19] I determine by using all the criteria that Queen's Birthday Monday 2004 would be an otherwise working day for the meat processing employees under their agreement, and they are entitled to payment at their relevant daily pay. In this regard the union has been able to show that the day of the week would normally be a working day. As such there is an entitlement to relevant daily pay, but that needs to be calculated and may not necessarily be a production rate. What did emerge in the investigation meeting was that there are different circumstances for different workers and that the agreement does provide for a non production rate and minimum payments. The real issue may be the amount of each calculation.

[20] Therefore, this will not end the problem because the parties will need to discuss the calculations for any entitlements of affected employees. It would be appropriate that if this cannot be mutually achieved that the parties use the mediation services available from the Department of Labour.

[21] Leave is reserved for costs. However, since this is a dispute about the interpretation, application and operation of the employment agreement, and the Holidays Act, I am inclined to let costs lie where they fall.

P R Stapp

Member of the Authority