Determination Number: AA 19/05
File Number: AEA 750/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Lumbercorp NZ Limited (Applicant)
AND	The NZ Engineering, Printing & Manufacturing Union Inc (Respondent)
REPRESENTATIVES	Maria Dew, counsel for applicant Garry Pollak, counsel for respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
CONSIDERATION OF PAPERS	17 January 2005
DATE OF DETERMINATION	24 January 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Lumbercorp NZ Ltd has requested a determination from the Authority to resolve an employment relationship problem that has arisen over the amount of pay an employee of the company ought to have received when he took special leave.

[2] The employer and the employee's union, the respondent NZ Engineering, Printing & Manufacturing Union Inc., have agreed that the Authority will arrive at a determination by considering the material to be found in the formal statement each party lodged and also in the written submissions they later supplied to me.

[3] Although no attempt has been made by the parties to resolve this dispute with the help of mediation, I am satisfied that because of the nature of the problem mediation would not contribute constructively in this regard and that it is appropriate for a determination to be given.

[4] Under the applicable collective employment agreement Lumbercorp has with the union, timberworkers covered by it are entitled to take five days special leave each year when they or their partners or their children become ill.

[5] The employee that this dispute is about, Mr Warwick Donaldson, took a total of nine days special leave on pay. These were spread over various dates from September 2002 until February 2004. Mr Donaldson's employer contends that he was correctly paid for each day an amount equivalent to his ordinary time rate for a period of 8 hours. His union however contends that Mr Donaldson was entitled to be paid his ordinary time rate for 9.6 hours on any day of special leave taken by him, this number being the average of his daily hours.

[6] The provisions of the collective agreement do not assist in resolving this difference of view, as they are silent about the number of hours the rate of pay is to be applied to for a day of special leave.

Section 30A of the Holidays Act 1981

[7] The applicable holidays legislation was the Holidays Act 1981 (replaced from April 2004 by the Holidays Act 2003), which included the following provision;

> ***30A. Entitlement to special leave –***
>
> ……..…
>
> *(4) The worker's employer shall …….… pay to the worker for each day on which the worker takes special leave under this section an amount equivalent to the pay at the ordinary time rate of pay for the normal number of hours that that worker normally works on that day.*
>
> (My underlining)

[8] There is no dispute that the rate of pay Mr Donaldson received for his days of special leave was correct. That rate was, as s.30A(4) provides, the ordinary time rate. The question is, for how many hours should he have been paid at that rate? The answer given by s.30A(4) is, the normal number that he normally worked on those days.

Case law

[9] In support of its position the employer relies on two decisions in particular from the Court of Appeal; *Ports of Auckland Ltd v NZ Waterfront Workers Union Inc.*, [1986] 3 NZLR 268, and *Greenlea Premier Meats Ltd v Horn* [2003] 1 NZLR 761. The two cases are about s.7A of the Holidays Act 1981, which provided for public holidays. These, where they fell on days that would otherwise be working days, were to be allowed to all employees as "holidays, on pay". The Court held in *Ports of Auckland* that calculating notionally what would have been received if the employee had worked on the holiday, was not the correct way for the provisions to be applied. Obviously the Court's observations that the inquiry is not about what the employee would receive if he or she worked on the particular holiday but is about what would be paid for an ordinary working day, are expressly made in the context of s.7A and not s.30A of the 1981 Act.

[10] In *Greenlea* the Court held that a calculation by reference to the average wages received was not the correct approach under ss.7A and 25(1) of the Holidays Act 1981. It held that averaging (the exercise of applying an average) produced the wages for a "fictional" working day rather than an actual working day and therefore was not what the Act intended.

[11] I do not consider that these two decisions are directly on point, as they deal not with s.30A but with other provisions of the 1981 Act which are differently worded. As the instant case is concerned with public holidays, s.30A is the relevant provision to be applied. It expressly requires the employee to be paid at the ordinary time rate of pay for the normal number of hours that he or she normally works on the day or days taken as sick leave. What would those hours have been for Mr Donaldson? I cannot agree with the employer that 8 was the number of hours for which he was to be paid, as he nearly always, or "normally", worked for longer than that. On average, based on his hours between January and December 2003, he worked 9.6 hours daily.

[12] The union contends that 9.6 was the normal number of hours that Mr Donaldson worked on the days on which he took special leave and that therefore 9.6 is the number for which he should have been paid. While I agree that the normal number of hours was more than 8, I cannot agree that it was 9.6, as that number is an arithmetic average which it is possible he did not ever actually work on any day.

[13] It seems that Mr Donaldsons hours varied from day to day and that there can be no certainty as to what the normal number of hours he normally worked was on any of the days taken as sick leave. Without normality in his hours, it becomes difficult to apply s.30A to Mr Donaldsons employment.

Determination

[14] I find that Lumbercorp has not applied s.30A of the Holidays Act 1981 correctly to Mr Donaldson. He has been incorrectly paid whenever he took special leave on a day on which the normal number of hours he normally worked was more than 8. It seems probable that this was the case on most if not all of the nine days he took. If one of the special days of leave was, say, a Monday then Lumbercorp should now pay Mr Donaldson for the same hours of work he had worked on other Mondays during his employment, assuming there is to be found some pattern or normality in his hours when looked at on a day of the week basis, Mondays, Tuesdays etc. As I have only a fortnightly breakdown of the hours, there is not enough detail for that exercise to be done by the Authority.

[15] An alternative way of calculating arrears would be by resorting to equity and good conscience. In the absence of any better way of fixing the number of hours (being more than 8), adopting the average of 9.6 for each day may be considered to be fair to both Lumbercorp and Mr Donaldson.

[16] The parties may ask for further directions from the Authority if there are any difficulties in implementing this determination.

[17] The employer and union are to bear their own costs.

A Dumbleton
Member of Employment Relations Authority