Determination Number: AA 60/06
File Number: AEA 564/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Service & Food Workers Union Nga Ringa Toa Inc (Applicant)
AND	Spotless Services (NZ) Ltd (Respondent)
REPRESENTATIVES	Tim Oldfield for Applicant Richard Harrison for Respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
INVESTIGATION MEETING	12 September 2005 and 28 February 2006
DATE OF DETERMINATION	3 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Service and Food Workers Union (SFWU) is in dispute with the respondent company, Spotless Services (NZ) Ltd (Spotless), about the interpretation of a collective employment agreement both are party to. That agreement is the South Auckland Health Collective Agreement expressed to be in force between April 2003 and April 2005. SFWU has applied to the Authority for a ruling as to the correct interpretation of the agreement.

[2] The particular provisions that are the subject of the dispute relate to pay entitlements for;

a) work performed at weekends on public holidays, and

b) sick leave taken under the CEA in excess of the Holidays Act 2003 entitlements.

[3] After the first day of the investigation meeting which commenced in September 2005, the parties agreed that further information in the form of wage records should be supplied to the Authority. This took some time to assemble and subsequently it was agreed that the Authority should hear evidence from a Spotless payroll officer about the information shown in the records and about the way the disputed pay entitlements have been calculated in the past. That evidence was taken on 28 February 2006, leaving the Authority in a position to determine the dispute.

[4] With regard to work performed on days that are Saturdays or Sundays and are also public holidays, the wage record evidence shows that in practice Spotless has on occasion paid entitlements in a way that is consistent with SFWU's interpretation of the disputed CEA provisions. Even so, I find it is not necessary to have resort to that evidence, because the meaning of the words in the disputed provisions is plain and clear and in accordance with principle they must therefore be considered on their own.

Weekend work

[5] The relevant provision of the CEA is as follows;

> **5. PENAL PAYMENTS FOR WEEKEND AND NIGHT WORK**
>
> *5.1 An employee who is required to perform ordinary hours of work on a Saturday or Sunday shall, in addition to the weekly wage, receive the following penal payments:*
>
> *(i) For work between midnight Friday and midday Saturday – half ordinary time rate extra (T1/2) for the first three hours and ordinary time rate extra (T1) thereafter.*
>
> *(ii) For work between midday Saturday and midnight Sunday ordinary time rate extra (T1).*
>
> ……

[6] Clause 5.1 also provides that an employee shall receive a penal payment (T1/4) for night work as defined, which is expressed to be "payable in addition to the weekend penal payments." (my emphasis). Spotless submits that a particular inference can be drawn from the inclusion of this expression in the clause, when interpreting it in relation to payments required for work performed on any day that is a Saturday or Sunday as well as being a public holiday.

Public holidays

[7] The relevant provision of the CEA is as follows;

> **7. SPECIAL HOLIDAYS**
>
> *7.1 Employees who are required to work on Christmas Day, Boxing Day, New Year's Day, 2 January, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the birthday of the reigning sovereign, Labour Day and Anniversary Day (or a day in lieu thereof) shall be paid double their ordinary rate of wages and shall receive a day off in lieu at a mutually acceptable time.*
>
> ……
>
> *7.2 Notwithstanding the foregoing, an employee required to work on a special holiday shall be granted:*
>
> *Penal rates of pay at T1 in addition to his/her ordinary time for the hours worked, plus equivalent time off at a later date convenient to the employer.*

Determination of Work on weekend – public holiday issue

[8] It can reasonably be assumed that when they were drafting clauses 5.1 and 7.2 of the CEA the parties to the agreement were well aware that the statutory public holidays fixed by date will from time to time fall on a day of the weekend. For example Waitangi Day (6 February) was a Sunday in 2000. In the way clauses 5.1 and 7.2 have been laid out along with all others in the document, I find there is nothing expressed or necessarily to be implied that provides a cap of T1 on the total

payment due under the clauses in addition to the ordinary time payable.

[9] In my view SFWU has correctly interpreted the CEA to mean that where work is performed on, say, a Sunday that is also a public holiday, in addition to ordinary time (T1) a worker is to receive the aggregation of payments due under clause 5.1 (T1) and under clause 7.2 (T1). In that case the combined pay entitlements will amount to triple time (T3).

[10] It may reasonably be assumed that the payments provided under clause 5.1 and clause 7.2 were intended by the parties to the CEA to be for separate purposes to do with the subject covered by each clause. One particular day may be a Sunday (for example) and it may also be Waitangi Day (for example), but the fact that the weekend day and the public holiday begin and end in the same period of 24 hours in my view does not mean as a consequence that the payments due under each provision are to be combined in only one payment of TI to be made in addition to ordinary time. There is no justification for amalgamating the purpose of the two clauses to produce a total payment of T1 in addition to ordinary time.

[11] Neither can it reasonably be claimed that the higher level of payment is unearned, as payment at T3 acknowledges the fact that work is being performed on a Sunday (for example), which most of us are able to observe as a special day of the week, and is also being performed on a public holiday, which most of us are able to observe as a special day of the year. Payment provided under only one clause does not in my view absorb or extinguish payment required under the other for the imposition arising out of working on a weekend or on a public holiday.

[12] While clause 5.1 expressly provides for night work penal payments to be payable "in addition" to weekend payments, the absence of such a provision in relation to public holiday payments does not in my view lead to the conclusion that these were not intended to be paid "in addition" to weekend payments. The "in addition" provision can only be read as words intended to make abundantly clear the relationship between two parts of the same clause dealing with the same subject. The relationship between two separate clauses is a different thing and cannot be assumed to exist in some particular way because of the internal clause structure of one of them alone.

[13] In this interpretation exercise I have disregarded the evidence of the way payments have been made by Spotless for work performed when a weekend day and public holiday have previously coincided. In relation to Anzac Day in 2004, a Sunday, the payments appear from the wage records to have been made at T3. That happens to be consistent with the view SFWU has of the correct interpretation to be given the disputed provisions, but Spotless says that the T3 level of payment was made in error and they should only have been made at T2. I find that the words themselves of the relevant provisions, the overall context in which each provision must be read and the layout of the CEA, leave the parties intentions clear enough without having to rely on extraneous evidence such as the wage records and the conduct of a party.

[14] The submissions made for Spotless place much emphasis on the words in clause 7.2, "penal rates ……in addition to his/her ordinary time." It is submitted that these words leave room for only one kind of additional payment (i.e. that under clause 7.2), not two (i.e. those under clause 7.2 and clause 5.1). I do not agree that the words naturally mean that, as they are addressed to the payment to be made under clause 7.2 and say nothing about what other clauses, such as clause 5.1, may provide for. There is nothing to show expressly or by implication that clause 7.2 subsumes clause 5.1 in certain circumstances. The two provisions stand independently and should be applied in the same way.

[15] In conclusion, for the above reasons I find that clauses 5.1 and 7.2 are to be interpreted in the

way contended by SFWU.

Sick leave

[16] The relevant provision of the CEA is as follows;

> **15. SICK LEAVE**
>
> 15.2 Conditions
>
> *(a) After six months of continuous service with the employer, an employee shall be entitled to accumulate five working days leave on ordinary pay (i.e. T1 rate). On completion of each subsequent six months, he/she shall be entitled to a further five working days, with a maximum accumulation of 260 days.*

Determination - Rate of pay for sick leave issue

[17] Section 65(2) of the Holidays Act 2003 provides that all employees are entitled to 5 days sick leave in each 12 month period while they remain employed by the same employer. Under s.66 untaken entitlements of sick leave may be carried over to any subsequent 12 month period of employment, but there is a limit of 20 days in any year that can be accumulated under the Act in that way.

[18] The statutory minimum entitlement of 5 days sick leave per year is to be paid in an amount equivalent to the employees "relevant daily pay." This is defined by s.9 of the Act as the amount of pay that the employee would have received had the employee worked on the day or days concerned.

[19] The SFWU-Spotless CEA contains a sick leave provision, apparently drafted long before the Holidays Act 2003 was passed, allowing for up to 260 days sick leave to be accumulated.

[20] Although clause 15(2)(a) of the CEA as reproduced above provides that sick leave is to be "on ordinary pay (i.e. T1 rate)" by operation of the Holidays Act when its provisions came into force on 1 April 2004, this part of clause 15 was modified to require payment at the "relevant daily pay" rate as defined.

[21] SFWU contends that this statutory modification applies to all sick leave up to 260 days that can be accumulated, whereas Spotless contends it applies only to the statutory minimum of 5 days which may either be taken or accumulated up to 20 days in any year.

[22] I find that Spotless has correctly interpreted the provision to mean that the relevant daily rate applies only;

> (i) to up to 5 days sick leave taken in any 12 month period as specified in s.63(2) of the Act, and
>
> (ii) to untaken sick leave, if any, carried over under s.66(1) and (2) of the Act; i.e. to a maximum of 20 days' current entitlement in any year. If by operation of clause 15.2 a worker has accrued an entitlement to take more sick leave than 20 days in any year, the additional leave above 20 days taken is to be paid at ordinary time, or T1.

[23] The intention of the Act is clearly to provide for minimum entitlements only, although at s.66(3) parties to an employment agreement are expressly not precluded from providing for more than the statute requires to be carried over as sick leave. It is clear that "relevant daily pay" is not a term that applies to additional sick leave carried over (i.e. more than 20 days), as its meaning at s.9 is related to "sick leave" which has been defined by s.5 as "paid sick leave provided under subpart 4 of Part 2" of the Act. It is axiomatic that the additional entitlement to sick leave accumulated under clause 15 of the CEA is not sick leave provided under the Act. The CEA is not therefore in conflict with the Act in relation to the pay rate for this additional accumulation. The CEA and not the Act addresses the appropriate pay rate.

[24] While the CEA at clause 15.2 was modified with the enactment of the Holidays Act 2003, that was only to the extent necessary to ensure that entitlements under the Act were reflected in the provisions of the employment agreement. In particular the agreement was modified to allow workers at least 5 days sick leave available to be taken in a 12 month period and paid at the relevant daily rate, and also allow up to 15 days a year to be carried over. Since any of those 15 days if they had been taken would have been paid at the relevant daily rate, if taken later they should remain payable at the relevant daily rate.

[25] In conclusion, for the above reasons I find that clause 15.2(a) is to be interpreted in the way contended by Spotless.

[26] Costs does not appear to be an issue between the parties and other than the declarations as to rights made above at paragraphs [15] and [25] no other orders are made by the Authority.

A Dumbleton
Member of Employment Relations Authority