Determination Number: WA 70/06
File Number: WEA 324/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Service & Food Workers Union Nga Ringa Tota Inc (applicant)
AND	OCS Limited (respondent)
REPRESENTATIVES	Luci Highfield for the applicant Paul McBride for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 6 April 2006
DATE OF DETERMINATION	4 May 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. By way of an initially urgent application the Union asked the Authority to resolve a problem arising out of the respondent's actions of refusing to pay, on Anzac Day and Queen's Birthday public holidays, the hours its members would normally work but instead of paying only the actual hours worked – statement of problem received on 5 September 2005

2. The Company says it properly applied the relevant collective employment agreement (CEA) – statement in reply received on 20 September.

3. Mediation did not settle this employment relationship problem.

4. Agreement was reached on a 1-day investigation in Wellington commencing, initially, on 11 November. Subsequently, the parties agreed on the later investigation date of 6 April 2006. The parties usefully provided an agreed statement of fact in advance of the investigation as well as one witness statement, and – at the investigation's conclusion – closing submissions.

Background

5. The parties submitted the following:

Agreed Statement of Fact

Parties' Positions

1. The applicant ("the union") contends the respondent has refused to provide and pay members of the applicant at least their normal hours on Anzac Day and Queens Birthday public holidays and therefore seeks payment.

2. The union claims that employees are entitled to be paid:

2.1 Ordinary pay for all hours they would normally work; and

2.2 In addition receive the penal rate (T2) for those hours actually worked on a public holiday; and

2.3 In addition receive an alternative holiday on full pay.

3. The respondent ("OCS") contends that it has correctly engaged and paid its employees on the basis that, under clause 19)b), where any employee is required to work on a public holiday, that employee is entitled to be paid:

3.1 For the hours worked at T2 (which equates to a sum no less than what the employee would ordinarily have been paid for working the day); and

3.2 In addition receive an alternative holiday.

Employment history and CEA

4. *Prior to 1 April 2005 members of the union working as domestics (cleaners) at Wellington, Kenepuru, Porirua and Paraparaumu Hospitals were employed by OCS' competitor, Spotless Services (NZ) Limited. An expired collective employment agreement set out the terms and conditions of employment of the domestics who were Union members: the* "Spotless Services (NZ) Ltd Capital and Coast Health Domestic Employees Collective Employment Agreement" *14 January 2003 – 13 January 2005 ("the CEA").*

5. *Domestics were engaged variously on a part time or full time basis. Subject to any provisions of the CEA, Domestics employed in either capacity had regular days and hours of work.*

6. *Following a competitive tender process, OCS secured the cleaning contract at the Hospitals. From 1 April 2005 OCS Ltd employed the domestics who are members of the union and listed in schedule 1 ("the domestics").*

7. *Employment was ordered to the domestics* "on the same terms and conditions as applied immediately before …" *their engagement by OCS. The CEA therefore continued to apply to the domestics.*

8. *OCS took on the then current permit hours for part-time employees from 1 April 2005: clause 14(b) CEA.*

Work patterns of sample domestics

9. *A sample domestics selected by the union indicates the following work patterns:*

Name	***Day of the week (hours ordinarily worked)***						
	Mon	***Tue***	***Wed***	***Thurs***	***Fri***	***Sat***	***Sun***
Lalopua Sanele	*8*	*8*	*8*	*8*	*8*	*8*	
Suifaga Apolo	*8*	*8*	*8*	*8*	*8*		*4*
Tusa Gasaloga	*8*	*8*	*8*	*8*	*8*		

Meki Sagele	*8*	*9*	*9*	*9*	*8*	*4*	
Simalu Feleti	*7.5*	*7.5*	*7.5*	*7.5*	*7.5*		
Kolopa Uiese	*8*	*8*	*8*	*8*	*8*		*8*
Brian Randall	*8*	*8*	*8*	*8*	*8*		

Hours of work on public holidays

10. *Prior to Anzac Day (Monday 25 April 2005) and Queens Birthday (Monday 6 June 2005) no consultation was entered into by OCS with the union about changing the ordinary hours of work for employees on those two public holidays. OCS denies that such consultation was required.*

11. *Apart from any provisions of the CEA, no agreement was reached to vary the ordinary hours of work of any of the employees on the two public holidays.*

12. *On Anzac Day and Queens Birthday 2005, the same samples of domestics worked the following hours –*

Name	***Ordinary hours of work***	***Anzac Day***	***Queens Birthday***
Lalopua Sanele	*8*	*7*	*7*
Suifaga Apolo	*8*	*6*	*3*
Tusa Gasaloga	*8*	*7*	*8*
Meki Sagele	*8*	*6.5*	*7*
Simalu Feleti	*7.5*	*5*	*5*
Kolopa Uiese	*8*	*8*	*8*
Brian Randall	*8*	*8*	*8*

13. *The sample of domestics worked in the following areas or departments.*

Name	***Areas/ Departments***	***Areas/ Departments***	***Areas/ Departments***

	ordinarily worked in	***closed on Anzac Day***	***closed on Queens Birthday***
Lalopua Sanele	*Cardiology, oncology, theatres*	*Cardiology, oncology*	*Cardiology, oncology*
Suifaga Apolo	*Level 4, nuclear medicine, ENT, eye department*	*Nuclear medicine, ENT, eye department*	*Nuclear medicine, ENT, eye department*
Tusa Gasaloga	*Ward 2, ATR LD*	*ATR LD*	*ATR LD*
Meki Sagele	*Cardiology, oncology, theatres, Grace Neill Block*	*Cardiology, oncology*	*Cardiology, oncology*
Simalu Feleti	*Bedding, finance, neo-natal, Supply*	*Finance, Supply*	*Finance, Supply*
Kolopa Uiese	*Emergency Department*		
Brian Randall	*Public Areas*		

Payment of hours on public holidays

14. *The samples of domestics were paid the following for work on Anzac Day and Queens Birthday -*

Name	***Ordinary hours of work***	***Anzac Day***		***Queens Birthday***	
		T1	***T2***	***T1***	***T2***
Lalopua Sanele	*8*		***7***		***7***
Suifaga Apolo	*8*		*6*		*4*
Tusa Gasaloga	*8*		*7*		*8*
Meki Sagele	*8*		*6.5*		*7*
Simalu Feleti	*7.5*		*5*		*5*

Kolopa Uiese	*8*		*8*		*8*
Brian Randall	*8*		*8*		*8*

15. *In addition, each domestic who worked received an alternative holiday.*

16. *OCS Ltd disputes that any money is owing at all. However, if the Authority determines that T1 must be paid for all hours ordinarily worked (in addition to T2 previously paid for all hours actually worked and the alternative holiday), then all issues as to quantum should be able to be resolved between the parties, with leave to revert to the Authority in the event of difficulty.*

Attempts to resolve the issue

17. *The parties have exchanged correspondence and attended mediation in an attempt to resolve the issue, but have been unsuccessful.*

New Collective Employment Agreement

18. *Collective bargaining for a new collective employment agreement has concluded, with settlement reached. The new collective agreement has now been ratified and executed. There is no material change to provisions of the CEA, other than in relation to wage rates.*

DATED at Wellington this 27th day of March 2006

(signed) *(signed)*

Ms L.G. Highfield *Mr P.A. McBride*
Counsel for applicant *Counsel for respondent*

Applicant's Position

19. The basis of the Union's claim is its belief that its members' enjoy fixed weekly hours of work (and, therefore, wages) that cannot be reduced without their agreement: no agreement was provided. The Union wants the Company to pay its members, when they work public holidays, their normal pay, with an additional T1 to be paid in respect of those hours actually worked on the day.

20. Additionally, clause 10(d) of the CEA recognises that hospital departments may be closed on a public holiday in which case cleaners are to be paid their ordinary wages. Other clauses in the CEA support the Union's interpretation, including clauses 10(b) & (d) 14(b) (ii) and 25(a).

21. The Health Sector's Code of Good Faith requires the Company to employ cleaners on the same terms and conditions as applied prior to the transfer of their employment: as the previous employer paid union members for their normal working hours and an additional T1 for all hours actually worked on a public holiday, the respondent should be required to do the same.

22. Reliance is also placed on the principles of interpretation (and the case law cited) set out in *Brookers Employment Law, par 129.12*.

Respondent's Position

23. Through its counsel, Mr Paul McBride, the Company has raised various issues about the Authority's jurisdiction in respect of whether arrears are payable when employees have not brought an application for recovery, there is no evidence of prejudicial impact on the applicant itself – the Union – and whether the latter was at all times registered and, if not, does it have standing before the Authority. It sensibly is leaving these *"technical"* (Mr McBride) issues for the Authority to resolve.

24. In reliance on well-established case law, the Company challenges the value of the Union's witness, Mr John Ryall, because of its subjective content: *Mabon* v *Conference of Presbyterian Church* [1998] 2 ERNZ 440, 449 (CA), etc.

25. The matter for the Authority to determine is what the CEA actually said and meant at the time the agreement was first entered into: *McLaren* v *Waikato Regional Council* [1993] 1 NZLR 710, 713.

26. The evidence of the previous employer apparently acceding, after a long resistance and at around the time it was known it had lost the cleaning contract, to the Union's interpretation of the CEA should be considered in light of the actual or potential advantage that third party gained at the time, as a competitor to the respondent.

27. It is at the Company's sole discretion as to whether it employs it staff on public holidays: it is not required by the CEA or otherwise to do so, or for any particular hours or indeed at all. It is a matter of its managerial prerogative: *G N Hales & Sons Ltd* v *Wellington, Taranaki and Nelson Caretakers etc IUOW* (1990) ERNZ Sel Cas 843 (CA). Consistent with the provisions of the CEA, employment for specified hours is effected via the weekly roster. No consultation is required.

28. When it does employ staff on public holidays the Company complies fully with the requirements of the CEA and the Holidays Act 2003: any other terms and conditions would be inconsistent with the CEA.

29. Payments actually made for statutory holidays worked by employees as exampled by the Union clearly exceeded the claimed entitlment to specified hours in respect of that day and the usual daily (and thus weekly) wage, as a consequence of penal payments made.

Discussion and Findings

30. As can be seen from the agreed statement, outside of public holidays, the Company normally requires of its employees that they undertake consistent, unvarying hours of work: refer to the examples set out at par 9 of the agreed statement.

31. Commencing on Anzac Day and Queen's Birthday 2005, and without consultation, the Company reduced the hours of work normally required of some of its domestic workers for those public holidays: refer to the examples set out at par 12 of the agreed statement. The reductions were mostly between 1 and 2 hours on each day but, in the case of Suifaga Apolo, the reduction of hours ordinarily worked, on Queen's Birthday, was 5. The Company has applied this practice to subsequent public holidays.

32. At issue is that unilateral decision by the Company, to reduce hours normally worked by some of its domestic employees, when they are required to work public holidays.

33. At the time this problem first arose the affected domestic workers were covered by a CEA. The Union was a party to that CEA.

34. Clause 6 of the CEA sets out the ordinary hours of work. Those provisions make it clear that employees work a seven day week (Clause 6. (d)). They do not stipulate minimum or fixed hours to be worked. They do impose maximum limits on ordinary hours:

> *(a) (i) The ordinary hours of work shall not exceed 40 in any one week … and shall be made up of five shifts, not exceeding eight hours each … . Shifts may be worked as required by the employer … .*
>
> *(e) A timetable setting out the correct working hours of each employee shall be affixed and maintained one week in advance in* (some) *conspicuous place in each department and shall be accessible to the employees employed therein and to the … union. Rosters once posted shall not be changed without prior consultation with the employee(s) concerned.*

35. Clause 25, Terms of Employment provides the following:

> *(a) Except as otherwise specially provided in this agreement, the employment shall be a weekly one, whether the employee shall or shall not be called upon to work full-time … .*

36. The CEA limits the maximum ordinary hours of work in any one week: it does not provide for any minimum or fixed normal or ordinary hours of weekly work. I am therefore satisfied that the CEA does not prevent the Company from varying the hours of work required of its domestic workers covered by that agreement. Provided a timetable or roster setting out the correct working hours of each employee is communicated to them one week in advance of those hours of work, consistent with the provisions of clause 6 (f), and subject to the maximum hours provision also set out in the CEA, it is at the Company's discretion as to the hours required of each employee. Once posted, rosters will not be changed without prior consultation with the employees concerned. Despite the no doubt unwelcome uncertainty that results for domestic workers, Clause 6 permits the Company to vary the weekly hours required of those employees.

37. What is not clear from the agreed statement of facts is whether the Company, in unilaterally varying the domestic workers' hitherto normal hours of work, complied

with clause 6 (e) of the CEA: a failure to set out a correct timetable or roster one week of the two public holidays in 2005 is a breach that would, at the very least, be corrected by the respondent paying the hours previously set in place to be worked, on those days.

38. The express provisions of the CEA must prevail over the belated agreement reached by the Union and its members' previous employer, particularly as that agreement was not incorporated into the CEA via its variation provisions, at clause 4.

39. As a party to expired and current CEA, I am satisfied the Union has properly brought this employment relationship problem to the Authority, on behalf of its members, involving as it does a dispute as to the interpretation or application of that agreement: s. 161 of the Act & Clause 5 of the Employment Relations Authority Regulations 2000.

Determination

40. For the reasons set out above, I find against the applicant, Service & Food Workers Union Nga Ringa Tota Inc's , claims against the respondent, OCS Limited.

41. As requested by the parties, they are to attempt to reach agreement on the matter of costs failing which leave is reserved for the matter to be returned to the Authority.

Denis Asher
Member of Employment Relations Authority