

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 201/07
5071424

BETWEEN Rail and Maritime Transport
 Union Inc
 Applicant

AND North Tugz Limited
 Respondent

Member of Authority: Dzintra King

Representatives: Guido Ballara, Counsel for Applicant
 Richard McIlraith, Counsel for Respondent

Investigation Meeting: 6 June 2007

Determination: 3 July 2007

DETERMINATION OF THE AUTHORITY

The Issues

[1] The issues relate to the correct interpretation of the parties' collective employment agreement and the Holidays Act 2003. The issues are:

- The respondent's decision to reduce the minimum pay for work performed on a public holiday;
- The correct rate of pay where the type of task changes during an engagement;
- Entitlement to an alternative holiday if "on call";
- The correct contractual minimum pay where towing and bunkering duties are performed during an engagement;
- The public holiday and leave entitlements of workers who the Union says have been incorrectly categorised as "casual".

[2] The applicant seeks a determination solely on issues of liability. Once that is done the parties are agreed that they will meet to determine quantum with the ability to return to the Authority if they are unable to resolve issues.

Background

[3] North Tugz Limited is party to a collective employment agreement, the North Tugz Collective Agreement 2004 with the NZ Towage, Pilotage and Port Workers Union and the Rail and Maritime Transport Union Inc (RMTU).

[4] The parties have negotiated a new collective employment agreement which has not been ratified by the RMTU.

[5] In relation to the current issues the terms of the two collective employment agreements are the same.

[6] It is agreed that the parties are bound by the terms of the CEA or the Holidays Act 2003, whichever is the more favourable as far as the issues concerning the Holidays Act are concerned.

Public Holiday Pay

[7] Clause 8.3 of the Collective Agreement provides:

For engagements involving ship movements (including towing and bunkering), Employees will be paid a minimum of five hours at the hourly rate specified in the Employee's individual letter of appointment. For Engagements not involving ship movements, Employees will be paid a minimum of three hours at the hourly rate specified in the Employee's individual letter of appointment.

[8] Clause 14.2 of the CEC provides

Where Employees work on a public holiday employees will be entitled to be paid for working on that day at the hourly rate classification for which they are engaged. In addition Employees (permanent and casual) will be entitled to a paid day in lieu.

[9] Section 50 of the Holidays Act provides:

Employer must pay employee at least time and a half for working on public holiday

(1) If an employee works (in accordance with his or her employment agreement) on any part of a public holiday, the employer must pay the employee the greater of—

(a) the portion of the employee's relevant daily pay (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or

(b) the portion of the employee's relevant daily pay that relates to the time actually worked on the day.

(2) In subsection (1)(a), penal rates—

(a) means an identifiable additional amount that is payable to compensate the employee for working on a particular day of the week or a public holiday; but

(b) does not include, for example, any additional payment for a sixth or seventh day of work.

(3) This section is subject to section 51.

[10] Section 9 (1) (a) Holidays Act defines “relevant daily pay” as “the amount of pay that the employee would have received had the employee worked on the day concerned”. Pursuant to clause 8.3 of the CEA the relevant daily pay is a minimum either 3 or 5 hours pay, depending on the type of work.

[11] Mr McIlraith submitted that in order to give effect to the statutory words “the portion of the employee’s relevant daily pay” and “time actually worked on that day” in section 50 of the Holidays Act North Tugz was required to pay employees who work on a public holiday time and a half only for the hours actually worked. This did not give an entitlement to be paid time and a half for any portion of the minimum hours for which payment was contractually required which were not actually worked.

[12] In support of this argument, Mr McIlraith referred to a decision of the Employment Court: *Service and Food Workers Union Nga Ringa Tota v OCS Ltd*, unreported, Shaw J, 1 March 2007, WC 8/07. In that case the Court found that

employees were not entitled to be paid penal rates for the minimum contractual hours they did not work.

[13] Since April 2004 the respondent paid its employees penal rates for the minimum contracted hours, whether the hours were actually worked in full or not. Following mediation in December 2006 the respondent ceased to pay penal rates for hours which were not actually worked.

[14] I find that the contractual provision for minimum hours does not mean that those hours are hours actually worked and for which the employees are entitled to be paid penal rates. If an employee is employed on a minimum 5 hourly engagement on a public holiday but actually works only three hours the correct rate of payment is 5 hours ordinary time plus three hours at penal rates.

Was the Alteration to the Method of Payment Discriminatory, a Breach of the CEA and a Breach of Good Faith?

[15] After the mediation the respondent implemented what it believed was the correct rate of payment. As I have found that the employer implemented the correct payment correct regime there can have been no breach of the CEA – the CEA does not provide for a method of payment that is an enhanced minimum pursuant to s 6(2).

[16] The applicant claims that there has been discrimination on the basis of involvement in the activities of a union. This claim relates to s 107 (d) Employment Relations Act 2000 refers to an employee who has made or caused a claim to be made for a benefit of an employment agreement. In the first place, the decision to change the method of payment was applied to all employees; and, secondly, the action was in accordance with the statutory provision and it was not discriminatory or a breach of good faith. As a result of seeking advice and attempting to resolve a disputed matter the employer reached a conclusion upon which it acted.

Rate of Pay When Duties Change During a Shift

[17] Clause 8.3 of the CEC has been previously set out at para 7. Clause 8.4 provides:

The actual start time of each Engagement will be advised to employees in advance on advice received by the Company. Start time for engagements involving ship movements (including towing and bunkering) will in most cases be the onboard plant time. The order to cease work will be given by the Company. It is recognised that the start time may be brought forward or delayed at no penalty to the Company. Continuous time will occur if an engagement extends beyond five hours. In a day where a gap in time occurs between one engagement and the next, for payment purposes the engagements will be classed as separate engagements. This does not limit the Company from requiring Employees to remain at work on continuous time beyond the three or five hour minimum.

[18] The standard letter of appointment provides that:

All engagements are paid for at the minimum specified in the Collective Employment Agreement. If you are employed in one engagement task and rate, the new task rate will apply from the end of the first engagement minimum time, unless it is a higher rate engagement, in which case the higher rate will apply from the time the job commences.

[19] The parties agree that the words mean that when an employee starts on a higher task rate and moves to a lower task rate he or she is entitled to be paid at the higher rate for the minimum 5 hour engagement time and at the lower rate from the end of the minimum 5 hour engagement time.

[20] The parties disagree about what should happen when the rate changes from a lower rate to a higher rate. The applicant's position is that the higher rate applies for the entire time worked.

[21] The respondent says it is clear that the plain meaning of the words is that the employee is entitled to be paid at the higher hourly rate from time he or she actually started working on the higher rate job.

[22] The word “job” is not defined in the CEA. The applicant says that “job” means the whole time worked, that is, from the start of the engagement. The applicant contends that “job” means “arrival at work” or “engagement”.

[23] The respondent says that “job”, in the context of the waterfront industry, means “task” or “ship”; and that is different from “engagement”.

[24] The respondent has referred to the way the word “job” is used in its Operational Guidelines. The Guidelines provide very clear support for the respondent’s position. The applicant objects to this on the grounds that the Guidelines have not been agreed.

[25] Clause 5 defines “engagement” as:

An assignment of any work by the Company to be undertaken by the Employee, including, but not limited to: vessel piloting, vessel movements; plant maintenance; administration, standby as a result of vessel immobilisation, vessel towing, bunkering and/or adverse weather; and training

[26] Clause 20 of the CEA provides at sub clause (d):

Whilst allocated to a job at the commencement of a work period the Employee will, if and when required by the Company, transfer to other activities within the same work period.

[27] A work period is clearly an “engagement”; it cannot be anything else. The word “activities” in the phrase “other activities within the same work period” is synonymous with the word “job”. “Job” means “task”. A “job” is a component of an “engagement”, not the engagement itself.

[28] The respondent's interpretation is correct. That is a conclusion I have reached by considering the words in the contract.

Entitlement to Alternative Holiday for being On Call

[29] Section 59 (3) Holidays Act provides:

If an employee is on call and is not called in to work, the employee is also entitled to an alternative holiday if the nature of the restriction imposed by the on call condition on the employee's freedom of action is such that, for all practical purposes, the employee has not had a whole holiday.

[30] Clause 9.2 of the CEA provides:

Employees are expected to be contactable at all times by home telephone, cell phone or pager. The company will provide either a cell phone or pager to enable Employees to be contacted when away from home. All Employees absent from the Whangarei area or unavailable for work are expected to notify the Company of absence. Employees required and available for work are expected to remain within one hour of Marsden Point when a Vessel serviced by the Company is in port, unless prior arrangements are agreed with the Company.

[31] The applicant says that employees who are not called in to work on a public holiday, either because all scheduled shipping is cancelled or because they are not told there is no work, should be entitled to a day in lieu.

[32] The Operational Guidelines require employees to check the tape of ship movements four times a day, at 0900, 1300, 1700 and 2100. Staff must be able to be contacted on cell phones and 48 hours notice is required if staff are unavailable for work. Employees are unable to consume alcohol.

[33] Clause 14.3 of the CEA provides:

Where permanent Employees are available to work on a public holiday but are not required, they will be paid one engagement at the appropriate hourly rate for their position as set out in the Employee's letter of appointment. A paid day in lieu will not apply. Casual Employees available to work on a public holiday but not required to work will not receive an engagement payment and will not be entitled to a paid day in lieu.

In effect this provides for the payment of an on call allowance.

[34] I was told that pilots, who are not covered by the CEA, have contractual provisions giving them a day in lieu and that the restrictions and requirements are the same for the pilots. While the chagrin felt by the RMTU members regarding this is understandable, the pilots have a different contract.

[35] The blanket provision in clause 14.3 that a day in lieu will not be paid is contrary to s59 (3) Holidays Act 2003.

[36] In *O'Brien (Labour Inspector) v Guardian Alarms (Auckland) Ltd* [1995] 2 ERNZ 170 the Court held that there could be situations where restrictions on an employee's freedom of action would be sufficiently great to require the provision of a day in lieu. In that case, the restrictions imposed were not of such a nature.

[37] Mr McIlraith said the issue was whether the restrictions imposed were such that "for all practical purposes, the employee has not had a whole holiday". In his submission, that had to be assessed on the circumstances of each employee for each public holiday the employee was on call.

[38] Since s 59(3) came into force there have been three public holidays when there have been no shipping movements and accordingly no work for North Tugz. Two of those days (25 March 2005 and 25 December 2006) had no shipping scheduled and employees were advised of that in advance. Mr McIlraith said that in

those circumstances work commitments did not therefore interrupt the employees' public holidays.

[39] On 6 April shipping was scheduled and then cancelled. Employees were advised of that at 8.30am and the shipping movement had been scheduled for 8pm.

[40] Section 59 (3) does not provide that all on call situations will require the giving of a day in lieu. It clearly allows for some degree of restriction upon an employee's freedom of action. A degree of restriction is an inherent part of being on call. A person who is on call will need to be:

- Able to be contacted, therefore will need to be within cell phone or pager reach;
- Will need to be able to access the location where the on call work is to be carried out within the appropriate period of time;
- Is unlikely to be able to consume alcohol.

[41] While I am sympathetic to assertions that not knowing whether one has to work places a psychological impediment upon one's enjoyment or anticipation of a public holiday, living with that uncertainty is an intrinsic element of being on call.

[42] There is merit in Mr McIlraith's submission that differing circumstances may result in differing outcomes regarding the requirement to give a day in lieu.

[43] On the evidence I heard I do not think that the restrictions imposed by being on call are so onerous that employees must invariably be entitled to a day in lieu. Employees can apply to opt out of being on call on some public holidays.

Correct Minimum Pay for Towing and Bunkering

[44] Clause 8.3 provides that "*for Engagements involving ship movements (including towing and bunkering), Employees will be paid a minimum of five hours at the hourly rate specified in the Employee's individual letter of appointment.*" The applicant says that ship movements therefore attract a minimum five hour callout. This is not in dispute. However, towing is not paid a five hour rate nor is bunkering.

[45] However, the respondent says that unless a pilot is used towing and bunkering do not constitute a “ship movement”. It points to the Operational Guidelines which have been in effect since 2003. These say:

a. As per the contract a minimum of 5 hours will be paid for an engagement where a pilot is posted except where continuous time applies.

b. A 3 hour engagement will be paid for non-pilotage (except Golden Bay – 5 hour engagement) or sundry movements except where continuous time applies, ie when in conjunction with a shipping movement.

[46] The difficulty for the respondent is that the reference to “as per the contract” is inaccurate. There is no reference in the contract to a pilot being required as a prerequisite to a 5 hour engagement. The term “ship movement” is not defined in the CEA and there is no mention in the CEA of a ship movement needing a pilot.

[47] The respondent says there is a distinction between ship movement towing and bunkering and non ship movement towing and bunkering. When there is ship movement towing and bunkering the respondent pays the 5 hour rate.

[48] As far as the Golden Bay is concerned, the respondent says the parties reached a separate agreement outside the terms of the CEA which does not affect the terms of the CEA.

[49] The words in the contract are unambiguous. The placement of the words towing and bunkering in parentheses is simply a clarification or amplification of what is meant by a ship movement.

[50] The applicant’s interpretation is correct.

Casual Employees' Public Holidays and Annual Leave

[51] At this stage the applicants only seek determinations of these issues with regard to two employees: Cliff Kehoe and Ken Baker. The applicants contend that these two employees are not genuine casuals. Mr Kehoe has been employed since 2003 and Mr Baker since 2000. The applicants say that their work records for the last six months show a regular pattern of employment:

- Mr Kehoe worked an average of 4.5 days per week and an average of 21.73 hours per week;
- Mr Baker worked an average of four days per week and an average of 15.07 hours per week.

[52] Because of the nature of the employer's business there are no set or regular hours for any employees. Mr Tom Grieg, the CEO of the respondent, said that in order for the company to provide its pilotage and tug services North Tugz operated on an engagement system. Employees did not work regular shifts but were required to come in and work when North Tugz was required to perform services. The number of ship movements and the available work varied.

[53] The CEA's coverage clause states:

This Collective Agreement shall have application to those persons employed by the Company, who are members of The New Zealand Towage, Pilotage and Port Workers Union, whose names are appended to this Collective and whose conditions are described herein. Appendix C to this Collective Agreement will have application to Casual Employees and details terms and conditions of employment for Casual Employees.

[54] There are a number of unusual provisions in the CEA. Clause 14.2 provides that "All Employees (permanent and casual) may be required to work on any of the public holidays..." yet Clause 1 of Appendix C states that the provisions of the CEA "shall have no application to Casual Employees working under this Schedule".

[55] Clause 2 of Appendix C states:

At the completion of each engagement, the Employees employment with the Company shall cease.

[56] Clause 6 of Appendix C “Availability” provides:

Employees will be contactable at all times by telephone. When absent from the Whangarei area or unavailable for work Employees are expected to notify the Company of their unavailability for work.

This is clearly inconsistent with Clause 2 and is inconsistent with the concept of a casual employee.

[57] The provisions in the Operational Guidelines regarding staff deployment state:

Permanent staff will get preference in all positions but as there are only 10 permanents (excluding pilots) there will be a lot of work for casual staff. There may be times when permanents are stood down and replaced by casuals to ensure adequate break periods are given between jobs. It is however difficult to quantify exactly the amount of available work for casuals.

Where casuals have been appointed to a movement and then a change occurs where the permanents could be re-appointed, in fairness to the casuals, they will remain with the job.

It is the company’s policy to try to ensure that the number and value of engagements/jobs/hours are allocated fairly across all permanent staff. Management will endeavour over a longer period of time to achieve this but this may not be achievable in the short term. Having stated that, the “referee’s” decision is final where the allocation of work is concerned.

[58] In *Canterbury Hotel, Hospital, Restaurant and Related Trades Employees IUOW v Fell* [1982] ACJ 285 the Labour Court held that a bartender rostered to work for a three year period over a number of hours over five days per week was in reality not a casual worker. The Court said she was “*not just a casual occasionally and irregularly called in for some limited or purely casual purpose. Because of the long standing continuity she was a regular employee...*”.

[59] In his submissions Mr McIlraith stated:

A casual employee is an employee hired for short periods of time to do specific work. A casual employee has no regular pattern or expectation of ongoing employment and is only employed from time to time as the availability of work demands. Casual employees have no set hours or guarantee of work from one week to the next.

[60] Neither Mr Baker’s nor Mr Kehoe’s patterns of employment satisfy all those criteria. Such criteria are also problematic in the context of North Tugz’ activities where employees classed as “permanent” do not have set hours or regular patterns of work.

[61] Both Mr Baker and Mr Kehoe have sufficiently regular work patterns for the classification of “casual” to be inaccurate.

Summary

[62] The respondent was successful on the following issues:

- Rate of pay for working on public holidays;
- Rate of pay when duties change;
- Alternative holiday for on call days.

[63] The applicant was successful on the following issues:

- Correct pay for towing and bunkering;
- Casual staff.

Costs

[64] Costs are reserved. At this stage I will not set a timetable as I anticipate that the parties will wish to meet to resolve outstanding issues as a result of this determination. If the parties in the course of those negotiations are unable to resolve the issue of costs they should agree on a timetable and notify the Authority of that timetable.

Dzintra King

Member of the Employment Relations Authority