

- Reinstatement of the leave lost; and
- Compensation to each applicant pursuant to s.123 (1)(c)(i); and
- Costs in the matter.

[4] The respondent denies the applicants' claims and also seeks costs in the matter.

Background

[5] Mr Shakes and Mr Helyar are employed by Norske Skog Tasman Limited (Norske Skog) as control system technicians. Mr Shakes is a member of the Eastern Bay Independent Industrial Workers' Union (EBIIWU) and is a workplace delegate for that Union. Mr Helyar is also a member of EBIIWU, and is an assistant delegate for the members of that Union employed by Norske Skog.

[6] In November 2006 Mr Shakes and Mr Helyar were requested by the Pulp and Paper Workers' Industrial Council to give evidence at an Employment Relations Authority (ERA) investigation meeting that was to take place in Hamilton on 29 November 2006.

[7] Approximately one week prior to the ERA investigation meeting, Mr Shakes approached his supervisor, Stephen Brown, on behalf of himself and Mr Helyar for permission to attending the investigation meeting. Mr Brown was requested to approve their leave as paid Union leave. Mr Brown's evidence was that his main concern was that the work be covered in their absence and that once he was assured this was the case he gave his approval for Mr Shakes and Mr Helyar to take the requested leave.

[8] Mr Shakes and Mr Helyar attended the ERA investigation meeting and gave evidence as planned.

[9] Shortly after this meeting, it came to the Mr Haslem's attention (Mr Haslem is an HR adviser in the maintenance section of Norske Skog) that Mr Shakes and Mr Helyar had taken paid Union leave to attend the ERA investigation meeting on 29 November. It was his evidence that this was not an appropriate use of paid Union leave.

[10] Mr Haslem submitted that in accordance with their roles as Union delegates, Mr Shakes and Mr Helyar are entitled to paid Union leave under the terms of the Norske Skog Collective Agreement (Control Systems Employees). This clause was included in the Collective Agreement to recognise the fact that Union delegates have additional responsibilities on site. Norske Skog agreed with the Union that it was appropriate for Union delegates to have reasonable time off on pay to attend collective negotiations and to discuss Union issues with company representatives. The purpose of this leave was to ensure that Union delegates are not financially disadvantaged by having to use their annual holidays or take unpaid time off for Union business.

[11] However, it was Mr Haslem's evidence that it is his expectation that any employee who elects to be a witness in a proceeding against Norske Skog (whether or not that person is a Union delegate) would take personal leave of some kind on the day concerned and it would be up to the employee whether they took annual leave or an accrued alternative holiday.

[12] It was Mr Haslem's evidence that the only other time he was aware of a Norske Skog employee giving evidence against the company in an Authority hearing was on the occasion that Mr Tane Phillips (delegate for the Pulp and Paper Workers' Union) attended the same investigation meeting of the ERA on 29 November 2006. Mr Haslem noted that Mr Phillips took annual leave on that day.

[13] Mr Phillips gave evidence to the Authority in this matter. He stated that he was on annual leave but that he had been on leave for the entire week. He stated he was enroute between Auckland and Rotorua on the day of the meeting and he stopped in Hamilton to attend the investigation meeting. He accepted he had not thought to change that to paid leave for Union business.

[14] For their part, Mr Shakes and Mr Helyar submit they were subsequently instructed by their supervisor, Mr Brown, to apply for annual leave that day. Both workers disputed the instruction and subsequently notified Mr Brown they were complying with the instruction under duress and that they would bring personal grievances in the matter.

[15] Mr Shakes took one day's annual leave to cover for his absence from work on 29 November and Mr Helyar applied for and was paid for that day out of alternative days available to him.

Position of the parties

[16] For the applicants, it is argued they applied for, and were granted, Union leave pursuant to clause 37.2 of the Collective Agreement. The respondent subsequently instructed the workers to take annual leave. It was Mr Yukich's submission that while it could be argued that the employer was entitled to decline leave under clause 37.2 when Mr Shakes and Mr Helyar applied for that leave, there was no right for the employer to subsequently reverse that approval having given it.

[17] Mr Yukich also argued that there is a common law right to access dispute resolution processes and, in the absence of an explicit provision for paid leave for workers to address employment relationship problems under the dispute resolution processes in the Collective Agreement there is an implied obligation on employers to allow reasonable paid leave for that purpose. Mr Yukich objected to the fact that the employer in this case had penalised Mr Shakes and Mr Helyar by requiring them to take annual leave.

[18] It was submitted that the employer's requirement that the workers take annual leave was in breach of the Holidays Act 2003 including its purpose provision (s.3); the provisions for setting the time when annual leave or alternative leave will be taken and the requirement that the parties deal with each other under the Act in good faith.

[19] It was submitted, therefore, for Mr Shakes and Mr Helyar that their leave entitlements remain in force and on their behalf the Union seeks a declaration that the company is in breach of the Holidays Act 2003 and in breach of s.4 of the Employment Relations Act 2000 (Good Faith provisions).

[20] The Authority is requested to reinstate the annual leave day and alternative leave day deducted from the workers' leave balances. Compensation pursuant to s.123 (1) (c) (i) is sought on the workers' behalf and the Union also seeks costs in the matter.

[21] The parties attended mediation in an attempt to resolve the issues between them. The matter was not resolved and it now must be decided by the Authority.

[22] The respondent submits that the first question the Authority must address is whether or not the applicants were entitled to paid Union leave for the purpose of attending the Authority investigation meeting held on 29 November.

[23] It is accepted that as Union delegates Mr Shakes and Mr Helyar are entitled to paid leave to conduct Union business under the terms of the Collective Agreement between Norske Skog and the EBIIWU.

[24] On 29 November Mr Shakes and Mr Helyar took a day's paid Union leave. They did not, however, conduct business for the EBIIWU on that day or in fact conduct Union business at all. Their Union and the Union they represent, EBIIWU was not a party to the proceeding in the Employment Relations Authority on 29 November 2006. That proceeding was brought against Norske Skog by the Pulp and Paper Workers' Union (PPWU) and Mrs Lynette Weatherly a member of that Union. Mr Shakes and Mr Helyar did not attend the meeting as EBIIWU delegates. They attended in order to give evidence of a brief discussion they had with Sharon Scott, (Norske Skog's HR manager), regarding Mrs Weatherly's personal grievance. It was simply never appropriate for Mr Shakes and Mr Helyar to take paid Union leave to attend this meeting.

[25] It is noted in this regard that Tane Phillips a PPWU delegate attended the Authority hearing on 29 November to give evidence on behalf of his Union. Mr Phillips took annual leave on this day and not paid Union leave. This, it was submitted, is a very telling point.

[26] It was also submitted that somewhat creatively Mr Shakes and Mr Helyar now appear to be of the view that the EBIIWU and PPWU are the same "Union" as both are affiliated with the Manufacturing and Construction Workers' Union. The Collective Agreement defines the Union to which the Union business in para.37.2 relates. This is the EBIIWU.

[27] It is submitted that the second question the Authority must decide is - given Mr Shakes and Mr Helyar are not entitled to Union leave for the purposes of attending the ERA meeting on 29 November, how should the day have been treated?

[28] Mr Shakes and Mr Helyar claim to have suffered a disadvantage grievance because they were required by the respondent to take an alternative form of leave for that day.

[29] The respondent points to the s.103A test contained in the Employment Relations Act and submits that when it requested the employers to take annual leave for the day on 29 November, Norske Skog acted as a fair and reasonable employer towards Mr Shakes and Mr Helyar. It was reasonable in all the circumstances.

[30] It is also noted that neither worker provided evidence of hurt and humiliation in support of their claim for compensation pursuant to s.123 (1) (c) (i) of the Employment Relations Act.

[31] Lastly it is submitted the Authority has no jurisdiction to address the claim brought by the applicant's that the respondent breached the Holidays Act 2003. Neither it is submitted does the Authority have the jurisdiction to reinstate the leave days lost by the applicants.

Issues to be determined

- Does the Authority have jurisdiction to determine the claim brought by the applicants that the respondent has breached the Holidays Act 2003?
- Does the Authority have the jurisdiction to reinstate the leave days lost by the applicants?
- Were the applicants entitled to take Union leave pursuant to clause 37.2 of the Collective Agreement to attend and give evidence at the ERA investigation meeting?
- If not how should the day be treated?
- Do the workers have personal grievances in that one or more terms of their employment has been effected to their disadvantage by some unjustified action of the employer?
- If so, what remedies should be awarded to them?

Does the Authority have jurisdiction to determine the claim brought by the applicants that the respondent has breached the Holidays Act?

Does the Authority have the jurisdiction to reinstate the leave days lost by the applicants?

[32] The applicant's have asked the Authority for a declaration that the respondent has breached the Holidays Act 2003.

[33] As I read the enforcement provisions of the Holidays Act (SS 73-79) only a Labour Inspector that may bring such an action before the Authority (pursuant to s.76 of that Act) and the available remedy is a penalty. This is mirrored by a corresponding provision in s.161 of the Employment Relations Act 2000 that describes the jurisdiction of the Authority. Section 161(m) provides that the Authority may make determinations in relation to the recovery of penalties under s. 76 of the Holiday Act.

[34] The Authority has, I find no jurisdiction to address the claim brought by *the applicants* for breach of the Holidays Act. Neither does it have jurisdiction to make a determination directing that the respondent reinstate the leave days lost by the applicants.

[35] In closing on this point I note that the real concern of the applicants was and is their belief that¹:

- They believe they were entitled to paid leave pursuant to Cl. 37.2 of the Collective Agreement for the purpose of attending the ERA investigation meeting on 29 November; and
- In denying them paid Union leave for the leave taken that day they have suffered a personal grievance.

[36] I will deal with the problem as described.

Were the applicants entitled to take Union leave pursuant to clause 37.2 of the Collective Agreement to attend and give evidence at the ERA investigation meeting?

If not how should the day be treated?

¹ (Refer documents E & J in which the applicants raised grievances)

Do the workers have personal grievances in that one or more terms of their employment has been effected to their disadvantage by some unjustified action of the employer?

If so, what remedies should be awarded to them?

[37] Clause 37 of the Control Systems Employees Collective Agreement sets out the arrangements for recognition of workplace representatives/delegates.

[38] Clause 37.2 provides

“Subject to prior arrangement with his or her supervisor, the delegate shall be allowed reasonable paid time to conduct union business”

[39] It is not disputed that the applicants are union delegates or that they made prior arrangements with their supervisor in respect of the leave taken by them on 29 November. However it is disputed that the leave taken was for union business.

[40] The definitions clause of the Collective (Clause 4) defines ‘Union’

*““**Union**” shall mean employee organisation party to this agreement, and as stated in Clause 2 of this agreement”.*

[41] Clause 2 of the Collective identifies the Union party to the Agreement as Eastern Bay Independent Industrial Workers’ Union. For the sake of certainty I find that the definition of “Union” does not encompass the Manufacturing and Construction Workers’ Union.

[42] Taking these definitions I find that the applicants are entitled to take paid Union leave to attend to EBIIWU business. The leave taken by them to attend the ERA meeting on 29 November was not EBIIWU business but related to a claim brought by the Pulp and Paper Workers and Lynette Weatherly against the respondent.

[43] The applicants were not entitled to paid Union leave under Cl. 37 (2) to attend the ERA investigation meeting on 29 November 2006. I also reject the submission made on the applicants’ behalf that in the absence of an explicit provision in the CEA

to allow for reasonable paid leave to take part in dispute resolution processes there is implied obligation on the respondent to have allowed the applicants reasonable paid leave to attend the investigation meeting.

[44] This finding leads to the question as to how the day should have been treated.

[45] The respondent had the applicants' supervisor Mr Brown discuss the situation with the applicants. He told them he expected them to take leave to cover their absence from work on 29 November and he subsequently sent an email to each applicant *requesting* them to submit an annual leave request. Both applicants understood his request to mean they could elect to take annual leave, long service leave or an alternative day's leave. It was of course also open to the applicants to request LWOP.

[46] I find that Mr Shakes elected to take a day from his annual leave entitlement and Mr Helyar elected to take an alternative day's leave.

[47] However, both men consider they have suffered a disadvantage grievance because they were required to take leave other than union leave to cover for they day they were absent from work on 29 November.

[48] S. 103 (1) (b) of the Act sets out the definition of a disadvantage grievance:

That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the workers disadvantage by some unjustifiable action by the employer.

[49] The Employment Relations Act 2000 was amended in 2004 by the insertion of a new section 103A against which the actions of employers are to be tested in addressing claims of unjustified disadvantage or unjustified dismissal.

103A Test of justification

For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[50] In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those of a *fair and reasonable employer ...in all the circumstances ...at the time....*

[51] I have found that the applicants were not entitled to take union leave for time off work taken on 29 November. I find too that the only logical way of dealing with the situation would have been for the employer to have simply docked each worker a day's pay or to discuss the situation with them and advise that it would be appropriate for them to take a days leave from their accumulated leave. I find that the employer adopted the more reasonable approach and I find the employer's actions were what a fair and reasonable employer would have done in all the circumstances. The applicants have not suffered any disadvantage grievance.

[52] Neither has there been a breach by the respondent of its obligations to the applicants under s. 4 of the Employment Relations Act 2000.

Determination

[53] The Authority has no jurisdiction to address the claim brought by the applicants for breach of the Holidays Act 2003. Neither does it have jurisdiction to make a determination directing that the respondent reinstate the leave days lost by the applicants.

[54] The applicants were not entitled to paid Union leave to attend the ERA investigation meeting on 29 November 2006.

[55] The applicants have not suffered any disadvantage grievance.

Costs

[56] Costs are reserved. The parties are to attempt to resolve the issue of costs between. If that is not possible then they are to file and serve submissions to allow costs to be determined.

Janet Scott

Member of the Employment Relations Authority