

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

Determination Number: AA 202/07

File Number: 5080449

BETWEEN EASTERN BAY INDEPENDENT
INDUSTRIAL WORKERS UNION
Applicant

AND PEDERSEN INDUSTRIES
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: Lou Yukich, advocate for Applicant
Alayne Wills, counsel for Respondent

Investigation Meeting: 21 June 2007 at Rotorua

Determination: 04 July 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Eastern Bay Independent Industrial Workers Union (“the union”) and Pedersen Industries Limited (“PIL”) are parties to a collective employment agreement which came into effect on 1 November 2006 (“the cea”).

[2] The cea contains a leave provision which reads as follows:

“21.2 Annual holidays

Basic entitlement: ...

Shift holiday: An employee who has worked on shift work for a complete year, in accordance with shift work rosters shown in appendix 2, shall be entitled to an additional week’s leave.

Note: P Tawera shall be due an additional week of shift leave as from 1/11/05, all other shift employees shall become entitled to the shift leave provision as from 1/11/06.”

[3] The union says the clause means the entitlement to the extra week’s leave crystallises on completion of a year’s qualifying shift work, or on the dates identified in the Note as appropriate. PIL says the entitlement begins to accrue on completion of a year’s qualifying shift work, or on the dates identified in the Note as appropriate.

[4] Thus the parties are in dispute about the meaning of the provision. Although the union has sought a compliance order and has not requested that the dispute be determined, it is appropriate to determine the dispute first.

Approach to interpretation

[5] The following is a convenient summary by a full court of the Employment Court of the principles applicable to determining the dispute:

“[16] The starting point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of the entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectively, the aim of the transaction: ...”¹

History of the negotiations

[6] The cea is a new agreement, negotiated in association with PIL’s obtaining of a contract at the Carter Holt Harvey Tasman mill in Kawerau. The notice initiating bargaining for the agreement was dated 10 May 2005, with negotiations themselves beginning in or about November 2005. The negotiators included Loui Yukich and John Mahanga for the union parties to the agreement, and Sharon Reeves and Douglas Logan for PIL. All four gave evidence.

¹ **New Zealand Tramways etc Union Inc v Transportation Auckland Limited and Cityline (New Zealand) Limited** 27 November 2006, AC 61A/06

[7] The negotiations proceeded with reference to proposed draft agreements. A draft prepared by the union parties, dated November 2005, included this provision:

“Shift holiday: An employee who has worked on shift work for a complete year shall be entitled to an additional week’s leave.”

[8] By mid-2006 most of the terms of the cea had been agreed, although a further meeting went ahead on 21 July 2006. It was common ground that Paul Pedersen, the company’s director, entered the room during that meeting. He enquired in general about progress with the negotiations, and was told the question of an extra week’s shift leave remained outstanding. He said something like ‘give it to them’, and left.

[9] Mr Yukich and Ms Reeves discussed the wording for the shift leave provision. Mr Yukich had been particularly concerned to obtain the benefit of an extra week’s leave for workers on rotating 24/7 shift patterns. Accordingly the reference in the final wording to the ‘rosters shown in Appendix 2’ identifies the qualifying patterns. The parties also agreed on a special arrangement for P Tawera to recognise Mr Tawera’s circumstances, and that was recorded in the ‘Note’.

[10] Issues such as whether the entitlement to an additional week’s leave crystallised on the dates identified in the proposed wording, or began to accrue on those dates, were not expressly discussed. However there was no dispute the wording was agreed, and Mr Yukich and Ms Reeves both told me they believed the wording reflected their intentions. Both have acted subsequently in accordance with their understanding of the meaning of the words used.

[11] As at the date of the investigation meeting only a relatively small number of employees were covered by the provision. Of those, five plus Mr Tawera had been employed on the qualifying shifts for a complete year as at 1 November 2006. PIL says the wording means Mr Tawera has been entitled to the additional weeks’ leave since 1 November 2006, while the remaining five will become entitled to the additional week’s leave on 1 November 2007. Its position on the entitlements of a further five employees who had not completed a year on qualifying shifts as at 1 November 2006 is not clear.

[12] The union says the employees who had worked on qualifying shifts for a complete year as at 1 November 2006 are already entitled to the leave, with Mr Tawera having been entitled to its benefit as from 1 November 2005. The entitlements of the remaining five employees will crystallise on the completion of a complete year's service on qualifying shifts.

Determination

[13] I regard as quite clear from the outset the unions' intention concerning the additional week's leave, with that intention being the same as the interpretation now being contended. I consider, too, that the first two lines of the shift holiday provision are clear to the effect that the entitlement to an additional week becomes due on the completion of a complete year's work on qualifying shift rosters, not that it begins to accrue on completion of that year's work.

[14] The 'Note' is not well-worded, however, and it is not surprising that confusion has resulted.

[15] Nevertheless on its face I read the 'Note' as no more than a statement of when the shift holiday clause comes into effect, having the particular purpose of identifying the special arrangement for Mr Tawera. It does not go further and purport to address the commencement date of the qualifying period. Hence, once the clause has come into effect it applies according to its tenor – namely that an additional week's leave is available to people who have worked for a complete year on a qualifying shift.

[16] Finally, the comments attributed to Mr Pedersen appear to amount to an instruction to give the unions what they wanted. The remaining task was to put that into effect in the agreement. An attempt was made to do so

[17] Overall I conclude that the words used, and the circumstances of the entry into the shift holiday agreement, support the interpretation contended by the union. I find accordingly.

[18] Finally, the issuing of a compliance order is a discretionary matter. Here there was a genuine dispute between the parties, which I have now resolved. I see no reason to assume that PIL will ignore or fail to act on the matter, and accordingly no reason to believe an order for compliance is necessary.

[19] The application for a compliance order is therefore adjourned. Leave is reserved to raise the matter with the Authority again if there is any further or ongoing breach of the clause as I have interpreted it. If there is no such approach within 28 days of the date of this determination, the application for a compliance order shall lapse.

Costs

[20] Costs are reserved. The parties are invited to reach agreement on the matter. If they are unable to do so they shall have 28 days from the date of this determination in which to file and serve memoranda setting out their positions on the matter.

R A Monaghan

Member of the Employment Relations Authority