IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 58/08
5074540

	BETWEEN	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA Applicant
	AND	SANFORD LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Peter Cranney, Counsel for Applicant Nic Soper, Counsel for Respondent
Investigation Meeting:	14 February 2008 at Invercargill
Determination:	6 May 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a statement of problem filed on 14 December 2006, the applicant union (the Union) raised two problems, namely a breach of the Holidays Act 2003 and a breach of a collective employment agreement. Of those two issues, only one remains for determination by the Authority, the other having been settled by the parties.

[2] The unresolved issue is the claim in relation to a breach of the Holidays Act 2003 relating to what wage is to be paid for weeks in which a public holiday falls when an employee works the holiday.

[3] The respondent (Sanford) alleges that its payroll practice is in accordance with the applicable collective employment agreement (CEA) and the Holidays Act 2003.

[4] The problem can be neatly encapsulated in the following example. In a week where a public holiday falls and a worker works less than the full span of ordinary hours on that public holiday, the way that Sanford applies the payroll rules is that the worker is paid less for actually working than would be the case if the worker had that public holiday off.

[5] For example, where a worker works four hours on the public holiday, Sanford's interpretation is that that worker is entitled to be paid time and a half for those four hours plus, of course, time one on the other four days of the week so the total entitlement of that worker is for an equivalent payment of 38 hours pay for the week.

[6] If the worker did not work those four hours on the public holiday, then of course that worker would be paid more by reason of the fact that the worker would receive a total of 40 hours for the week, two hours more than if they had worked.

[7] I was told that a consequence of this result was that where there was some work available on public holidays, but it was likely not to require a full day's work, the tendency of some employees was not to make themselves available because, in effect, they received less money than would be the case if they did not work at all.

[8] There is no issue about the alternative holiday where a worker works on a public holiday. It is common ground that any employee is entitled to an alternative holiday if he or she works on any part of a public holiday.

Issues

[9] It will be useful to consider the various provisions in the Holidays Act 2003 which are relevant to the problem before the Authority and then to review the relevant provisions of the CEA which impact on the problem.

[10] Then the Authority will need to consider the decision of Judge Shaw in *SFWU v. OCS Ltd* 1 WRC 8/07, 1 March 2007. The Union relies on this decision as support for its position while Sanford says the Employment Court's decision is distinguishable.

The Holidays Act 2003

[11] Part 2 of the Holidays Act 2003 relates to holiday and leave entitlements. Sub-Part 3 of Part 2 of the Act concerns public holidays. Section 43 sets out the purpose of the sub-Part of the Act as being to provide employees with an entitlement to 11 public holidays if those days fall on days that would otherwise be working days for the employee and to enable employees to agree to work on public holidays in exchange for another day's paid leave.

[12] Section 47 is the base provision setting out when an employee is required to work on a public holiday and it provides as follows:

> *An employer may require an employee to work on a public holiday if–*
> *(a) The public holiday falls on a day on which, but for it being a public holiday, would otherwise be a working day for the employee; and*
> *(b) The employee is required to work on the public holiday under the employee's employment agreement.*

[13] Section 49 deals with the situation of payment where the employee does not work on the public holiday and it provides that the employee must be paid not less than his or her relevant daily pay for that day provided the day would otherwise be a working day for the employee were it not the public holiday. Section 50 provides generally that an employer must pay an employee at least time and a half for working on any part of a public holiday.

[14] Finally, s.54(4) makes plain that a dispute about whether or not an employer is complying with the provisions I have just referred to is an employment relationship problem for the purposes of the Employment Relations Act 2000.

The collective employment agreement

[15] The CEA at clause 9.1 broadly defines workers employed for which the document has coverage as involved in *weekly employment*. Although the different categories of worker are carefully defined in the CEA, there is no definition of an hourly worker although there was reference in the wages clause to hourly rates. The reason for this, as the Union's submission makes clear, is to deal with part-time workers who are employed for less than 40 hours per week and for whom it is therefore necessary to derive an hourly rate. However, it is equally clear that there is no intention that that provision be used to reduce a full time worker to an hourly rate

worker by the effect of clause 8.6 which makes clear that the provisions are not to be used for the purpose of reducing either the hours of work or the earnings of any worker.

[16] Public holiday pay is dealt with at clause 15.2 wherein it is provided that such work is to be paid at overtime rates although it is clear from the effect of clause 4 and clause 5 of the CEA that while the work on a public holiday may be paid at overtime rates, the worker concerned is not in truth working *overtime* as that expression is defined in the CEA.

The effect of Service & Food Workers' Union v. OCS Ltd

[17] The starting position in comparing the *OCS* decision with the present case is para.[9] of Her Honour Judge Shaw's decision. There she encapsulates precisely the dichotomy here when she says:

> *… the case for each of the parties on their interpretations of the CEA are, in summary:*
>
> - *The employees are only entitled to be paid penal rates stipulated in the CEA for each of the hours actually worked on the holiday (OCS).*
> - *The employees are entitled to a minimum weekly payment and where a public holiday falls during the working week they are also entitled to penal rates for any hours worked on the public holiday (the Union).*

[18] In the next paragraph, the Judge goes on to describe the position more fully by identifying that *the essential difference between the parties is whether the employees are entitled to a minimum weekly wage*.

[19] The nub of the dispute between the parties in the instant case is expressed in the submissions filed by Sanford in the following way:

> *Service and Food Workers' Union v. OCS (unreported) WRC23/06 relates to workers who were contractually entitled to receive a minimum payment for weekly employment. Accordingly, if they worked on a public holiday, being a day that they would otherwise work, then they were entitled to receive their minimum weekly pay in addition to time and a half and a lieu day. This authority is clearly distinguishable.*

The respondent employees (the Sanford employees) do not receive a minimum weekly wage, regardless of days or hours actually worked, and accordingly the

standard provisions of the Holidays Act 2003 apply in respect of working on a public holiday.

[20] To put it another way, the evidence of Sanford, given by its Bluff manager, Mr Thomas Foggo, had this to say in relation to the issue:

> *I do not believe that there is anything within the Holidays Act 2003 of the applicable CEA that requires Sanford to pay a worker a full weekly wage, including a daily wage for a public holiday, plus an additional amount equally half again for any portion of the public holiday actually worked. Such a practice would result in a worker receiving a double payment for public holiday, i.e. a day's pay, a paid day in lieu and time and a half for time actually worked.*

[21] But that, of course, is precisely what the Union says ought to be the position. The Union says that the effect of the interpretation advanced by Sanford in the instant case is that where a worker works less than a full span of hours on the public holiday (assuming that that public holiday falls on a day that that worker would usually have worked), then the effect of Sanford's interpretation is that the worker gets less for turning out to work than if he or she stayed home and enjoyed the public holiday. The Union says that does violence to commonsense and to the purpose of the Holidays Act and I accept both of those submissions at face value. As to commonsense, it clearly flies in the face of everything that is reasonable for workers to be asked, however rarely, to work on a public holiday and earn less than would be the case if they stayed home on the same day.

[22] As to the principle in the Holidays Act, it is clear that the policy of the statute is that a person who works on a public holiday ought to receive more payment than a person who works on a normal working day, a point Judge Shaw made in her judgment in the *OCS* matter. However, it is suggested that that principle can be reasonably extended to provide that it is a logical nonsense for a worker to be paid less to actually turn out and work on a public holiday than would be the case if the worker elected not to make herself or himself available.

[23] The central question then is whether Sanford is right to argue that the *OCS* case is distinguishable on its face. If it is, then whatever the logical difficulties with the situation as it stands, Sanford must succeed because the Union's whole case is based on the *OCS* decision.

[24] Conversely, if *OCS* is not distinguishable, then the Union's argument must triumph.

[25] The fulcrum of Sanford's argument is simply that its employees do not receive a minimum weekly wage and therefore *OCS* is distinguishable because those workers do receive a minimum weekly wage.

[26] I have given earnest consideration to Sanford's submission but I do not agree with it. I think it is fair to say that the nature of the CEA which Judge Shaw was construing in *OCS* probably was more definitively directed to weekly employment than is the case in the Sanford document, but I am not persuaded that the Sanford document, properly construed, ought not to be interpreted in the same way.

[27] One of the aspects upon which Judge Shaw relies in her judgment is the fact that the OCS document apparently requires the payment of a weekly rate without deduction irrespective of the hours actually worked, except in the case of default by the employee.

[28] Although it may be said that the wording in the Sanford agreement is less directive, it is still clearly a document which provides for weekly employment. That is what clause 9.1 of the CEA says and, in operational terms, it is difficult to distinguish that from the situation in *OCS*.

[29] Given the predominance of weekly work in the Sanford CEA and the logical difficulty in a situation where, in some circumstances, a worker is better off staying at home on a public holiday they would normally work than attending at the workplace, I reach the conclusion that the policy of the statute and the decision of Judge Shaw in *OCS* requires me to find for the Union, rejecting Sanford's argument that the *OCS* decision is distinguishable.

Determination

[30] The Authority finds that Sanford is in breach of the CEA in respect of the payment of full time employees who work on public holidays on the basis set out in this determination.

[31] The consequences of that decision are to be worked out between the Union and Sanford in a pragmatic way. If there is difficulty in that being attended to by

negotiation between the parties, then leave is reserved for the parties to come back to the Authority.

Costs

[32] Costs are reserved. The parties are encouraged to endeavour to resolve the matter of costs in their discussions about the effect of this decision.

James Crichton
Member of the Employment Relations Authority