

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 408/08  
5103944

BETWEEN                      NEW ZEALAND  
   AMALGAMATED  
   ENGINEERING PRINTING &  
   MANUFACTURING UNION  
   (INC)  
   Applicant

AND                                SCA HYGIENE  
   AUSTRALASIA LIMITED  
   Respondent

Member of Authority:        Marija Urlich

Representatives:             Anne-Marie McNally, Counsel for Applicant  
   David France and Gemma Mayes, Counsel for  
   Respondent

Investigation Meeting:      2 October 2008

Determination:                1 December 2008

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**DETERMINATION OF THE AUTHORITY**

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[1]     The parties have agreed to a two week annual shut during the Christmas/New year period<sup>1</sup>. A dispute has arisen as to the appropriate payment for public holidays over the Christmas and New Year period. The EPMU says as parties cannot contract out of their obligations under the Holidays Act 2003 (“the Act”) all public holidays falling in the annual shut, for the purposes of payment, must be treated the same as public holidays falling during any other time of the year. SCA says the parties have agreed to suspend the usual roster arrangement during the annual Christmas shutdown period and this effects the calculation of payment for the public holidays that fall in this period.

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<sup>1</sup> SCA Hygiene Australasia – Treasures Babycare Swanson Collective Employment Agreement 2006 – 2008 (“the CEA”)

[2] Section 40 of the Act sets out the relationship between annual holidays and public holidays:

- (1) *A public holiday that occurs during an employee's annual holidays must be treated as a public holiday and not as part of the employee's annual holidays.*
- ...
- (2) *The employee is entitled to be paid for a public holiday if the holiday would have –*
  - (a) *otherwise been a working day for the employee;*
  - ...

[3] Section 49 of the Act provides how an employee is to be paid if they do not work on a public holiday:

If any employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay for that day.

[4] There are two issues for determination – would the days in question *otherwise be [] working day[s] for the employee[s]* and, if so, what is the *relevant daily pay for [those] day[s]*?

[5] At the investigation meeting I received evidence from Richard Turk, EPMU senior site delegate at SCA Swanson Road, Cliff Gunning, the EPMU organiser SCA Swanson Road, Trevor Rowland, SCA Swanson Road manufacturing manager and Frank Jackson, who formerly held that position with SCA and is now employment as SCA's general manager Pacific Islands. They gave evidence of the history of the contractual provisions at issue, the history of this dispute and the operation of the annual shut. At the conclusion of the investigation counsel presented submissions.

[6] There is no labour inspector determination pursuant to section 11 or 13 of the Act to consider.

### **Otherwise a working day?**

[7] Section 12 of the Act sets out the factors to be taken into account in determining what would otherwise be a working day:

- (3) *The factors are –*
  - (a) *the employee's employment agreement;*
  - (b) *the employee's work patterns;*

- (c) any other relevant factors, including –
- (d) whether the employee works for the employer only when work is available;
- (e) the employer’s rosters or other similar systems;
- (f) the reasonable expectations of the employer and the employee that the employee would work on the day concerned.

[8] The relevant provisions of the CEA provide:

*Appendix A – Swanson Road Variance*

1. *Hours of Work*

1.1 *The ordinary hours to be worked shall be 12 hours per shift, Monday to Sunday inclusive. These hours shall be worked in accordance with a roster, Providing, providing for four days to be rostered as work days with the subsequent four days to be rostered off, or any such pattern as may be mutually agreed.*

1.2 *Over the eight week cycle of this roster, this pattern provides an average of 42 hours per week.*

...

5. *Public Holidays*

*This clause stands in lieu of the provisions contained in the agreement 12.1.1. – 12.1.3 inclusive.*

*Except for public holidays that fall during the Christmas shut period (provisions for which is made in 6.[8] below, the following shall apply:*

...

*Observance and payment for any public holiday that falls during the Christmas shut shall be detailed in Clause 6.[8] below.*

6.8 *Annual Shut*

6.8.1 *The diaper operation shall be closed for a two calendar week period (14 days) at Christmas.*

6.8.2 *For the duration of this closure, the provision of this roster shall be suspended. At the conclusion of the 14 days closure, the roster will be resumed exactly at the point that it was left off.*

6.8.3 *For the duration of the closure, all employees shall be deemed to be “five days per week, eight hours per day” employees. Accordingly any public holidays that may occur shall be paid on this basis and any leave days taken during this 14 day closure shall be reckoned at eight hours per day, and deducted appropriately from the individuals accumulated annual leave entitlement.*

6.8.4 *If the Company requires production during the shutdown period due to the needs of the business and/or marketplace, the parties agree to use their best endeavours to arrange for sufficient employees to enable the companies’ operations to continue.*

[9] Mr France submits that as the parties have agreed to suspend their usual roster during the annual shut and the affected employees will not be required to work the public holidays falling during this period those days could not be said to be *otherwise working days* and section 49 does not apply.

[10] The first of the section 12 criteria to consider is the employment agreement (section 12(3)(a) of the Act). The CEA deems employees during the shutdown to be “*five days per week, eight hours per day*” employees. The *five days per week* commences on closure of the diaper operation per clause 6.8.1 of the CEA. This work pattern, albeit notional, replaces the suspended roster. It follows that *otherwise working days* are any days which fall in the *five days per week* span of the notional work pattern.

### **Relevant daily pay**

[11] Section 9 of the Act provides the meaning of relevant daily pay:

(1) *In this Act, unless the context otherwise requires, **relevant daily pay**, for the purposes of calculating payment for a public holiday,...., -*

(a) *means the amount of pay that the employee would have received had the employee worked on the day concerned [my emphasis];*

[12] The parties have agreed that for the two week closure employees are deemed “*five days per week, eight hours per day*” employees”. The *day concerned* is one of these deemed days and therefore, per the CEA, must be *reckoned at eight hours per day*. The relevant daily pay is correctly calculated on this basis.

[13] Clause 6.8.4 of the CEA makes it clear that employees cannot be required to work during the annual shut. There is no reasonable expectation on the part of SCA or the affected employees that there will be work on *the day concerned*. The evidence of work completed during the annual shut, paid at 12 hours, was worked on a voluntary basis and falls outside the provisions concerning the annual shut.

### **Costs**

[14] Costs are reserved. However, given this is a dispute about the interpretation, application and operation of the employment agreement and the Holidays Act I am inclined to let costs lie where they fall.

Marija Urlich

Member of the Employment Relations Authority

