

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 185/10
5306480

BETWEEN NEW ZEALAND PUBLIC
 SERVICE ASSOCIATION
 INCORPORATED
 Applicant

AND THE CHIEF OF THE NEW
 ZEALAND DEFENCE FORCE
 Respondent

Member of Authority: G J Wood

Representatives: Peter Cranney for the Applicant
 Nigel Lucie-Smith for the Respondent

Investigation Meeting: 28 September 2010

Submissions Received: 28 September 2010

Determination: 16 November 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This claim affects security guards employed by the respondent (the Defence Force) who work shifts, whether as senior security guards or security guards. The members of the applicant union (the PSA) who are directly affected by this determination are set out in Schedule A. Any claims for Messrs Hayward and Pohe and Ms Watson, however, do not form part of this determination. The issues for determination concern these workers' entitlements to annual holidays between 15 January 2007 and 25 June 2009.

Factual Discussion

[2] Senior security guards work an average of 42 hours per week. The actual hours worked vary greatly, as they work two weeks on a 96 hour fortnight, followed by two weeks on a 72 hour fortnight, based on 12 hour shifts. Security guards work a more complex roster, involving 12 hour and 8 hour shifts, averaging between 41.4 and 41.8 hours per week over a year.

[3] Before 1 September 2007, the parties' terms and conditions of employment were covered by the 2004 New Zealand Defence Force General Collective Agreement and later by the 2007 New Zealand Defence Force General Collective Agreement.

[4] Between 25 January 2007 and 30 April 2009 the parties affected also entered into a variation to the collective agreements, to cater for the particular shift arrangements of the security guards. The main reason for the variation was that the collective agreements did not properly cover their hours of work as the collective agreements provided for only 40 hour per week Monday to Friday workers, or shift employees of five shifts of eight hours each. The hours of work clause did, however, provide for such variations, provided as here they were in writing. The variation provided for the following of relevance to this case in clause 6.18:

Leave general – For each rostered shift day that a rostered shift employee takes annual, sick, bereavement, long service or other approved leave in terms of the Holidays Act and/or employment agreement, one day's entitlement will be deducted.

[5] There was no other variation covering annual leave. It implies that a day's entitlement to annual leave is more likely to be for the length of the shift, rather than eight hours.

[6] As well as providing for shift arrangements, the variation provides for an allowance for senior security guards which *will fully compensate the employee for work carried out in terms of 6.6 to 6.8 above*, which are the shift arrangements.

[7] Clause 6.12 deals with similar provisions for security guards and provides:

This payment of base salary and roster allowance, which will be paid fortnightly, will fully compensate the employee in a "rostered/shift" position for all work carried out on their rostered shift, other than for work carried out on a public holiday, Defence Force holiday or on rostered days off, or other situations, for which the relevant clause will also apply.

[8] Clause 6.13 provides:

The roster allowance will also be payable during approved annual leave ...

[9] The collective agreements provided for annual leave as following, with underlined sections being additions to the 2004 provisions that are contained only in the 2007 agreement:

4.3.2 **Permanent** employees, and **fixed term** employees whose period of employment is for greater than 12 months, will accrue annual leave for all time worked on the following basis:

- (a) *Employees who have completed less than five years continuous service, will accrue annual leave of three weeks per year e.g. if worked four months, entitled to five days annual leave. Employees who were employed on and after 1 April 2007 will accrue annual leave of four weeks per year.*
- (b) *Employees who complete five or more years of continuous service, will accrue four weeks annual leave per year e.g. if worked six months, entitled to 10 days annual leave.*
- (c) *Employees with a three week annual leave entitlement move to a four week entitlement on their first anniversary date falling after 1 April 2007.*
- (d) *Part time employees shall accrue annual leave as prescribed above. Salary during leave will be paid at the same rate that would be paid for the usual working week.*
- (e) *Subject to approval, employees may anticipate up to half of their annual leave entitlement subject to refund on resignation if necessary.*
- (f) *Employees with over 20 years' continuous service may anticipate one year's annual leave entitlement, i.e. 20 days annual leave.*

[10] Clause 4.3.3 provides a chart as to how annual leave entitlements for workers on special leave are to be reduced by a particular number of working days, depending on the length of a worker's absence. That sets out the number of days that are reduced rather than weeks. This is similar to the examples provided in clause 4.3.2, which show the number of days' pay that will be accrued on the basis of a five day week. By contrast, many of the security guards involved work shifts of more than eight hours over all days of the week.

[11] Defence maintains that security guards are only entitled to the minimum entitlement under the Holidays Act, whereas the PSA claims that the security guards are entitled to 20 days of annual leave paid according to their normal length of shift, often 12 hours.

[12] Mr Lucie-Smith referred to *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v. SCA Hygiene Australasia Ltd* [2010] NZEMPC 73. However, under the collective agreement affecting those parties, 12 hour workers were deemed during the course of the Christmas close down period to work shifts of 8 hours duration. In paras.[29-30] it was held:

[29] *In spite of not being required to pay the relevant daily pay for those public holidays falling in the closure period, I note that SCA reached an agreement with the Union, as embodied in its Appendix A to the various collective agreements, which ensured that the employees would still be paid for those public holidays, but on the basis of an 8 hour working day. This gave those employees the right to be paid on all four public holidays and not merely on the days when they might have been notionally rostered during the close down period. It also gave the 12 hour employees the advantage of having only 8 hours per day deducted from their accumulated annual leave entitlements instead of 12 hours per day.*

[30] *In a very real sense, Appendix A has provided the affected employees with more than the minimum entitlement of the Act, in terms of s6(a), and there is no basis to find that Appendix A has reduced those entitlements in terms of s6(3).*

[13] Mr Lucie-Smith relies on this extract, however, for the point that a 12 hour worker would normally have 12 hours deducted from their leave entitlement when taking a day's leave. Defence has accordingly calculated annual leave entitlements on the basis of the shift hours worked over the four week period of the shift cycle, so as not to advantage shift workers over other workers for leave entitlements.

[14] This issue has been thrown into stark relief because the Defence Force's computer programme for the computation of leave had until recently (in its view mistakenly), calculated the leave deductions as if employees are working on an 8 hour 5 day basis, rather than on a 12 hour average on a 3.5 days a week basis, as is the case for most of them. This is consistent with the PSA's but not the Defence Force's views in this dispute, although the Defence Force has taken steps to remedy that situation thus leading to this case.

[15] Clearly, the way that the Defence Force is now calculating leave is consistent with the default position in the Holidays Act. The issue for determination is whether or not the agreement provides more for security guards.

Determination

[16] Clearly security guards are permanent employees and are therefore entitled to the benefit of clause 4.3.2. I conclude that the word *accrued* does not assist either party, because leave balances accrue over time under either interpretation.

[17] The allowance only relates to shift work arrangements and therefore does not cover leave, as is clear from clause 6.18 of the variation. I conclude as well that leave entitlements would be unaffected in any event, because they are designated under 4.3.2 of the collectives. Clauses 6, 11 and 12 provide security officers with an allowance to compensate them for all work carried out on a rostered shift, in order to compensate them for the inconvenience of working shift work. The allowances do not therefore override the specific terms of clause 4.3.2 because of the operation of clause 6.18 and had the parties wished to do so, the variation could have specifically overridden clause 4.3.2, as indeed did the 2009 variation to the collective agreement.

[18] It is clear that from clause 4.3.2(f) (which is not set out in the collective as an example - because it uses the term *i.e.*), that 20 days' annual leave is an employee's normal entitlement. This is also consistent with clause 4.3.3 and not inconsistent with the examples give in (a) and (b) of clause 4.3.2.

[19] I therefore conclude that because the parties failed to deal with the matter specifically in the variation the security guards' entitlement to leave must be analysed under clause 4.3.2 and 4.3.3, and that they provide for accrual on a 20 day per year basis rather than four weeks per year basis provided for under the Holidays Act. There is no need to read down the clear wording of the parties' collective agreements. I therefore determine that permanent security guard employees are entitled to 20 days' annual leave per year and that leave accrues on that basis accordingly.

Costs

[20] Costs are reserved.

G J Wood
Member of the Employment Relations Authority