IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 95/10
5280021

	BETWEEN	NZ Amalgamated Engineering Printing & Manufacturing Union Inc Applicant
	AND	Sealed Air (New Zealand) Limited Respondent

Member of Authority:	Denis Asher
Representatives:	Greg Lloyd for the Union Lorne Campbell for the Company
Investigation Meeting	Wellington, 13 April 2010
Submissions Received	On the day of the investigation
Determination:	12 May 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] The problem between the parties is a dispute over the interpretation and application of the parties' collective employment agreement. At issue for the applicant (the Union) is, as it puts it: can the respondent (the Company) lawfully

deduct money from an employee's weekly wage in the event they fail to attend work when they have agreed to do a 'cover', being hours the unions says are in addition to their contracted hours of work? The Union says the Company cannot; the Company disagrees.

The Investigation

[2] During a telephone conference call on 27 January 2010 the parties agreed to a one-day investigation in Wellington on 13 April. Timelines for the provision of witness statements and an agreed bundle of documents were also put in place. Timelines were also agreed during the investigation for closing, written submissions.

Background

[3] The relevant facts are not in dispute:

[4] The Company manufactures plastic bags for the meat industry. As a result it experiences seasonal workload peaks and ebbs.

[5] At the time this dispute arose, the terms and conditions of employment of Union members employed by the Company were set out in the Sealed Air (NZ) and EPMU collective agreement 1 October 2008 – 30 September 2009 (doc A).

[6] By way of what is, the parties acknowledge, a densely worded Variation Agreement appended to the collective agreement, the parties have agreed to what is now a 10-year old annualised pay system (the pay system).

[7] A new collective agreement was ratified on 2 November 2009. It carries over the same Variation Agreement and pay system.

[8] Amongst other things, the pay system is intended to deliver the same pay for employees each week irrespective of the actual hours worked in that week; weekly pay is based on a projection of the hours that will be worked over the course of a year, divided by 52.

Summary of the Union's Position

[9] The issue in dispute is whether the Company is entitled to deduct money from employees' weekly wages in the event that they fail to attend work having agreed to do a cover, i.e. the applicant says, hours in addition to their contracted hours of work.

[10] In other words, employees who complete their contracted hours in any given week and who agree to provide cover in accordance with the relevant provisions of their collective agreement and then fail to do the cover have had their wages illegally deducted by the respondent for the hours not worked on cover.

Summary of the Company's Position

[11] Because of my finding in favour of the Company, it is unnecessary for me to summarise their position which I now adopt and adapt as my determination.

Findings

[12] Employees are not paid weekly wages but instead receive an all inclusive annual salary which is divided into 52 equal payments. Employees therefore cannot rely on a concept of contracted hours in any given week, as claimed by the Union.

[13] Instead, employees undertake to *"work all reasonable hours (including call-backs) as required by the company"*. *"In return, employees … receive an all inclusive annual salary for a specified period"* (clauses 2 & 3, *"Purpose"*, of the Variation Agreement).

[14] *"The process applied when determining the hours of work and annual salary shall be referred to as "Annualised Hours". This is a method of calculating working hours on an annual basis and determining a total salary to reflect those hours based on the set formula detailed in the Schedules to this Agreement"* (clause 3, above).

[15] At the start of the annualised hours year (1 October to 30 September) each employee agrees to work a total number of contractual hours for the year, e.g. employee X contracted to work 2140 hours for the 2008-2009 year.

[16] Under the collective agreement, those contractual hours are to be worked *"as required"* (above) so as to meet the Company's business needs.

[17] I accept the Company's claim that that requirement has always contained an element of covers, usually to maintain staffing levels in the case of absences. 'Covers' is, I find, another term for, and method of implementation of, *"as required"* (above).

[18] While the Company consults with employees as to when covers are to be worked, their agreement is not required as their working covers is fundamental to this annualised hours system.

[19] However, the Variation Agreement also imposes limits on working hours required by the Company of its employees (so as to ensure adequate rest between work periods, and to take account of employee requirements, etc).

[20] Covers therefore should not be construed as, or confused with, *"additional hours"* as provided by clause 4 of the Variation Agreement, which allows employees and the Company to *"agree to a set number of additional hours"* in addition to the contractual hours, i.e. over and above the already agreed hours.

[21] Contractual hours, and covers, do not relate to a particular week, as claimed by the Union, but to the annual total of hours originally agreed by the parties, consistent with the flexibility provided the Company by the employees' agreement *"to work all reasonable hours"* in return for which they receive *"an all inclusive annual salary for a specified period"* (*"Purpose"*, clauses 1 & 2).

[22] The hours to be worked on any day, or in any week or fortnight or month, while generally based around a set roster pattern, but – importantly in the context of this dispute – can be added to or reduced by the Company using covers, or call-backs (which are different from covers, as they are voluntary and paid for in cash) or by stand-downs (when the employee is not required to work).

[23] This annualised hours system is balanced by, amongst other things, the relationship between covers and stand-downs. The Variation Agreement also contains

provisions that ensure that, amongst other things, employees are paid for any additional hours worked over and above their contractual hours. However, if the Company does not utilise all of their contractual hours for that year, and because of the annualised pay system and provisions in the Variation Agreement, the respondent has no claim against that employee for what might be called an 'overpayment'.

[24] For the reasons set out above, a cover is therefore no different than any normal scheduled work day or shift.

[25] The working of covers is fundamentally part of the employee's obligation to *"work such reasonable hours as are required by the Employer"* (first par, clause 6 of the Variation Agreement); and, *"Roster patterns and daily hours will be worked as or when required by the Employer and, so far as is possible … in accordance with the wishes of the workers"* (second par, above).

[26] That obligation is reiterated in the final paragraph of clause 4, *"Annualised Hours"*, which provides: *"It is important to remember that all staff may be required to work covers and callbacks whether or not they have taken any additional hours"*.

[27] Clauses 6 & 13 of the Variation Agreement expressly provides that where an employee defaults (for example, does not work an agreed cover) or takes leave not accounted for by the relevant parts of that agreement then deductions will be made at the appropriate hourly rate and that the *"hours shall be deducted from the total contractual hours"* (above), in recognition that that portion of the contracted annual hours had not been worked as agreed by the parties.

[28] Clauses 6 & 13 of the Variation Agreement reflect the provision in clause 29.5 of the collective agreement that provides for deductions for time lost through the employee's own default, sickness or accident.

[29] A deduction for an agreed cover not worked is comparable to the provision contained in most collective agreements allowing an employer to make a deduction to wages in respect of time lost by that employee due to absence, sickness or default.

[30] A deduction for an agreed cover not worked is not in breach of the Wages Protection Act 1983, in particular ss. 5 (1) and/or 16 of that Act.

[31] I am therefore satisfied that the deductions challenged by the Union were and are properly made by the Company per the relevant provisions of the Variation Agreement and do not amount – as claimed – to a breach of the Wages Protection Act 1983.

Determination

[39] The application is dismissed.

[40] As requested, costs are reserved.

Denis Asher
Member of the Employment Relations Authority