

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 131/10  
5297145

BETWEEN                    MARS NEW ZEALAND  
   LIMITED<sup>1</sup>  
   Applicant

AND                            MANUFACTURING AND  
   CONSTRUCTION WORKERS  
   UNION INC  
   Respondent

Member of Authority:    P R Stapp

Representatives:        Andrew Caisley for Applicant  
   Lou Yukich for Respondent

Investigation Meeting:    22 June 2010 at Wellington

Determination:            4 August 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant has filed a dispute for interpretation as to how an employee's entitlement to annual holidays can be met under the Holidays Act 2003 and a collective agreement between Mars New Zealand Limited trading as Mars Petcare New Zealand, and the Electrical Union Division and the Manawatu Industrial Workers Branch of the Manufacturing and Construction Industrial Union of Workers Inc. The applicant says it is allowed to calculate annual leave in hours, instead of days as claimed by the Union.

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<sup>1</sup> The SOP cited Marscare NZ Limited. The sir identified the correct applicant name as Mars New Zealand Limited. This is accepted by the applicant. For completeness I have corrected the name of the applicant under s 221 of the Employment Relations Act.

[2] The respondent has claimed that the Authority does not have jurisdiction and it has denied that there is a dispute over the methodology for calculating leave entitlements because it is fixed by the employment agreement.

[3] Also, the respondent has filed claims for breaches by the applicant of the Holidays Act and the employment agreement. The respondent has relied on the requirements under ss 16, 17, 18, 41 and 81 of the Holidays Act. In addition the respondent has claimed the applicant has deliberately and wilfully been in breach of the duty of good faith and is seeking a penalty for a breach of s 4A (a) of the Employment Relations Act. Finally the respondent is seeking a compliance order requiring the applicant to keep an accurate record of employee leave entitlements and to adjust the records to show the correct leave entitlements.

[4] Both parties are seeking costs.

[5] There has been mediation.

### **Issues**

[6] Does the Authority have jurisdiction in regard to the employment relationship problem?

[7] What is the employment relationship problem having regard to the positions taken by the parties in the SOP, SIR and application from the respondent for breaches, penalty and compliance? In summary can the company calculate holidays by reference to hours rather than days worked?

### **The facts**

[8] The collective agreement has expired (1 January 2010) but remains in force because the unions have initiated collective bargaining before the collective agreement expired for the purpose of replacing the collective agreement under s 53 of the Employment Relations Act.

[9] It is agreed that the existence of the dispute has been advised to the other union party to the collective agreement under s 129 (2) of the Employment Relations Act.

[10] Mars operates a pet food production facility at Castlecliff in Whanganui. The employees are covered by the terms of the collective agreement: four are electrical workers and are members of the Electrical Division and 4 are employed as mechanics and are members of the Manawatu Industrial Workers Branch, of the Manufacturing and Construction Workers Union Inc.

[11] Rosters have operated since 2004. In January 2009 there was a shift from a 7 day week roster to five days. This operated for a short period of time due to falling demand. From February 2009 overtime was worked to cater for increasing demand and consultations occurred to reintroduce a seven day operation.

[12] On 14 April 2009 the decision was made to return to 4 shifts by 17 May 2009. In the meantime consultations continued, but a dispute came about over the calculation of annual leave entitlements in hours. There was agreement reached on 15 May 2009 to get a Labour Inspector from the Department of Labour to provide a determination on the matter. Also the parties reached an agreement for an interim arrangement to deduct 8 hours for the Saturday and Sunday 12 hour per day shifts. On 13 November 2009 a Labour Inspector provided an opinion that calculating annual leave entitlements in hours was not unlawful and also not in breach of the collective agreement and the Holidays Act.

[13] The applicant resumed the calculation of the annual leave entitlement on 1 February 2010 following the opportunity provided to the employees and Union to have input and comment. Despite progress being made in collective bargaining to replace the employment agreement there remains an issue about how the entitlement to annual leave is to be calculated.

**The Union's case**

[14] Mr Yukich submitted that the Authority has no jurisdiction to fix terms and conditions of employment by defining what a week is to calculate the annual holiday entitlement in clause 19.1 of the collective agreement and s 16 of the Holidays Act.

[15] He submitted that the applicant cannot rely on subsuming terms contrary to the Holidays Act and collective agreement.

[16] He also submitted that the applicant can not rely on custom and practice to support an agreement to use its methodology to calculate the annual holiday entitlement.

[17] I have not needed to summarise the applicant's position on the matter because its arguments will become self evident in my comments shortly.

**Determination**

[18] The Authority's jurisdiction to deal with a matter in dispute where a Labour Inspector is involved and has certain powers arises from s 161 of the Employment Relations Act (see *Progressive Meats v Meat and Related Trades Workers Union of Aotearoa* [2006] ERNZ 863 P 870). The Authority has jurisdiction in regard to a dispute on the interpretation, application and operation of a collective agreement.

[19] The applicant is seeking a declaration over a dispute about the calculation of the annual leave entitlement under the collective agreement and the Holidays Act. The question that arises from the filing of the statement of problem is whether or not it is lawful to make that calculation in hours as opposed to days as claimed by the Union?

[20] The application for a declaration does not involve a request to fix new terms and conditions of employment, but involves a dispute about the interpretation application and operation of the collective agreement. This is within the Authority's jurisdiction: applying s 161 (1), s 161(1) (a), s 161(1) (f) of the Employment Relations Act, and consistent with the Union's own claims under s 4A of the Act.

[21] Sections 17 and 18 of the Holidays Act 2003 are as follows:

**17 *How employee's entitlement to annual holidays may be met***

- (1) *An employer and employee may agree on how an employee's entitlement to [four weeks'] annual holidays is to be met based on what genuinely represents a working week for the employee.*
- (2) *If an employer and employee cannot agree on how an employee's entitlement to [four weeks'] annual holidays is to be met, a Labour Inspector may determine the matter for them.*
- (3) *In making a determination, the Labour Inspector may take into account any matters that the Labour Inspector thinks fit, including the matters specified in s.12(3).*

**18 *Taking of annual holidays***

- (1) *An employer must allow an employee to take annual holidays within 12 months after the date on which the employee's entitlement to the holidays arose.*
- (2) *If an employee elects to do so, the employer must allow the employee to take at least two weeks of his or her annual holidays entitlement in a continuous period.*
- (3) *When annual holidays are to be taken by the employee is to be agreed between the employer and employee.*
- (4) *An employer must not unreasonably withhold consent to an employee's request to take annual leave.*

[21] The collective agreement 1 January 2009-1 January 2010 between the applicant and the respondent makes provision for the following terms:

**13. *Hours of Work (Shifts)***

*Ordinary hours of work are an average of 40 hours per week (e.g. 24 hours, seven days a week) to be worked on any days of the week, Monday to Sunday inclusive.*

*Actual hours of work are according to the roster as determined by MARS Petcare New Zealand and it is agreed that they may be altered as determined by the Company to suit the business requirements with a period of notice dependent on the circumstances. Any changes in hours of work will follow the consultation process. Reasonable notice will be provided to Employees of any requirement to change shifts.*

*The salary provided for in this agreement is in full consideration of all the requirements of the position in respect to hours, days and times of employment.*

*Employees are required to attend calls at any time during their on duty period and accordingly meal breaks are paid.*

*Employees are required to remain after shift for such times as it takes to ensure all documentation and an effective hand over is completed.*

*Employees may be required to change shifts on occasion to cover holidays and training.*

*A Shift allowance calculated at 5% for each hour worked is provided in the salaries shown in the remuneration tables.*

## **19. Annual Holidays**

### **19.1 Entitlement**

*Employees shall be entitled to four weeks' paid annual holidays after the completion of 12 months continuous employment. (For the purpose of this provision the parties will meet to determine what constitutes a working week given the roster in operation at that time.)*

*MARS will allow Employees to take at least two weeks of their annual holiday entitlement in a continuous period.*

### **19.2 Calculation**

*Annual holidays shall be paid at the greater of Employees's (sic) average weekly earnings during the year of entitlement or ordinary weekly pay at the time annual holidays are taken.*

### **19.3 Timing**

*The timing that annual holidays will be taken shall be determined in accordance with the Holidays Act 2003.*

...

[22] There is no provision defining what a week means, but the Act does provide a number of alternative ways to determine what a week is by agreement and or by a Labour Inspector's determination (s17 of the Act). These are permissive arrangements. The current matter does not fall into either category where it is arguable no agreement has been reached, and it is arguable that, despite having been requested to do so, the Labour Inspector did not determine the matter for the parties.

[23] The payment of wages is provided for at clauses 27, 43 and 44 of the collective agreement. There is no express provision outlining the salary nature of weekly wages. Mars has interpreted a week to mean 40 hours consistent with the collective agreement. I accept that the employees work on average 39 hours per week

across an eight week roster cycle. However within some weeks there will be variations on the hours worked: from 20 hours on two days to 56 hours on six days. The company's treatment of a week as being 40 hours has been agreed by inferred conduct over time. This is consistent with Mars treating five weeks holiday entitlement as 200 hours. It has been the practice for this to be done by the company according to Mr Colin Fergus, the plant manager, at least since he has been at the plant production facility for the last five years.

[24] Even if there was no agreement a definition of a week is still necessary and there must be some system in place to give meaning and effect to the obligation to provide at least four weeks holiday. That approach is consistent with the statutory powers given to a Labour Inspector to make a determination on the meaning of a week. Incidentally, the Labour Inspector's opinion was consistent with the approach taken by Mars.

[25] By allowing workers 200 hours annual leave per annum Mars is discharging its obligations under the Holidays Act 2003, I hold, for the following reasons:

- (a) Employees work on average 39 hours per week.
- (b) Employees work on average 4.5 days per week.
- (c) Employees are paid and accept 40 hours pay per week. This is regardless of the actual hours worked.
- (d) Employees have not objected to time off on leave being equated with hours. For example where an employee takes off a calendar week and it happens that the week would only be two days (one 8 hour day and one 12 hour day) it is 20 hours of annual leave.
- (e) There are approximately 230 employees to whom the company applies this approach. Seven employees have objected.
- (f) The 40 hour treatment is beneficial in most employees' favour. Where any individual difficulties arise Mars has undertaken to address specific issues on a case by case basis.
- (g) No actual disadvantage has been identified, except in theoretical terms.

[26] The next issue is whether or not the approach breaches the collective agreement. Under that agreement there is provision for 4 weeks annual holidays plus an additional one week of annual holiday. There is no specific definition of what a week means. There is provision for 40 hours per week. However, there is no express provision to use hours to calculate the holiday entitlement. In the absence of that I hold that the hours approach does not breach the collective agreement because:

- (a) The approach is consistent with a week meaning 40 hours per week.
- (b) There has been no prior objection (other than this dispute).
- (c) The absence of any agreement in writing to the contrary.
- (d) The existence of shift arrangements. Thus, the variables and unpredictable hours of work have meant that some meaning has to be provided to a week to enable employees' entitlements to be met. What Mars has done has been a genuine attempt to define a working week. Any failures to meet the statutory requirements on the taking of leave and annual holiday pay calculations would need to be treated on an individual by individual basis. There have no complaints.

[27] The union has alleged that there was an agreement in 2005/2006 for only eight hours to be deducted from accrued leave entitlements where leave is taken on 12 hour daily shifts such as Saturday and Sunday. Mars denied that claim.

[28] I accept Mars's position on this because:

- (a) The 12 hour shift was introduced in August 2004.
- (b) In November 2004 there was a roster review and the outcome involved a continuation of the 12 hour shift.
- (c) The 12 hour shift has remained.
- (d) Mr Fergus' evidence was detailed.
- (e) There was supporting documentation produced by Mr Fergus.
- (f) The alleged 2005/2006 agreement was not previously raised in earlier correspondence and the original statement in reply from the Union.

The allegation was raised just prior to the Authority's investigation meeting.

- (g) It is unlikely there was an agreement when if it existed it would have been applicable to the production employees and yet no other employee and or union has raised any claim about it prior to this matter.
- (h) New collective agreements, negotiated since 2005/2006, have not included any arrangement and provision reflecting the 2005/2006 agreement.
- (i) There is some ambiguity in the statements made by the union's witnesses where any agreement reached has been able to be confirmed.

[29] It is my conclusion that on the balance of probabilities there was no agreement in 2005/2006 as alleged by the Union.

[30] I now turn to the claims by the Union that Mars has deliberately and wilfully breached s 16 and 73 (1) of the Holidays Act and s 4A of the Employment Relations Act, and the claim for penalties.

[31] Mars has produced evidence of compliance with its obligations under s 16 of the Holidays Act. Its treatment of a week as being 40 hours meets the requirement. Further the company requested the Department of Labour to help, and whilst the Labour Inspector did not provide a determination the company relied upon an opinion from the Department in good faith. I agree that it can not possibly be said that Mars has deliberately and wilfully breached s 16 of the Holidays Act.

[32] S 73(1) of the Holidays Act requires the parties to deal with each other in good faith. There has been no evidence produced that Mars has done anything to mislead or deceive or done anything likely to mislead or deceive the Union. I accept Mars has been open and honest in this matter. It has had negotiations. Its approach has been open and transparent. It referred the matter to a Labour Inspector. It applied to the Authority with an employment relationship problem for determination on the matter. I conclude that there has been no proven breach in regard to the employer's actions. Furthermore there is no penalty for breach provision that applies to s 73 (1) of the Holidays Act under s 75 of that Act.

[33] I am satisfied that the employer has not breached s 4A of the Employment Relations Act by failing to act in good faith. Its action would not amount to a deliberate, serious and sustained failure to act in good faith, I hold. Thus there can not therefore be any penalty imposed under s 4 of the Act.

[34] For completeness the employer acknowledged that at the time it referred the issue to the Department of Labour it did not copy information to the Union. I accept this was a genuine mistake and oversight. When the omission was brought to the company's attention the information was copied quickly to the Union. There is some suggestion that not all the information has been, and or, was provided. Even if this is the case there has been no identifiable loss, harm and or damage as a result.

### **Orders of the Authority**

[35] Under the collective employment agreement it is permissible for the company to treat a week as a 40 hour week and calculate holiday entitlement by hours.

[36] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority