

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 189
5538136

BETWEEN THE PULP AND PAPER
INDUSTRY COUNCIL OF THE
MANUFACTURING AND
CONSTRUCTION WORKERS
UNION
Applicant

A N D CARTER HOLT HARVEY PULP
AND PAPER LIMITED
First Respondent

AND CARTER HOLT HARVEY
LIMITED
Second Respondent

Member of Authority: Vicki Campbell

Representatives: Tim Oldfield for Applicant
David France for First Respondent
Rob Towner for Second Respondent

Investigation Meeting: 24 June 2015

Date of Determination: 25 June 2015

DETERMINATION OF THE AUTHORITY

- A. Carter Holt Harvey Limited acted in accordance with the collective agreement when it applied the requirements of the Holidays Act when calculating the leave entitlements of its employees when the employment with Carter Holt Harvey Limited ceased on 30 November 2014.**

Employment relationship problem

[1] This matter is a dispute over the application, operation and interpretation of a collective agreement.

[2] The Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union (the Union) claims that annual leave paid out to its members has not been calculated and paid correctly. In particular, it claims leave should have been calculated based on the average number of shifts worked by employees each week.

[3] Carter Holt Harvey Pulp and Paper Limited (CHHPPL) and Carter Holt Harvey Limited (CHHL) deny the claim and say that the method of calculating holiday pay complied with the obligations under s.24 of the Holidays Act 2003 (the Holidays Act) and that the method of calculation is also consistent with the collective agreement.

Issues

[4] The issue for determination is whether CHHL correctly calculated the annual leave for its employees in December 2014.

Background

[5] The Union and CHHL were parties to a collective agreement dated 1 October 2012 to 4 October 2015.

[6] CHHL employed members of the Union at its pulp business in Kawerau who were covered by the collective agreement. Employees covered by the collective agreement work one of three roster patterns – a five-shift roster, a four-shift roster or a day-worker roster. Employees employed on a four-shift or five-shift roster work 12 hour shifts.

[7] The five-shift roster has a ten week cycle including two weeks of utility shift. Employees on utility shift cover employees taking annual leave, lieu days or sick days during the two week period. Before the rostered utility period commences arrangements are made to work out which days of the week coverage is required due to planned absences. Employees on utility shift are rostered to work on those days when cover for planned absences is needed. Even if not rostered for planned absences employees on the utility shift remain on call and may be required to work where there is an unplanned absence.

[8] Only one area in the mill has a four-shift roster and that is in the pulp dryers. This has an eight week roster cycle and all leave is covered by spares carried on shift or overtime covered by the shift on days off. There is no utility shift.

[9] All employees covered by the collective agreement are paid an annual salary and are provided with four weeks of annual holidays with an additional week for shift employees including employees employed on five-shift and four-shift rosters and an additional week for employees named in Schedule 9 of the collective agreement. For shift employees annual leave is accrued at 48 hours per week.

[10] In the case of an employee entitled to five weeks of annual holidays employed on a four-shift or five-shift roster, leave is deducted from the employee's accrued balance based on the employee's shift roster. For example, an employee could be physically absent in one calendar week but only be rostered to work for 36 hours (three days). Therefore, only 36 hours leave is deducted from their leave entitlement. In this situation holiday pay equates to one week's salary.

[11] On 26 April 2014 CHHL announced the conditional sale of its pulp, paper and packaging business to OJ Holdings Limited and Innovation Network Corporation of Japan.

[12] On 28 April 2014, CHHL commenced consultation with employees employed at its pulp, paper and packaging business about the sale of the business. That consultation period concluded on 12 May 2014.

[13] Between 26 May 2014 and 17 June 2014 CHHPPL and the Union executed a written variation to the collective agreement which provided for CHHPPL to be added as a party to the collective agreement in substitution for CHHL. The variation was conditional on the sale of CHHL's pulp, paper and packaging business being completed. The sale was subsequently confirmed and completed on 1 December 2014.

[14] CHHL advised its affected employees that they could transfer their employment on the same terms and conditions of employment with service treated as continuous to CHHPPL. Affected employees were invited to elect whether or not to transfer from CHHL to CHHPPL. Employees were asked to complete a form to indicate whether they wished to transfer their employment and whether they wished to have their accrued annual leave and/or days in lieu and/or long service leave entitlements paid out or transferred.

[15] If affected employees did not transfer, their employment with CHHL came to an end and they did not become employees of CHHPPL.

[16] Some of the Union members who were affected by the sale elected to transfer to CHHPPL and have their accrued annual leave and/or days in lieu and/or long service leave entitlements paid out by CHHL. Each member was able to elect the amount of leave they wished to have paid out.

[17] The amounts paid to employees who were employed on shifts and who elected to have their accrued holiday and long service leave entitlements paid out by CHHL when their employment with CHHL terminated and transferred to CHHPPL are the subject of this dispute.

Annual leave entitlements

[18] Section 17 of the Holidays Act states:

An employer and employee may agree on how an employee's entitlement to four weeks annual holidays is to be met based on what generally constitutes a working week for the employee.

[19] Because of the nature of the work on shifts of 12 hours and across different days of the week on a roster pattern, the parties to the collective agreement have agreed on what constitutes a working week for the purposes of establishing the annual leave entitlements for employees. This is set out at clause 13.2 which states:

For payroll purposes, a "week's leave" shall be fixed at 5 x 8 hour days for day workers and 4 x 12 hour shift for shift workers.

[20] The effect of this agreement is that the parties have agreed for the purposes of annual leave entitlements that a week's leave is either 48 or 40 hours. By this methodology the entitlements to weeks of leave have been translated into an hourly entitlement. By way of example:

- a) A shift employee with an entitlement to six weeks annual leave is entitled to six weeks of 48 hours totalling 288 hours;
- b) A shift employee with an entitlement to five weeks annual leave is entitled to five weeks of 48 hours totalling 240 hours.

Payment for annual holidays on termination of employment

[21] On 30 November 2014 employment with CHHL ended. Employees who had elected to transfer became employed by CHHPPL from 1 December 2015. For those employees who elected to have their annual leave and other holiday entitlements paid

out, CHHL calculated and paid out annual holiday pay pursuant to s.24 of the Holidays Act.

[22] Section 24 states:

An employer must pay the employee for the portion of their annual holidays entitlement not taken at a rate that is based on the greater of –

(a) the employee's ordinary weekly pay as at the date of the end of the employee's employment; or

(b) the employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.

[23] Ordinary weekly pay is defined by s.8(1)(a) of the Holidays Act as meaning:

The amount of pay that the employee receives under his or her employment agreement for an ordinary working week.

[24] Section 5 defines average weekly earnings as "*1/52 of an employee's gross earnings*".

[25] I will digress here to comment briefly on arrangements the parties have agreed with respect to the payment for public holidays. Pursuant to the Holidays Act¹ the parties have agreed on a formula for calculating the Relevant Daily Pay. This formula is set out in the collective agreement at schedule 4 "Shift Workers' Salaries":

5 Shift Roster

Base Salary + Qualifications / 52 (weeks) / 33.69 (hours) = hourly rate (for the purposes of RDP calculations)

4 Shift Roster

Base Salary + Qualifications / 52 (weeks) / 42 (hours) = hourly rate (for the purposes of RDP calculations)

[26] Despite section 8(3) of the Holidays Act allowing for parties to specify a special rate of ordinary weekly pay for the purpose of calculating annual holiday pay, there is no equivalent formula set out in the collective agreement dealing with the

¹ Holidays Act 2003, section 9(2).

calculation of pay for annual holidays at termination. The collective agreement states at clause 13.3:

Employees are entitled to annual leave on pay according to the Holidays Act 2003.

[27] All employees receive a salary. Employees are not paid by actual shifts or hours worked. Their pay does not fluctuate from week to week based on whether the employee is rostered to work four shifts or three shifts.

[28] This agreement has the advantage for the employees, which allows them to make financial plans based on a regular income. It means that despite a variation in the hours of work on shifts, employees receive a consistent amount each pay cycle.

[29] The Union submits that CHHL's method of calculating the final holiday pay for its members meant the workers were paid less than what they would have earned had they actually taken the leave. The Union submitted that in reality a shift worker is paid more than one calendar week's salary for 48 hours of work or leave. By way of example, the Union referred the Authority to payslips which it says showed one worker (Mr Munro) being paid the equivalent of five weeks' salary for 15 days of annual leave.

[30] I have reviewed those records and note that Mr Munro works a five-shift roster. He took 15 days annual leave in October 2014 which equates to 3.75 weeks of leave. Mr Munro worked for part of each of the first and final weeks during which he took leave. The reality is that Mr Munro worked on 2 of the five weeks and received holiday pay for 3.75 weeks. This does not demonstrate any enhanced payment, Mr Munro received his ordinary pay for each of the weeks he worked and/or took leave.

[31] The Union submits that because the Holidays Act² requires the employer to increase the number of annual holidays by any public holidays that fall during a period of annual holidays, CHHL should have projected the number of leave days into the roster and paid annual holidays to determine whether a particular public holiday fell during an annual holiday.

[32] In response CHHL and CHHPPL submitted that because CHHL did not continue to operate its business after 1 December 2014 section 40 does not apply. That is because the business of CHHL was no longer operating after 30 November

² Holidays Act 2003, section 40.

2014 and therefore any public holidays falling within a period of annual holidays would not be otherwise working days for the worker.

[33] I agree with the Union's submissions that that argument cannot succeed. If that was the case then there would be no need for section 40 at all as once employment terminates, for whatever reason, it is arguable that no days after termination would otherwise be a working day. However, I have not been asked to determine whether any one person's holiday pay has been calculated in accordance with section 40. This determination is limited to whether or not CHHL has used the correct method of calculating holiday pay generally.

[34] The Union has asked the Authority to find that the holiday pay calculation at termination ought to have been undertaken on the basis of an average of hours worked during a year for each employee. This equate to a formula similar to the formula the parties have agreed for determining the Relevant Daily Pay. That submission ignores the fact that by virtue of clause 13.3 the collective agreement the parties have agreed that holiday pay is to be in accordance with the Holidays Act.

[35] I find CHHL has acted in accordance with the collective agreement when it applied the requirements of the Holidays Act when calculating the leave entitlements of its employees when the employment with CHHL ceased on 30 November 2014.

Costs

[36] Costs are reserved. I am of a mind to let costs lie where they fall. However, the parties are invited to resolve the matter. If they are unable to do so Carter Holt Harvey Limited and Carter Holt Harvey Pulp and Paper Limited shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority

