

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 98
3023079

BETWEEN

RAIL AND MARITIME
TRANSPORT UNION
INCORPORATED
Applicant

AND

TRANSDEV AUCKLAND
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Ben Thompson for Applicant
Rachael Judge for Respondent

Investigation Meeting: 23 March 2018

Submissions Received: 23 March 2018

Oral Determination: 23 March 2018

Record of Oral
Determination: 26 March 2018

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. Payments made on termination for employees who qualify for shift leave must include an accrued leave payment proportionate to an employee's underlying entitlement.**
- B. Transdev Auckland Limited is ordered to pay the Rail and Maritime Transport Union Incorporated the sum of \$500 as a contribution to costs within 14 days of the date of this determination.**

Employment relationship problem

[1] This is a dispute about the interpretation, application, or operation of the collective agreement between the Rail and Maritime Transport Union Incorporated and Transdev Auckland Limited.

[2] The dispute relates to the way leave is calculated at the end of employment. In particular RMTU says Transdev is not properly accounting for shift leave in its calculations for final pay of terminating employees.

Issue

[3] In order to resolve the RMTU's employment relationship problem I must determine whether Transdev is correctly calculating holiday pay when an employee ends their employment.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from RMTU and Transdev but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

Relevant terms of the collective agreement

[5] The following clauses of the collective agreement are relevant to this dispute:

23.2 Definitions

23.2.3 **Shift Worker:** An employee who works on a rotating roster, where at least 40% of the work periods on the roster include hours falling between 2000 and 0600 or other employee who works more than 40% of their hours between 2000 and 0600.

26. Leave

26.1 Annual Leave

The leave year for employees employed prior to 1 April 2004 or who work in a part of the business subject to an annual closedown, is 1 December to 30 November. The leave year for employees employed after 1 April 2004 will commence from their anniversary date.

26.2 Annual leave entitlement

26.2.1 At the end of each year of employment you will be entitled to four weeks annual leave. Any leave entitlement above four weeks may be taken in cash with your Manager's approval. You must take a day's annual leave for each day cashed up.

26.2.2 Employees will receive an extra week of annual leave after 7 years of service, effective from their next annual leave rollover date after 1 July 2010. Retrospectively, this will not apply to those employees with greater than 7 years of service as at 1 July 2010.

26.3 Shift Workers

If you are a shift worker as defined in clause 23.2.3, you will be entitled to an additional week's leave; prorated if you are on shift work for less than a year.

...

26.6 How leave is paid

26.6.1 Annual leave for a full pay fortnight is counted as 10 days annual leave. Annual leave is otherwise deducted on the basis of one day for every rostered shift absent. There is no leave deducted, or paid, for absence on the rostered extra work periods or other overtime. Part time employees are treated on a pro rata basis.

26.6.2 Annual leave will be paid for in accordance with the Holidays Act 2003 (or subsequent legislation) provided that leave carried forward from previous years will be paid at the higher of your average weekly earnings or your ordinary weekly pay at the time you go on leave. Normally you will be paid for annual leave in your normal pay cycle however if you wish it to be paid before taking your annual leave you need to notify Payroll at least seven days in advance.

[6] I have been provided with copies of extracts from the collective agreements applicable to the members of RMTU for the years 2004 through to 2010. In each of those agreements the entitlements to leave were set out under one general heading of "Annual Leave" including the entitlement to an extra week's leave for shift workers.

[7] In the 2010 to 2012 collective agreement the way leave is described in the collective agreement was changed and under a general heading of "Leave" different types of leave are identified. This format has continued through to the collective agreement as set out above.

[8] The substance of the provisions dealing with the additional entitlement to leave for shift workers has remained constant. That is, the wording states that if the employee covered by the collective agreement is a shift worker they are entitled to an additional week's leave which is prorated if they are on shift work for less than a year.

Events leading to this application

[9] A member of the RMTU resigned her employment and received her final pay. The member questioned Transdev on the calculation of her holiday pay as it did not account for her additional shift leave which she had accrued by working on shifts for the part year of employment.

[10] Transdev advised the member that accrued annual leave is calculated at the rate of 8% of taxable earnings from the last leave rollover date until the end of the

employment relationship in accordance with the provisions of the Holidays Act 2003. It also advised that accrued shift leave was not payable because it was not an entitlement until the employee's next rollover anniversary date.

[11] When this was questioned by the RMTU the Head of HR for Transdev advised that shift leave was not covered by the Holidays Act and was treated like sick leave in the sense that it was an entitlement after a period. The Head of HR explained that the reference in clause 26.3 to prorating applied only to the first year of employment to allow for a prorated entitlement at the end of the first year and a full entitlement at the end of each year thereafter.

[12] Transdev clarified its position on 8 August 2017 when it wrote to RMTU and advised that for shift workers who resign or whose employment is terminated it did not believe it was required to pay the accrued shift leave and it has not done this historically.

Determination

[13] The starting point when interpreting a clause in a collective agreement is to consider the natural and ordinary meaning of the language used by the parties. Even if the words are plain and unambiguous, this does not preclude a consideration of the surrounding circumstances¹. This acts as a cross-check as to whether some other or modified meaning was intended.

[14] RMTU argues shift leave is not a discrete class of leave but enhances the annual leave entitlement for shift workers and the final leave calculation should be at a level higher than 8% to take into account the enhanced entitlement to annual leave.

[15] Transdev's Payroll Manager told me that payment for shift leave is treated the same as annual leave although shift leave is separated out on the payroll system so that it can be monitored.

[16] I was given two examples of employees who had worked part of a year in shift work. One had worked in a non-shift role and moved into a shift role and the other had worked in a shift role and moved into a non-shift role. In both cases the accrued

¹ *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789; *Tertiary Education Union v Vice-Chancellor, University of Auckland* [2015] NZEmpC 169

shift leave for the portion of the year worked in the shift role was transferred into the employee's annual leave balance.

[17] The wording in the clause makes provision for the additional week's leave to be prorated where an employee works on shift work for less than one year. Employees terminating their employment prior to the date of their leave anniversary are not paid for the proportion of leave accrued during the period between their leave anniversary and their termination date. This is inconsistent with the approach taken for employees who move from a shift work role to a non-shift work role and remain employed. Those employees are entitled to take a proportion of shift leave with them to take at a later date.

[18] The Holidays Act is a minimum statute and employers and unions are free to agree to provide enhancements to the minimum entitlements. The use of the words "additional week's leave" has led me to the conclusion that the parties intended the shift leave to be additional to the four or five (for employees with more than seven years' service) weeks annual leave entitlement.

[19] The Holidays Act provides for a proportion of the four weeks minimum annual leave (being 8%) to be calculated and paid on termination of employment. Transdev have taken a strict approach to the interpretation of this section without taking into account the enhanced leave provisions provided for in the collective agreement.

[20] I find payments made on termination for employees who qualify for shift leave must include an accrued leave payment proportionate to an employee's underlying entitlement.

Costs

[21] During a case management call on 18 January I invited the parties to consent to this matter being dealt with on the papers. In light of the RMTU's opposition to this invitation I set down an investigation meeting. The meeting took less than an hour.

[22] Applying the daily tariff and taking into account all of the circumstances I consider an appropriate contribution to costs is \$500. Transdev Auckland Limited is

ordered to pay the Rail and Maritime Union Incorporated the sum of \$500 as a contribution to costs within 14 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority