IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 131
5301409

	BETWEEN	GARY BRIGGS AND OTHERS Applicants
	A N D	SILVER FERN FARMS LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Karina Coulston, Counsel for Applicants Tim Cleary, Counsel for Respondent
Investigation meeting:	2 December 2010 at Christchurch
Submissions Received	At the investigation meeting
Date of Determination:	29 June 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The question that the applicants wish the Authority to resolve is:

> *Whether the Respondent could compel the Applicants to use their annual leave entitlement in circumstances where they were suffering from covered work related injuries and receiving earnings related compensation.*

Acknowledgement

[2] Unfortunately a considerable period of time has passed since the investigation meeting. The situation has arisen as a result of the file being inaccessible for a considerable time due to Christchurch's earthquakes. I appreciate the parties patience and regret any inconvenience suffered.

Background

[3] The applicants were all engaged at Silver Ferns Belfast Plant. The employment was seasonal and normally ceased at the commencement of an off-season which, in 2008, was to commence on 27 June. On termination and having not completed a full year of service since being re-employed after the last off-season, employees were normally paid 8% of their earnings in lieu of holiday pay as required by s.23 of the Holidays Act 2003.

[4] Silver Fern is an accredited employer as defined by s.181 of the Accident Compensation Act 2001. This means Silver Fern assumes the roles and responsibilities of the Accident Compensation Corporation in respect of a range of specified tasks which, in this case, included the management of claims.

[5] The applicants all suffered work related injuries during the 2007/2008 season. All were certified as incapable of performing their pre-injury duties. All had individual rehabilitation plans as required by the Accident Compensation Act 2001 (see s.75 and Schedule 1, clause 7). Each had, as part of that plan, agreed to perform alternate duties when cleared to do so by his medical practitioner. While each had an entitlement to weekly compensation under ACC, each was entitled to have that topped up to full pre-injury levels under their collective agreement.

[6] There is also the issue of 'abatement' which saw a reduction in earnings related compensation when a person received other earnings whilst injured. Such earnings included holiday pay upon termination.

[7] The applicants claim that a practice existed whereby employees who had suffered an injury but were capable of performing alternate duties were assigned to what was known as the 'Black Gang' during the off-season. This meant they worked on maintenance or repair tasks and their employment continued through the off-season.

[8] Toward the end of June 2008 the applicants learned this practice would not apply in the upcoming off-season which, as said earlier, was to commence on 27 June. The following season was to open on 31 July.

[9] The applicants say that instead they would be required to use whatever annual leave entitlement each may have accrued. They claim this decision was advised

informally and there was neither consultation over the use of annual leave or notice as required by either ss.19(2) or 32(3) of the Holidays Act 2003. Indeed, the applicants claim that Silver Fern has previously taken the view that employees simply could not take leave whilst covered by earnings related compensation. Leave was for the purpose of rest and recreation which could not be enjoyed while recuperating from an injury.

[10] Silver Fern's position denies the applicants were required to use annual leave. Silver Fern contends each was actually dismissed at the conclusion of the season for which he was employed. As would normally occur in such circumstances, payment in lieu was made as required by s.23 of the Holidays Act which led to a corresponding abatement of earnings related compensation.

[11] While Silver Fern agrees that prior to the 2008 close-down *those on alternative duties could and would be required to work on the Black Gang as a matter of course* that approach would not apply in 2008. The plant manager, Mr Andrew Hay, advised that while the practice had applied since Silver Fern became an accredited employer in 1996 he felt change was necessary for the following reasons:

a. Incapacitated employees would be working more than 12 months in a row without a decent break;

b. Incapacitated employees would earn more for the year than their fit colleagues; and

c. The number of injuries trended upward toward the end of the season and he thought one factor might be the financial incentive.

[12] Mr Hay says he consulted with the employment relations manager who advised there was no obligation to offer alternate duties during the off-season. Mr Hay says he *therefore decided that the applicants would be laid off and recalled to work alternative duties when their annual holiday had expired.*

[13] The evidence is that those unable to perform any work were not terminated at the seasons conclusion and remained on earnings related compensation. The evidence also shows that the original practice returned in 2009 and those on alternate duties were again engaged with the Black Gang during the off-season. This is, however, balanced to some extent by the evidence of Mr Matterson, union secretary for

25 years, that Silver Fern made it very clear that while it had historically required those capable of working to do so if appropriate work was available, they were not obliged to do so. His evidence suggested the union reluctantly accepted that view.

[14] Silver Fern also disagrees with the claim no notice was given. It asserts all departments were advised of the Black Gang's composition on 11 June and the union told of the decision on or about 16 June. The union accepts it was told injured employees would not be engaged on the Black Gang but disputes being advised they would be terminated and loose their entitlement to earnings related compensation due to abatement.

[15] It was subsequently suggested in the statement in reply that the Black Gang *did not include the applicants or anyone on alternative duties because the anticipated duties of the gang was beyond the capacity of those on light duties*. Mr Hay did not mention this rationale in his evidence and there is no evidential support for it.

[16] Finally it should be noted that:

a. once the leave entitlement was used (or applying Silver Fern's approach – abatement ceased) each of the applicants had his earnings related compensation reinstated; and

b. Silver Fern claim that the Authority is precluded from determining this matter by virtue of s.133(5) of the Accident Compensation Act.

Issues for determination

[17] There are, possibly, two issues for determination. They are:

(a) Does the Authority have jurisdiction to determine this claim?; and if so

(b) Could Silver Fern act as it did and pay the applicants their leave entitlements as of 27 June 2008.

Determination

Jurisdiction

[18] Section 133(5) of the Accident Compensation Act 2001 states:

> *If a person has a claim under this Act, and has a right of review or appeal in relation to that claim, no court, Employment Relations Authority, Disputes Tribunal, or other body may consider or grant remedies in relation to that matter if it is covered by this Act, unless this Act otherwise provides.*

[19] A review may be sought in respect to any decision of the Corporation (including those of an accredited employer) on a claim; any delay in processing the claim or a decision in respect to a complaint under the code of claimant rights.

[20] It is difficult to consider this claim is covered by the above exclusions. There is no debate about the validity of the claims – they have been approved; no argument about the timeliness with which they were considered and no argument about a breach of the code of claimants rights. Indeed, payment continued with the argument being limited to issues concerning the source of payment. The outcome of that argument will be determined by considering whether or not there was a dismissal. Arguments about dismissals and their validity are dealt with under the provisions of the Employment Relations Act 2000, not the Accident Compensation Act 2001.

[21] If there was not a dismissal and the applicants were effectively on leave as opposed to being paid in lieu on termination, issues arise over rights and obligations imposed by the Holidays Act 2003.

[22] These are not disputes about management of the applicants' claims. They are not therefore issues that would be resolved under the disputes provision contained in the Accident Compensation Act 2001. I conclude I am not excluded from determining the application.

The substantive issue

[23] The applicants position (summarised) is:

a. While the collective agreement (which applies to multiple sites) mentions seasonality, Belfast is unique in that it has a short close down, some departments continued throughout the year and the collective did not specifically identify the applicants as seasonal employees. This, it is argued, distinguishes this situation from that considered by the Court in *New Zealand Meat Workers Union Inc v Alliance Group Limited* [2006] ERNZ 664 and the situation is more

akin to a close down (s.29 of the Holidays Act 2003) as opposed to a termination;

b. In any event, the applicants were not seasonally dismissed as some did not receive their full leave entitlement and they continued to be paid weekly in contravention of the requirement leave be paid in full on cessation (s.27(1)(b) of the Holidays Act 2003);

c. Silver Fern was obliged to offer work given past practice especially as the practice continued for some years after the inclusion in the collective of a clause which indicates the offering of light duties was discretionary. Reference is made to *New Zealand Tramways etc IUOW v Christchurch Transport Board* [1969] BA 1182 that long standing practices will not be held to have been altered by a contractual provision unless the change is declared in clear and explicit language;

d. That if it is concluded that the applicants were not seasonal employees, it follows they were compelled to take their leave and the notice provisions of the Holidays Act 2003 were not complied with;

e. There were numerous breaches of the duty of good faith; and

f. Having entered into individual rehabilitation plans with the applicants that contemplate the performance of alternate duties Silver Fern is, as an accredited employer, obliged to implement the plan.

[24] Silver Fern contends:

a. First, Belfast is an export beef plant – all export beef plants in New Zealand are seasonal. Second, the collective discusses seasonal layoffs and seasonal re-engagement, not closedowns. In such circumstances and given the Court's conclusions in *New Zealand Meat Workers Union Inc v Alliance Group Limited* it is submitted the applicants must be considered seasonal employees;

b. It is therefore unsustainable to conclude the applicants became permanent simply because they suffered an injury;

c. The custom and practice argument is invalid as it is inconsistent with the express terms of the collective (*Woods v NJ Ellingham & Co Ltd* [1977] 1 NZLR 218;

d. The argument Silver Fern is obliged to offer alternate duties is inconsistent with the terms of the individual rehabilitation plans. They say the applicants agree to perform such duties when certified capable of so doing. This, it is argued, means the work is being offered pursuant to the collective as opposed to the Accident Compensation Act 2001 as the collective talks about a need for medical approval while the Act does not. The collective does not make the provision of alternate duties mandatory;

e. Whilst the holidays were remunerated via weekly payments which continued after the alleged termination, there is no actionable breach of the Holidays Act 2003 as there has been substantial compliance and no loss. In any event, payment in this fashion was consistent with the provision of medical certificates and clause 49, Schedule 1 of the Accident Compensation Act 2001; and

f. The comparison with fully incapacitated employees is invalid. There can be no disparity as the two are wholly different groups (*Chief Executive of The Department of Inland Revenue v Buchanan (No 2)* [2005] 1 ERNZ 767 at para [45]).

[25] Having considered the submissions, which were considerably more substantial that the above summaries may suggest, I conclude this matter should be resolved in the applicants favour.

[26] I will not comment on whether or not the applicants were seasonal employees. I do not have to as I find that irrespective of their status they were not dismissed. I reach that conclusion for the following reasons:

a. There was no documentary evidence of an actual dismissal and the applicants clearly did not think that is what occurred. They continued to receive weekly remuneration, albeit as holiday pay rather than earnings related compensation, and when their leave was used, or the seasonal closure ended, they returned to work. It was a seamless

process which should not have been the case had dismissal occurred. Had the applicants been dismissed for the duration of the seasonal shutdown those like Mr Grey who had insufficient leave could not have been required to return before 31 July. Nor would Mr Spillane have been returned to earnings related compensation once an operation rendered him incapable of working prior to using all his leave. What occurred has all the hallmarks, and inherent flexibility, of an ongoing relationship;

b. Had these been seasonal lay-offs the applicants should all have been treated the same and the disparity in respect to how much leave each was required to use would not have arisen; and

c. Most importantly the Holidays Act 2003 requires payment in full on termination. This did not occur which, in my view, makes it hard to argue this was actually a termination. The submission about consistency with a medical certificate falls short as dismissal of an employee on ACC is possible after completion of the required process - medical certificate or not. Similarly the submission regarding clause 49 of the first schedule (24(e) above) does not sway me. It simply says that earnings for the purpose of abatement include payments made upon termination. The termination payment required by s.23 of the Holidays Act 2003 was never made. Weekly pay continued and those who had sufficient leave to take them past 31 July never received the total payment in any event. What occurred is not indicative of dismissal.

[27] The conclusion the applicants were not dismissed means they were treated as being on leave. It is clear, given Silver Fern's concession in this respect, that the requirements of ss.19(2) or 32(3) of the Holidays Act 2003 were not complied with thus possibly nullifying the validity of that leave.

[28] There is then the argument that the collective does not mandate the provision of alternate duties. The Accident Compensation Act 2001 requires that the Corporation's primary focus be on rehabilitation and, to the maximum extent possible, the restoration of a claimant's health, independence, and participation. As an accredited employer, Silver Fern undertakes that duty and is bound to do all in its

power to ensure the applicants are rehabilitated. That could best be done by retaining the employees and offering the alternate duties they had agreed to perform. Given the statement Silver Fern could not offer appropriate tasks was not evidenced (indeed other reasons were enunciated by Mr Hay), I conclude Silver Fern failed to do so.

[29] In any event there is the previous practice. By doing as they did for so long Silver Fern did, in my view, create a practice which effectively became an implied term, especially as it sits well with the statutory obligation (28 above).

[30] Finally, and in the event the last conclusion is wrong, I note the Court's conclusion that a fair and reasonable employer would always comply with their statutory obligations (*Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102). Section 4(1A)(c) requires an employer who is proposing to make a decision that will have an adverse effect on the continuation of employment of 1 or more of his or her employees provide the employee(s) affected with an opportunity to comment before the decision is made. The decision to alter a long standing practice which would have seen these employees retained notwithstanding their employment status (seasonal or not) is such a decision. According to Mr Hay the decision was made and the employees then advised. Assuming Silver Fern's position it had dismissed had been accepted, this would undoubtedly render the dismissals unjustified and undermines, once again, Silver Fern's view it could act as it did.

Conclusion

[31] For the foregoing reasons I conclude that the answer to the question posed is no.

[32] Silver Fern did not dismiss the applicants (and if it had the dismissals would undoubtedly have been found to be unjustified (30 above)). It could not therefore force them to use their leave given its failure to comply with ss.19(2) or 32(3) of the Holidays Act 2003. The only remaining option was to continue earnings related compensation.

[33] The applicants are therefore entitled to have their leave reinstated. This will alter to a payment in lieu if their injury proved to be such that there would be no return and cessation would, after a further period of ACC, have occurred before the completion of a years service.

[34] The value will differ for each and I leave it to the parties to resolve in the first instance. Leave is granted for a return to the Authority if difficulties arise and a determination of value is required.

[35] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority