IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 446
5369159

	BETWEEN	ELECTRICAL UNION 2001 LIMITED Applicant
	AND	MIGHTY RIVER POWER LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	L Yukich, advocate for applicants D France, counsel for respondent
Investigation meeting:	24 August 2012 at Rotorua
Determination:	10 December 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Electrical Union 2001 (Inc) (the union) and Mighty River Power Limited (MRP) are parties to a collective employment agreement in force from 1 July 2011 to 30 June 2013 (the cea). The cea covers union members working in the operation and maintenance of MRP's geothermal energy production facilities. The parties disagree about the meaning and application of provisions in the cea applying to annual leave entitlements for shift workers.

[2] The shift workers observe a roster which has a 12-week cycle. During that cycle they work for four consecutive calendar weeks on 5 x 8 hour shifts followed by 2 days off (the utility shift), then eight consecutive calendar weeks on 4 x 12 hour shifts followed by 4 days off (the 4 on/4 off shift).

[3] The practical effect of the 4 on/4 off shift is that in four of the Monday-Sunday weeks when that shift pattern is worked employees work for 36 hours, while in the

remaining four weeks they work for 48 hours. MRP averages these hours for the purpose of calculating entitlements to annual leave, so that a working week comprises 42 hours. A working week on a utility shift also comprises 42 hours for that purpose.

[4] The cea provides at clause 20.11 that shift workers are entitled to *4 weeks' annual holidays in accordance with the Holidays Act [2003]*, so that over a 12 month period MRP says an employee accrues an entitlement to 4 x 42 =168 hours' leave.

[5] When leave is taken MRP makes deductions from this entitlement, at either 12 hours per day or 8 hours per day depending on whether the leave is taken during a 4 on/4 off shift or a utility shift.

[6] The union says MRP's averaging approach does not comply with the cea. It says that on a correct interpretation of the cea:

- A 'week' for the purposes of entitlements to leave during a 4 on/4 off shift means 4 x 12 hour days;
- A 'week' for the purposes of entitlements to leave during a 5 on/2 off utility shift means 5 x 8 hour days;
- When one day's annual leave is taken during a 4 on/4 off shift, ¼ x 1 week's leave should be deducted from the employee's entitlement; and
- When one day's annual leave is taken during a utility shift 1/5 x 1 week's leave should be deducted from the employee's entitlement.

[7] The union's approach means in practice that, if in any 12-month leave period all annual leave is taken during a 4 on/4 off shift, shift workers would receive 192 hours of paid leave in that period. This total would reduce by 4 hours for each day of leave taken during a utility shift. MRP's approach means shift workers receive no more than 168 hours of paid leave in that period regardless of which shifts were taken as leave.

[8] The union believes the effect of MRP's approach is that (unless all leave is taken during a utility shift) shift workers do not receive their full entitlement to annual leave.

[9] The issues are whether MRP has:

- met its obligations under the Holidays Act 2003 to provide four weeks' annual leave by calculating employees' entitlements as 168 hours of leave per annum;
- interpreted and applied the cea correctly when deducting leave from that entitlement according to the actual hours the employee was otherwise rostered to work.

Relevant clauses in the cea

[10] Clause 20.17 is the disputed clause. It reads:

> ***Formula for conversion of annual leave entitlements 4 x 12 hour shift***
>
> *Where holidays are taken during periods of shift 1 week of leave will equal 8 days being 4 x 12 hour shifts rostered on followed by 4 days off, and*
>
> *1 week's leave is paid as the greater of the employee's average weekly earnings for the twelve months immediately before the end of the last pay period before the start of the holiday, or the employee's ordinary weekly pay at the start of the holiday and will result in 1 weeks leave being deducted from the employee's entitlement, and*
>
> *1 day's leave is paid as one quarter of the weekly amount calculated above and will result in one quarter of 1 week's leave being deducted from an employee's entitlement.*
>
> *Where holidays are taken during utility periods 1 week of leave will equal 7 days being 5 x 8 hour shifts rostered on followed by 2 days off and will result in 1 week's leave being deducted from an employee's entitlement, and*
>
> *1 day's leave is paid as one fifth of the weekly amount calculated above and will result in one fifth of 1 week's leave being deducted from an employee's entitlement.*

[11] Other relevant clauses include the shift hours of work clause, clause 13, which reads in part:

> *13. The ordinary hours of work for shift employees shall be 40 hours per week, of which no more than twelve consecutive hours may be worked on any days of the week Monday – Friday both days inclusive.*
>
> *The normal hours of work for shift employees shall be an average of 42.1[1] hours per week, based on a shift roster of 4 on/4 off 12 hour shifts worked over a 12 week cycle including a period of 4 weeks utility shift.*

[1] This figure takes into account paid breaks

[12] Appendix 1 charts the 12-week pattern based on 12 x Monday-Sunday weeks. It identifies total rostered hours in each of the weeks as 48, 36 or 42.5[2] respectively and identifies average weekly hours of 42.1.

Has MRP met the obligation to provide four weeks' annual leave

[13] The Holidays Act does not define a 'week' for the purpose of calculating the entitlement to 4 weeks' annual leave, but s 17 addresses methods of calculating the entitlement by providing:

- The parties may agree on how an employee's entitlement may be met based on what genuinely constitutes a working week for the employee; and
- If the parties cannot agree, a Labour Inspector may determine the matter for them.[3]

[14] Mr France submitted that the parties have not agreed on how an employee's entitlement may be met, in that the cea does not include express provision for meeting the entitlements based on 'what genuinely constitutes a working week'. He submitted that, instead, clause 20.17 sets out a process for calculating payment, and for deducting from the annual entitlement leave paid in accordance with that calculation.

[15] Mr France submitted further that the Holidays Act does not prevent annual leave entitlements being accrued in hours rather than days or weeks. In support he referred to a determination of the Authority in *Mars New Zealand Limited v Manufacturing and Construction Workers Union Inc*[4]. There, employees also worked on a roster cycle under which hours of work could vary from one calendar week to another. The relevant provision in the parties' agreement entitled employees to '*four weeks' paid annual holidays'*, and said the parties would meet to determine what constituted a working week '*given the roster in operation at that time'*. It appears there was conflicting evidence about any agreement reached as a result, but the

[2] This figure also takes into account paid breaks.
[3] A labour inspector was asked to determine the present matter, but declined to do so on the ground that it concerned a dispute about the interpretation of an employment agreement.
[4] ERA WA 131/10, 4 August 2010.

Authority did not accept the union's position and found the employer had discharged its obligations under the Act by accruing the employees' annual entitlements in hours.

[16] Another dispute involving the accrual of annual leave entitlements in hours was addressed in a decision of the Employment Court in *Chief of the New Zealand Defence Force v New Zealand Public Service Association Inc.*[5] The court was considering leave entitlements for security guards working on a roster cycle similar to the one here. The relevant provision in the parties' agreement entitled employees to '*four weeks' leave per year'*. The issue was whether that meant security guards were entitled to 20 days' leave a year, or leave calculated on an averaged basis with a total entitlement of 168 hours per year. The full text of the leave clause included other references to entitlements to annual leave in terms of days, phrased so that the court concluded the parties had agreed a 'week' for leave purposes was the equivalent of five working days. As a result the security guards were held to be entitled to 20 days' annual leave a year.

[17] These decisions turned on the interpretation of the relevant employment agreement, as does the present matter.

[18] I understood Mr Yukich be saying here that the parties have agreed on what 'genuinely constitutes a working week' for the purpose of identifying annual leave entitlements. He did not analyse the wording of clause 20.17, rather he took the view the meaning was obvious. He said that what genuinely constitutes a 'week' is as defined in the clause, namely an 8-day period comprising 4 days on and 4 days off for the purposes of the 4 on/4 off shift, and a 7 day period comprising 5 days on and 2 days off for the purposes of the utility shift. It follows that what 'genuinely constitutes the working week' is the 4 days of 12 hours each which are 'on' in a 4 on/4 off roster, and the 5 days of 8 hours each which are 'on' in a utility shift.

[19] I accept the clause incorporates an attempt to define a 'week' in the context of annual leave entitlements. In the scheme of the clause the first and the fourth sentences define a 'week' with reference to the 4 on/4 off and utility shifts respectively. Accordingly a 'week' of leave occurring during the 4 on/4 off part of

[5] [2011] NZEmpC 39

the cycle means 4 x 12 hour days, and a 'week' of leave occurring during the utility shift means 5 x 8 hour days.

[20] The question is whether these definitions amount to an agreement by the parties on how an entitlement to 4 weeks' annual holidays is to be met, based on what genuinely constitutes a working week for the employee.

[21] As has been observed there are difficulties in harmonising the job requirements of an 8-day cycle with the statutory assumption of a seven-day working week[6], and the difficulty is evident here. On Mr Yukich's construction, in some circumstances a 'week' means more than the assumed seven-day week. I am not persuaded that the parties went as far as to agree to that for the purpose of agreeing on what genuinely constitutes a working week, and how an entitlement to 4 weeks' annual leave is to be met. Most importantly other provisions in the cea which refer to a working week for shift employees (as well as others) are based on an assumed seven-day week. These include clause 13 and Appendix 1. Secondly, even if the parties did agree that in some circumstances a 'week' means more than seven days their agreement does not address how this is to be harmonised with the seven-day week applicable when a utility shift is worked, and in turn how these features are to be accommodated in an overall entitlement to 4 weeks' annual leave.

[22] The remainder of clause 20.17 is not concerned with identifying what genuinely constitutes the working week, rather it is concerned with how payment should be calculated and appropriate deductions made from an entitlement when leave is taken.

[23] Overall I conclude that clause 20.17 defines a 'week' for the purpose of calculating entitlement to payment for annual leave, but not for the purpose of agreeing on how the entitlement to 4 weeks' annual leave is to be met. In the absence of any other provision expressly addressing how an entitlement to 4 weeks' annual holidays is to be met, the averaging approach takes appropriate account of the variations in the number of hours worked in a Monday-Sunday week and is an acceptable method of calculating the entitlement.

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[6] *Brookers Employment Law Vol II*, HA17.04

Can MRP deduct leave based on actual hours that would otherwise be worked

[24] Mr Yukich said without expanding on his interpretation that, on the clear wording of clause 20.17, when one day's annual leave is taken during a 4 on/4 off roster the corresponding deduction from the accrued entitlement must be ¼ of a (4 day x 12 hour) week. The evidence suggested that during the course of this dispute the union has quantified this variously as ¼ x 40 hours (as specified in clause 13 as ordinary hours for a shift worker), or ¼ x 42 hours (as specified in clause 13 as normal hours for a shift worker).

[25] The evidence was also that ¼ of a (4 day x 12 hour) week is deducted when annual leave is taken during a 4 on/4 off roster. Some confusion may have been caused by the electronic recording of leave in units of 8 hours, so that a day's leave on a 12 hour shift is recorded as 1.5 days. That does not mean the entitlement of an employee seeking a day's leave when rostered for a 12 hour shift is reduced by 1.5 x 12-hour days. The entitlement is reduced by 12 hours.

[26] Similarly, when one day's annual leave is taken during a utility shift, 1/5 of a (5 day x 8 hour) week's leave is deducted.

[27] I conclude that MRP has interpreted and applied the cea correctly when deducting leave from employees' entitlements.

Costs

[28] Costs are reserved.

[29] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan
Member of the Employment Relations Authority