IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 23
5337195

	BETWEEN	WEERAPHONG HARRIS Applicant
	AND	TSNZ PULP AND PAPER MAINTENANCE LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	L Yukich advocate for applicant G Service, counsel for respondent
Investigation meeting:	20 June and 4 July 2011
Submissions received:	6 and 19 July 2011 from applicant 14 July 2011 from respondent
Determination:	18 January 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Weeraphong Harris entered into employment with his employer, TSNZ Pulp and Paper Maintenance Limited (TSNZ), on TSNZ's acquisition of a contract previously held by Mr Harris' former employer ABB Limited. Mr Harris says the employment relationship with TSNZ was entered into on the terms and conditions applying at ABB Limited, and it was also a condition that he not be disadvantaged by entering into the relationship.

[2] Mr Harris says further that he was disadvantaged in that TSNZ failed to apply certain of his terms and conditions of employment relating to the calculation of holiday pay, statutory holiday pay and sick leave in the same way as ABB Limited had done. In this respect he has a personal grievance.

[3] Accordingly Mr Harris seeks, as he put it:

(i) an order that wages be paid in accordance with the calculation used by ABB Limited;
(ii) an order for the payment of arrears of wages under s 123(1)(b) and (c) of the Employment Relations Act 2000;
(iii) an award of compensation for injury to his feelings under s 123(1)(c)(i) of the Act; and
(iv) a penalty for breach of the Wage Protection Act 1983 in respect of the miscalculation of the payments.

[4] TSNZ denies that Mr Harris was disadvantaged, and says it made the payments in question in accordance with the parties' employment agreement.

[5] With reference to the way the employment relationship problem was framed, the issues are:

(a) whether TSNZ's actions arose solely from the interpretation, application or operation of any employment agreement;
(b) if not, whether TSNZ's approach to the calculation of holiday pay, statutory holiday pay and sick pay amounted to, -
. an unjustifiable action,
. affecting Mr Harris' employment,
. to his disadvantage;
(c) what remedies should apply if the approach was that in (b) above;
(d) whether TSNZ's calculation of holiday pay, statutory holiday pay and sick pay was in breach of the Wages Protection Act; and
(e) whether a penalty is payable for the breach, if there was one.

Background

[6] Until 10 March 2009 Mr Harris was employed by ABB Limited on a maintenance contract at the CHH Tasman mill. His terms of employment were set out

in a collective employment agreement between ABB Limited and the Eastern Bay Independent Industrial Workers Union (EBIIWU) – (the ABB cea).

[7] On 10 March 2009 TSNZ took over the maintenance contract from ABB Limited. There was considerable activity in the lead up to the takeover[1], including discussions between the EBIIWU and TSNZ regarding a proposed collective employment agreement and the offers of employment to be made to ABB Limited's employees.

[8] The activity included an exchange of correspondence in late February. In a message to Carol Moodie, TSNZ's industrial relations manager, dated 25 February 2009 Mr Yukich asked whether TSNZ was proposing what would otherwise be continuity of employment for the affected ABB Limited employees. Ms Moodie replied on 26 February saying:

> *It is the intention of TSNZ to ensure continuity of employment for your members without disruption or disadvantage and I trust that now you have a copy of the proposed collective agreement we can move to a smooth transition. Accordingly we will now be providing offers of employment to your members based on the proposed collective agreement between EBIIWU and TSNZ which ensures there will be full continuity of employment. …*
>
> *I can confirm that the proposed collective agreement is the same as the expired EBIIWU collective agreement with ABB Limited …*

[9] By letter dated 27 February 2010 TSNZ offered employment to Mr Harris in the following terms:

> *This offer is on the same or similar capacity on similar terms and conditions of employment and will recognise your prior service with ABB Limited.*
>
> *COLLECTIVE AGREEMENT*
>
> *As a result of the correspondence between TSNZ and … the EBIIWU the employment offer to you is intended to preserve your existing terms and conditions of employment so that there is continuity of employment for you from ABB Limited to TSNZ. It is TSNZ's preference that the collective relationship with the EBIIUW has with ABB Limited continues with TSNZ, to that end TSNZ has proposed to your union that the parties enter into a new collective agreement which is the same as your current agreement.*
>
> …

[1] As evidenced by and described in *EBIIWU v ABB Ltd* ERA AA 166/10, 12 April 2010

TERMS AND CONDITIONS

The terms and conditions of employment, personal to you, as detailed in this offer comprise part of your terms and conditions of employment. Additional terms and conditions of employment include the terms and conditions contained in the proposed TSNZ and EBIIWU collective agreement.

…

COMMENCEMENT DATE

…

… all holiday and leave entitlements and any other employee benefits to which you are entitled as at 10 March 2009 will be recognised by TSNZ.

REMUNERATION

Your remuneration entitlements will be the same as the remuneration entitlements applicable to your employment with ABB Limited as at 09 March 2009.

[10] After an unsuccessful attempt to make his acceptance conditional on the employment of a named person, as well as an attempt to allege unconscionable conduct and undue influence[2], Mr Harris accepted the offer of employment embodied in the 27 February letter together with the proposed cea which was attached to the letter.

[11] In or about April 2009 Mr Harris came to the view that the calculation of holiday pay was not being approached in the same way as ABB Limited had approached it. He believed there was a 'discrepancy' in a payment of holiday pay he received in or about April, although at the time he was unable to identify the nature or detail of the 'discrepancy' and did not pursue the matter. Subsequently other EBIIWU members in similar circumstances also became concerned at 'discrepancies' which they believed amounted to underpayments.

[12] From the payslips available at the time it was not immediately obvious what, if anything, was the source of the perceived discrepancy. Although enquiries were made, the matter was not clarified.

[13] During the course of collective bargaining late in 2010 however, it was suggested that - unlike ABB Limited - when calculating payments of holiday pay and public holiday pay TSNZ was excluding a transport allowance from salaries identified

[2] Also referred to in *EBIIUW v ABB Limited* supra.

in the applicable salary tables. The EBIIUW said the allowance was part of the salary and was to be included. In exchanges between Ms Moodie and Mr Yukich dated 20 and 21 October 2010 respectively it was clear there was a dispute about the correct method of calculation.

[14] The EBIIWU said it sought to address the matter in the course of bargaining. The parties made enquiries about the ABB Limited approach to the calculations in question, but a continued inability to obtain details of the ABB Limited calculations led the EBIIWU to withdraw its claims. Personal grievances such as Mr Harris' were raised, rather than further addressing the matter in bargaining or embarking on a disputes resolution procedure in respect of the interpretation and application of the existing provisions.

[15] Mr Harris' personal grievance was raised by letter dated 24 November 2010. The letter referred to the terms of the offer of employment TSNZ had made in February 2009, saying in particular that Mr Harris had been offered:

> *… remuneration entitlements the same as the remuneration entitlements applicable to my employment with ABB Limited*.

[16] The grievance itself was framed as follows:

> *It has recently become apparent that TSNZ are calculating payment of relevant daily pay and annual holiday differently to ABB with the effect that I have been disadvantaged and consequently raise with you a disadvantage grievance.*
>
> *These are not the actions of a fair and reasonable employer in all the circumstances.*

Terms of the collective employment agreements

1. The ABB cea

[17] The ABB cea provided at Appendix Two:

> *Salary structure*
>
> *The following rates of salary are in full satisfaction and discharge of all working conditions that may arise … Salaries are shown in the following tables, subject to holding the qualifications set out below:*

Reimbursement Allowances

The salaries shown are inclusive of the following reimbursement allowances (which subject to IRD determination to the contrary shall be non-taxable):

Tool allowance… [amount specified]
Laundry allowance …[amount specified]

Transport allowance
The amount of non-taxable transport allowance included in the salary shall be calculated for each employee based on their personal circumstances in accordance with the IRD guidelines.

[18] Mr Harris' salary at the time was $82,990, being the salary identified in the salary table for a control systems technician with a trade certificate. The figure included the tool, laundry and transport allowances, said to total $11,301 per annum.

[19] Clause 20 provided for public holidays, with cl 20.4 reading in part:

Payment for working - …

Where an employee is required to work on a public holiday, in addition to the normal salary payable for that week, the employee will be paid as follows:

25/26 December – two times relevant daily pay
Other public holidays – one times relevant daily pay

For the purpose of this section one times relevant daily pay shall be calculated as follows: (This amount complies with section 94 of the Holidays Act 2003):

Personal Salary/Number of days scheduled to be worked by the employee per year

Where the number of days for the above calculation is currently 183 for shift employees, …

Note: Due to the shift change times …

[20] These provisions were substantially similar to those contained in a terms of settlement document entered into in December 2006, prior to the ratification of the cea, except that the following additional note appeared in the terms of settlement:

Note: Personal salary is gross earnings for the preceding 12 months, with exceptions dealt with on a case by case basis

[21] Clause 20.22 provided that paid sick leave be calculated –

> *.. according to the employee's relevant daily pay (which usually amounts to continuation of salary)*

[22] Appendix Four attached the terms of settlement document.

2. The 2009-2010 cea

[23] In February 2010 the EBIIWU and TSNZ entered into a collective employment agreement to be in force from 10 March 2009 to 31 March 2010 (the 2009-2010 cea). According to the terms of settlement reached in March 2009, the document comprised the former ABB cea, amended to reflect limited and specified changes not relevant here.

[24] Appendix Two of the 2009-2010 cea was essentially the same as its predecessor in the ABB cea.

[25] Clause 20.4 read:

> *(d) Calculation of relevant daily pay*
>
> *Relevant daily pay for public holidays shall be calculated as follows:*
>
> $$\frac{\text{Personal Salary}}{\text{Number of days scheduled to be worked by the employee per year}}$$

[26] Clause 20.22 provided that paid sick leave be calculated –

> *.. according to the employee's relevant daily pay (which usually amounts to continuation of salary)*

[27] Appendix Four attached the terms of settlement for the ABB cea, relevant contents of which I have already described, as well as the March 2009 terms of settlement. The latter was a brief document again of limited relevance here.

3. The 2010 – 2013 cea

[28] The EBIIWU and TSNZ entered into a further collective employment agreement on 2 February 2011. The agreement was to apply from 1 April 2010 to 31 March 2013 (the 2010-2013 cea).

[29] Appendix Two was retained in material respects, with some re-numbering as well as increases in certain allowances.

[30] Clause 20.4 was also retained in material respects, although part of the clause was re-numbered 20.5. Clause 20.22 was also retained.

[31] Appendix Four was amended by the deletion of previously attached terms of settlement, and the attachment of the terms of settlement for 2011. The terms of settlement referred to an agreement to retain:

> … *the definitions relating to calculations of RDP contained in terms of settlement dated December 2006, ie Personal salary is gross earnings for the preceding twelve months with exceptions dealt with on a case by case basis*'

Did TSNZ's actions derive solely from the interpretation, application or operation of any provision of any employment agreement

[32] Mr Harris' personal grievance is of the kind defined in s 103(1)(b) of the Employment Relations Act 2000 as:

> *(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives the termination of employment) … is or are or was (…) affected to the employee's disadvantage by some unjustifiable action by the employer.*

[33] Section 103(3) reads:

> *(3) In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application or operation, of any provision of any employment agreement.*

[34] Mr Yukich submitted that Mr Harris' circumstances fall within the definition in s 103(1)(b) because they relate to a condition arising out of the employment relationship - as distinct from a provision of the applicable agreement - namely the continued enjoyment of remuneration on the same basis as with ABB Limited. He pointed in support to statements such as that in the 26 February 2009 correspondence to the effect that employees would suffer no disadvantage if they accepted employment with TSNZ.

[35] That construction of the TSNZ responses takes them out of their proper context. The true thrust of the correspondence at the time was whether particular terms, conditions or arrangements would be preserved if employment with TSNZ was entered into, together with confirmation that the terms of the applicable collective employment agreement would continue to apply. Assurances of no disadvantage addressed the preservation of existing terms and conditions, including of continuity of service, and did not amount to an inchoate term or condition in their own right independently of the existing terms and conditions.

[36] Next, without directly addressing whether on its correct interpretation the cea meant the transport allowance was to be included in the calculation of holiday pay and statutory holiday pay, Mr Yukich submitted that, at ABB Limited, there was a practice to that effect which was a condition of employment. TSNZ was obliged to continue the practice.

[37] However there was no evidence of any second tier arrangement regarding the calculation of holiday and statutory holiday pay applying as between ABB Limited and its employees in addition to the terms of the ABB cea.

[38] Nor indeed was there evidence beyond assumption - although I have recognised the making of enquiries which did not advance the matter - that ABB Limited actually calculated holiday pay and statutory holiday pay entitlements in the way Mr Harris and his union now believe it did. Moreover when payment figures were analysed for the purposes of the investigation meeting it was not possible to identify whether ABB Limited had calculated holiday payments in the manner contended. Attempts were made to deconstruct the figures to demonstrate the method of calculation, but I do not accept this could be done in a meaningful way without details of the transport allowances payable at the relevant times and which were not available.

[39] Thirdly, even if the belief of the EBIIUW and its members regarding ABB Limited's method of calculation is correct, there were no grounds on which to go further and suggest that ABB Limited was acting other than in accordance with the terms of the ABB cea as it understood them. If its calculations amounted to a wrong

interpretation or application of the cea, TSNZ could not be obliged to follow the same wrong approach.

[40] Finally, TSNZ's offer was for employment on similar terms and conditions of employment, to the extent that for practical purposes the provisions of the ABB cea and any individual-specific provisions continued to apply. The present problem is not one of changed conditions of employment causing disadvantage, nor is it one of omitting to carry over into employment with TSNZ a condition of employment enjoyed at ABB Limited with a resulting disadvantage to employees such as Mr Harris. There was no relevant condition of employment outside the provisions in the employment agreements. The problem concerns the correct interpretation or application of the agreements themselves.

[41] Hence I find that the circumstances of Mr Harris' employment relationship problem derive solely from the interpretation, application, or operation, or disputed interpretation, application or operation, of any provision of his employment agreement. Specifically, the problem is concerned solely with whether the transport allowance must be included in the calculation of holiday pay, public holiday pay and sick pay.

[42] For these reasons I conclude that, even if there was an unjustifiable action on TSNZ's part (and I make no finding that there was), the action does not fall within s 103(1)(b) and Mr Harris' circumstances do not fall within that part of the definition of 'personal grievance'.

[43] This conclusion means it is not necessary to address the second and third of the issues I have set out. However the way in which the employment relationship problem was framed leads me to comment further as follows.

What remedies should apply

1. Payment in accordance with calculation used by ABB Limited

[44] This formulation begs the questions of precisely how ABB Limited calculated holiday pay, statutory holiday pay and sick pay, and of the appropriateness of such an

order if ABB Limited was misapplying the terms of the cea. I could not make an order whose effect was to oblige TSNZ to calculate payments other than in accordance with the terms of the cea.

2. 'Arrears of wages' under s 123(1)(b) and (c) of the Act

[45] Any claim for arrears of wages should be made in its own right and on the ground that TSNZ was misapplying terms of the cea in specified respects, resulting in underpayments to employees as quantified.

[46] Further if, on the correct interpretation of the cea, the transport allowance should be incorporated in the calculations of holiday pay, public holiday pay and sick pay then among other things the lack of detail of the allowances actually paid to individuals would cause difficulty in quantifying any underpayment.

3. Compensation under s 123(1)(c)(i) of the Act

[47] Since there was no personal grievance, there can be no order for compensation under s 123(1)(c)(i).

Was there a breach of the Wages Protection Act

[48] Section 4 of the Wages Protection Act reads:

> *Subject to sections 5(1) and 6(2) of this Act an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction*

[49] Section 5 concerns authority to make deductions, while s 6 concerns the recovery of overpayments. Neither is applicable here.

[50] The deduction allegedly amounting to a breach of s 4 concerned TSNZ's calculation of holiday pay, public holiday pay and sick pay with reference to the base salary exclusive of the transport allowance. Since the cea provided at Appendix Two that the transport allowance is included in the salary, it was said that excluding the allowance amounted to an unlawful deduction under s 4.

[51] I determine that matter with reference to the following passage cited with approval in *Portia Developments Limited t/as Silverstone Intercredit New Zealand:*[3]

> *'… but the distinction between a subtraction made as part of the process of calculating wages payable and a deduction from wages payable is rather fine, turning on the Court's construction of the particular contract of employment'*

[52] TSNZ did not make any deduction from Mr Harris' pay. It calculated the amounts it considered were owed to him as holiday annual holiday or sick pay, and paid him the amounts so calculated. It did not include the travelling allowance in its calculation because, on its understanding of the employment agreement, it was not required to. There was no element of an attempt to withhold for any reason the allowance otherwise payable. Such action is not a 'deduction' in terms of the Act, rather the circumstances overall concern a disputed method of calculation.

[53] For these reasons I conclude there was no breach of the Wages Protection Act.

Is a penalty payable

[54] In the absence of a breach of the Act there will be no order for the payment of a penalty.

Concluding comments

[55] I referred several times during the investigation meeting to my doubt that this matter was properly brought as a personal grievance. Mr Yukich proceeded with the grievance nevertheless, and the above discussion of his submissions indicates why his view in response to my concern was that the question of the proper interpretation of the cea was not relevant.

[56] My concern was such that I called for additional evidence I would not otherwise have sought in order to address what I considered to be the true underlying problem, namely a disputed interpretation of provisions in the employment agreement. I did so in the hope that I would be in a position to determine that matter

[3] Unreported Employment Court, AEC 100/97, 9 September 1997

in the event that I remained unpersuaded by Mr Yukich's submissions on the existence of a personal grievance.

[57] I am not in such a position. Mr Yukich's submissions in particular remained focussed on the personal grievance, with reference to why s 103(3) of the Employment Relations Act does not apply and in reliance on the arguments I have set out. While I intend no criticism by that observation, it means I am uncertain of whether Mr Harris or the EBIIUW in particular wish to proceed with any dispute about the interpretation, application or operation of the cea. I observe further - although in the present circumstances the point makes little practical difference - that s 129 of the Act sets out certain additional requirements in respect of disputes.

[58] Accordingly I find it preferable at least to resolve the matter put to me, and leave it to the parties to address where to from here regarding the place of the transport allowance in calculations of holiday pay, public holiday pay and sick pay.

[59] To that end leave is reserved to either party to refer a dispute concerning that point to the Authority, to be addressed as part of this employment relationship problem. The reservation of leave will expire within 28 days of the date of this determination if neither party has approached the Authority.

[60] For the avoidance of doubt the provision for expiry of the reservation of leave does not mean the Authority is purporting to prevent any further raising of the dispute at all, rather it means a fresh application will be required if the same dispute is raised later and the parties are unable to resolve it. Even so should a fresh application be made later then, depending on the circumstances in which it is made, in the light of the history of this matter an explanation may be sought for the later application.

Costs

[61] Costs are reserved.

[62] 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