IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 379
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:	15 August 2012
Determination:	24 October 2012

DETERMINATION OF THE AUTHORITY (No 2)

Employment relationship problem

[1] This employment relationship problem began as a personal grievance of Weeraphong Harris. In a determination dated 18 January 2012[1] (the first determination) I found the circumstances of Mr Harris' employment relationship problem derived solely from the interpretation, application or operation of provisions of his employment agreement, namely those relating to the calculation of holiday pay, public holiday pay and sick pay. Because the matter had been argued only as a personal grievance leave was reserved to refer the underlying dispute to the Authority for determination.

[2] The parties attended further mediation, and were unable to resolve the matter. The underlying dispute has now been referred to the Authority for determination.

[1] *Harris v TSNZ Pulp and Paper Maintenance Limited* [2012] NZERA Auckland 23

[3] The further statement of problem lodged in respect of the dispute sought a determination that the transport, laundry and tool allowances included in the salary table contained in the TSNZ Pulp and Paper Maintenance Limited (TSNZ) and EBIIWU and Anor collective employment agreement 2009-2010 (the cea) - and its successor ceas where corresponding provisions are the same - are incorporated in an employee's salary for the purpose of calculating:

- holiday pay; and
- 'relevant daily pay' for the purposes of calculating,
  - payment for work done on a public holiday, and
  - sick pay.

[4] A difficulty highlighted by this employment relationship problem is that s 6 of the Holidays Act 1981, which for the purposes of that Act excluded from an employee's remuneration non-taxable allowances paid to reimburse employees for work-related expenses, was not re-enacted in a comparable form in the Holidays Act 2003.

Background

[5] The genesis of the present dispute was set out in the first determination. In summary, when TSNZ took over a maintenance contract from ABB Limited it offered employment to the former employees of ABB Limited on the same terms and conditions. In association with this, the parties agreed to enter into a new collective employment agreement (namely, the cea) which contained the same clauses as those in the cea to which ABB Limited had been the employer party. Mr Harris says as a result TSNZ was obliged to apply the construction of the cea which he says ABB Limited was applying, and under which transport, laundry and tool allowances were included in the salary when calculating holiday pay, public holiday pay, and sick pay.

[6] For the purposes of this determination I repeat the relevant clauses.

[7] The cea provided at cl 21.1:

> *The rates provided in the tables payable under this agreement are inclusive of all qualifications and service payments. Salaries include these rates and other payments provided in Appendix 2.*

[8] Under the heading 'Salaries,' Appendix Two of the cea included tables setting out the dollar amounts payable as salaries to employees in the specified occupations. The appendix identified the components of the salaries as follows:

> *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.*

[9] I record that this employment relationship problem has proceeded on the basis that the reimbursing allowances in question are non-taxable. No determination to the contrary has been made by the IRD.

[10] Mr Harris' salary at the time the dispute arose was $82,990, being the salary identified in the salary table at Appendix Two for a control systems technician with a trade certificate. The figure included the transport, laundry and tool allowances described under the heading 'reimbursement allowances', which in Mr Harris' case were said to total $11,301 per annum. Mr Harris believed the allowances were not being included in the calculation of his annual leave, public holiday pay or sick pay when they should have been.

[11] One difficulty addressed in the first determination was the absence of evidence of how ABB Limited had applied the relevant provisions, as well as difficulties encountered in attempts to obtain such evidence. Additional hearsay information, said to be about how another company in the ABB group applies comparable clauses at

another site, was produced in respect of the present dispute although the clauses themselves were not produced. Mr Yukich submitted that it was objectively apparent TSNZ should give the clauses here the same meaning as ABB Limited did. The information was not sufficient to establish how ABB Limited had applied the clauses at the site where Mr Harris worked, and I do not accept it is objectively apparent that TSNZ should apply the clauses in the same way.

[12] I regard as unhelpful the use of the personal grievance procedure as the primary method of addressing the present problem. If a justiciable issue arises out of any difference between the way in which ABB Limited and TSNZ have applied the clauses in question, that issue cannot properly be addressed without satisfactory evidence that there was such a difference and while a dispute about the meaning of the clauses remains. There was no evidence of the former, and I turn to the latter.

Are the allowances included in the calculation of holiday pay

[13] The cea provided at cl 20.17:

> *Formula [for 12 hour shift employees]:*
>
> *…*
>
> *1 week's annual 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*

[14] The cea provided more generally at cl 20.18:

> *Holiday pay shall be calculated on the basis of the employee's average weekly earnings for the twelve months immediately before the end of the last pay period (as defined in the Holidays Act) provided that this is not less than the employee's ordinary weekly pay as at the start of the holiday.*

[15] The cea does not contain its own definition of 'average weekly earnings' or 'ordinary weekly pay', so I refer to the definitions in the Holidays Act 2003.

[16] ' Average weekly earnings' is defined at s 5 as:

> *1/52 of an employee's gross earnings*

[17] 'Gross earnings' is defined at s 14 to mean:

> *14…*
> *a. all payments that the employer is required to pay to the employee under the employee's employment agreement, including, for example –*
> *(i) salary or wages:*
> *(ii) allowances (except non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to his or her employment):*
> *(iii)…*
> *b. excludes …*
> *c. also excludes –*
> *(i) any payment to reimburse the employee for any actual costs incurred by the employee related to his or her employment:*
> *(ii) any payment of a reasonably assessed amount to reimburse the employee for any costs incurred by the employee related to his or her employment:*
> *…*

[18] The exception in s 14(a)(ii) was inserted by amending legislation and came into force on 1 April 2011.

[19] 'Ordinary weekly pay' is defined at s 8 to mean:

> *(1)…*
> *(a) the amount of pay that the employee receives under his or her employment agreement for an ordinary working week; and*
> *…*
> *(2) If it is not possible to determine an employee's ordinary weekly pay under subsection (1), the pay must be calculated in accordance with the following formula:*
>
> *[gross earnings for the 4 calendar weeks before the calculation is carried out]*
> *Less*
> *[one-off, irregular or discretionary payments]*
> *Divided by 4*
>
> *(3) However, an employment agreement may specify a special rate of ordinary pay for the purpose of calculating annual holiday pay if the rate is equal to, or greater than, what would be calculated under subsection (1) or subsection (2).*

[20] In a reference to the exclusion of reimbursing payments in s 14(a)(ii) and (c)(i) and (ii), Mr Yukich acknowledged a possible 'ambiguity' if the definition of gross earnings is considered in the context of the inclusion of reimbursing payments in the employees' salary under the cea. He submitted the matter should be resolved by a finding that the parties have created their own definition of 'salary,' which is the applicable definition for the purposes of calculating gross earnings under both the cea and s 14(a)(i). For that reason it does not matter that the parties' definition includes

reimbursing or non-taxable payments, which Mr Yukich called 'remunerative' payments. Mr Yukich sought to distinguish these 'remunerative' payments from other reimbursing payments provided for in the cea but not included in the parties' definition of 'salary'. He accepted the latter would not fall within the definition of 'gross earnings' and would be excluded from the calculation of holiday pay.

[21] I do not accept there is an ambiguity. I do not accept that payments which are expressly and clearly reimbursing payments - and which on their face are caught by the exception in s 14(a)(ii) and the exclusions in s 14(c) - can become or should even be described for the purposes of this dispute as 'remunerative' payments. I do not accept that the essential nature of the payments can be changed in that way. If the payments are at all remunerative, they cannot be made free of tax.

[22] Moreover if the parties could agree that what are in fact reimbursing payments are to be treated as part of the 'salary' for the purposes of the Holidays Act, so that the payments attract holiday pay when an employee is on leave, the payments would cease to be reimbursing payments while the employee was on leave. They could not continue to be reimbursing payments because the underlying expense would not be incurred while the employee was on leave. The costs of work-related transport, in particular[2], would not be incurred. By including such a payment in the calculation of annual leave the employer would be paying for something essentially different from the underlying agreed reimbursing payment. It would not be a payment that had been agreed to.

[23] I have considered whether the 2011 amendment to s 14(a)(ii) makes a difference to the above analysis. The amendment was made to confirm a distinction between non-taxable reimbursing allowances and other allowances, but otherwise reimbursing payments were excluded in any event by s 14(c)(i) and (ii). I conclude that the amendment does not affect the analysis.

[24] Mr Yukich submitted that it was open to the parties to apply their own definition of 'salary', in reliance on the judgment of the Court of Appeal in Service *and Food Workers Union Nga Ringa Tota v Cerebos Gregg's Limited*[3]. There the

[2] The laundry and tool allowances were not the focus of attention in the parties' arguments.
[3] [2012] NZCA 25

court said the critical question was whether the parties' agreed purpose was to provide a special or enhanced benefit - in that case an extra week's paid leave - and for that reason the primary focus should have been on the construction of the collective agreement rather than on the statutory nature and purpose of annual leave.

[25] Accordingly Mr Yukich submitted that the parties' agreed purpose here was to provide their own definition of 'salary' in cl 21.1 and Appendix Two, being an enhancement of the minimum provided for in s 14.

[26] I do not accept the submission. First, s 14 does not provide for a minimum entitlement. It is simply a definition section, with the relevant entitlements being located in the next Part of the Act. More importantly, the additional week's leave provided for in the agreement in the *Cerebos Greggs* case did not change the essential nature of what was being provided - namely paid time off work - rather it granted more paid time off work than the minimum contained in the Holidays Act. The outcome for which Mr Yukich contends changes the essential nature of what was being provided in that, as discussed above, for the purposes of calculating payment for annual leave an agreement to make reimbursing payments becomes a requirement to make a payment of a different kind and which was not agreed to.

[27] For these reasons I do not accept that the transport, laundry and tool allowances are part of Mr Harris' gross earnings - or in turn his average weekly earnings - for the purpose of calculating annual leave payments.

[28] Matters may not end there because both the cea at cl 20.18 and s 8 of the Act provide for payment at the greater of a rate calculated with reference to 'average weekly earnings' and 'ordinary weekly pay'. The purpose of these provisions is to recognise that average weekly earnings and ordinary weekly pay could differ - sometimes significantly if for example there had been a change in an employee's rate of pay, or variation or fluctuations in hours of work (including through overtime) during a relevant period. However if the allowances in question here fall within the definition of 'ordinary weekly pay' then the result is likely to be that Mr Harris' ordinary weekly pay is greater than his 'average weekly earnings' (according to the meaning I have identified), and must be included in the calculation of holiday pay.

[29] I determine that matter by saying that according to its natural and ordinary meaning the word 'pay' refers in its broad sense to what an employee receives in return for work done. Non-taxable reimbursing allowances are not in any sense what an employee receives in return for work done, rather they have no remunerative element and are what an employee receives by way of reimbursement for expenses incurred while doing the work. They are not 'pay' for the purposes of holiday entitlements.

[30] For these reasons I conclude that the transport, laundry and tool allowances are not incorporated in an employee's salary for the purpose of calculating holiday pay.

Are the allowances included in the calculation of relevant daily pay

1. Payment for public holidays

[31] The way in which this employment relationship problem was argued during the first investigation meeting caused me to seek further information about the bargaining between the EBIIWU and ABB Limited which occurred in 2006, and during which the text of the currently disputed provisions was agreed on. Union representatives gave evidence on the matter, as did the ABB Limited representative Tony Teesdale.

[32] A suitable formula for calculating payment for public holidays had been an issue between the parties, with some of the history of the matter being set out in a determination of the Authority dated September 2006[4]. The parties sought to address the matter again during bargaining in late 2006.

[33] The union sought a formula which would deliver a higher payment for work done on a public holiday. To that end clause 20.4 as eventually agreed in 2006 (and carried over into the TSNZ cea) read:

> *Where an employee is required to work on a public holiday, in addition to their normal salary payable for that week, the employee shall be paid as follows:*
> *25/26 December – two times relevant daily pay*
> *Other public holidays – one times relevant daily pay*

[4] *ABB Limited v EBIIWU & Anor* AA 303/96, 21 September 2006.

For the purposes of this section one times relevant daily pay shall be calculated as follows (This amount complies with s 9(4) 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, 208 for employees on the alternative day roster and 260 days for employees working the standard day work hours.

NOTE: Due to the shift change times on public holidays the resultant amount calculated above for shift employees shall be further multiplied by the following fractions to determine the actual payment due: …

[34] Attached to the cea were the terms of settlement reached in December 2006. The following additional note appeared in the terms of settlement, immediately beneath the calculation provision repeated materially as above in cl 20.4:

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

[35] The term 'personal salary' was introduced later in the bargaining, to reflect an agreed change to the transport allowance. Previously a standard transport allowance had been paid. In 2006 the parties agreed that the allowance would be payable on an individualised basis so that affected employees could claim an allowance for the actual distance travelled, based on the applicable rate per kilometre.

[36] I digress to say that the union, Mr Harris and his colleagues present at the investigation meeting recognised that the implications of applying a 'personal salary' in that way are that, if the inclusion of reimbursing payments is satisfactory to the IRD, then all other things being equal individual employees ostensibly on the same salary according to the salary table would receive differing nett amounts depending on the distance between their home and the workplace. Although they had originally expressed concern at the disparity this would create, they acknowledged that was an outcome they would have to accept.

[37] Put another way, each employee on Mr Harris' salary of $82,990 for example would receive an individualised payment comprising: the transport allowance in an amount dependent on the qualifying distance travelled; the standard tool and laundry allowances; and the balance, which would amount to the employee's taxable income.

Lest any residual concerns about disparity remain, in my view that is precisely what both parties agreed to in the provision in Appendix Two which allowed individual employees to claim the maximum transport allowance available to them under the IRD's rules.

[38] Returning to the submissions, Mr Yukich's approach assumes that the applicable 'personal salary' in Mr Harris' case is $82,990. Ms Service's approach assumes that the 'personal salary' is the balance remaining when the non-taxable allowances are subtracted from $82,990.

[39] If the note included in the terms of settlement can be given contractual effect, and if my conclusions regarding the meaning of 'gross earnings' are correct, then Ms Service's approach must also be correct.

[40] However in support of his approach Mr Yukich relied again on the *Cerebos Gregg's*[5] case to say that the parties had agreed on their own enhanced definition of 'gross earnings' and 'relevant daily pay.' He said this was confirmed by the reference in cl 20.4 to s 9(4) of the Holidays Act.

[41] Section 9 of the Holidays Act defines 'relevant daily pay' to mean:

> *i.* ...
> *(a)* *... the amount of pay that the employee would have received had the employee worked on the day concerned; and*
> *(b)* *includes-*
> *(i)* *productivity or incentive based payments (including commissions if those payments would otherwise have been received had the employee worked on the day concerned)*
> *(ii)* *[overtime]*
> *(iii)* *[board and lodging]; but*
> *(c)* *excludes [contributions to superannuation]*

[42] Section 9(4) was repealed by an amendment to the Act which came into force on 1 April 2011, but was re-enacted as s 9(2). The provision reads:

> *(2) However, an employment agreement may specify a special rate of relevant daily pay for the purpose of calculating payment for a public holiday, an alternative holiday, sick leave or bereavement leave if the rate is*

[5] Discussed at p 6 of this determination

> *equal to, or greater than, the rate that would otherwise be calculated under subsection (1).*

[43] Mr Yukich submitted that the enhancement in question was the inclusion of the non-taxable reimbursing allowances in the 'personal salary'. Ms Service submitted that the enhancement in question was one made to the entitlement in s 50.

[44] Section 50(1) provides that where an employee works on any part of a public holiday, the employer must pay the greater of:

> *a. the portion of the employee's relevant daily pay or average daily pay (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or*
> *b. the portion of the employee's relevant daily pay that relates to the time actually worked on that day.*

[45] A statutory definition of 'average daily pay' came into effect on 1 April 2011. I do not comment further on the provision because it applies when it is not possible or practicable to determine an employee's 'relevant daily pay', or when the employee's daily pay varies. Those matters are not in issue here.

[46] In Ms Service's submission, the enhancement to s 50 took the form of the provision in cl 20.4 for payment of normal salary for work done on a public holiday plus a payment at one (or two) times the relevant daily pay, rather than a payment calculated at T1.5 and without the payment in any event being limited to the time actually worked.

[47] Since the meaning and purpose of the reference to s 9(4) is not clear, I have referred to the surrounding circumstances for assistance.[6]

[48] The evidence showed the parties were bargaining specifically about a formula for calculating payment for public holidays. In doing so they addressed the appropriate multiplier for the payment to be made in addition to normal salary for work done on a public holiday, and secondly whether the divisor to be used when calculating relevant daily pay should be the number of hours worked in a year or the number of days worked in a year. As reflected in cl 20.4 agreement was reached on

[6] Ref: *Vector Gas Limited v Bay of Plenty Energy Limited* [2010] NZSC 5, especially [19]

the appropriate multiplier, and the outcome in respect of the divisor was an agreement based on the number of days scheduled to be worked in a year.

[49] A copy of sets of calculations written up on a whiteboard during the negotiations was produced. The calculations compared the amounts that would be paid if the relevant divisor were a specified number of hours worked in a year, with the amounts that would be paid if the relevant divisor were a specified number of days worked in a year. Otherwise there was no suggestion that any significance was being attributed to the figures used as the salary in the calculations, and the figures do not correspond with figures in the salary table in Appendix Two of the copy of the resulting ABB Ltd cea.

[50] I conclude the relevant phase of the bargaining was not concerned with enhancing entitlements under the Holidays Act in the manner being contended by the applicant here. The bargaining was concerned with provisions amounting to enhancements to s 50. I find, therefore, that the reference to s 9(4) was a reference to those enhancements.

[51] That finding, together with my earlier conclusions in respect of Mr Yukich's submissions, means I find Ms Service's approach is correct. The relevant allowances are not included in the calculation of relevant daily pay when calculating payment for work done on public holidays.

2. Payment of sick pay

[52] Clause 20.22 of the cea provided that paid sick leave be calculated –

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

[53] Section 71(1) of the Act provides:

> *An employer must pay an employee an amount that is equivalent to the employee's relevant daily pay or average daily pay for each day of sick leave of bereavement leave taken by the employee that would otherwise be a working day for the employee.*

[54] If the parties agreed on their own definition of 'relevant daily pay', being that contained in cl 20.4, then the definition was expressly '*for the purposes of this section'*. For all other purposes the statutory definition in s 9 applies.

[55] I have interpreted the word 'pay' as excluding non-taxable reimbursing payments. Accordingly I find the transport, laundry and tool allowances are not included in the calculation of sick pay.

Costs

[56] Costs are reserved.

[57] I have received the parties' submissions on costs following the first investigation meeting and determination. That matter will be determined at the same time as any further determination of costs in respect of the second investigation meeting and this determination. Accordingly, any party seeking to make a further application in respect of costs in respect of this determination shall have 28 days from the date of this determination in which to file and serve a memorandum 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