

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 371  
5556335

BETWEEN OHAAKI THERMAL KILNS  
LIMITED  
Applicant

AND LABOUR INSPECTOR  
Respondent

Member of Authority: Vicki Campbell

Representatives: Louise Foley for Applicant  
Alan Reid for Respondent

Investigation Meeting: 1 October 2015

Determination: 27 November 2015

---

**DETERMINATION OF THE AUTHORITY**

---

- A. The Improvement Notice is rescinded.**
  
- B. Costs are reserved.**

**Employment relationship problem**

[1] This determination deals with an objection pursuant to section 223E of the Employment Relations Act 2000 (the Act) by Ohaaki Thermal Kilns Limited (OTKL) to an Improvement Notice issued by a Labour Inspector on 26 March 2015.

[2] 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 OTKL and the Labour Inspector but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **The improvement notice**

[3] Mr Alan Reid is a Labour Inspector appointed under s.223 of the Act. On 26 March 2015 Mr Reid issued an improvement notice pursuant to s.223D of the Act. In issuing the Improvement Notice Mr Reid says he reasonably believed that OTKL was failing or had failed to comply with sections 9 and/or 9A of the Holidays Act 2003 (the Holidays Act) because OTKL had not applied the correct calculation for the relevant daily pay (RDP) or average daily pay (ADP) in respect of payments for public holidays, sick and bereavement leave or alternative holidays.

[4] The reasonable grounds for the Labour Inspector's belief are that the employer provided employee records to the Labour Inspector which showed that its calculation of RDP/ADP was not founded on the provisions of sections 9 and/or 9A of the Holidays Act.

[5] The Improvement Notice requires the employer to recalculate the payments for all current and former employees for public holidays, sick and bereavement leave and alternative holidays in accordance with section 9 and/or 9A of the Holidays Act. The calculation is to be backdated six years from the date of the Improvement Notice.

[6] On 13 April 2015 Mr Rod Vanner, Managing Director for OTKL, wrote to the Labour Inspector lodging an objection to the Improvement Notice. In particular Mr Vanner objected strongly to the retrospective paying of current and former staff using ADP for the previous six years as that would result, in his view, to a bonus payment for those employees.

### **The business**

[7] OTKL was established by Mr Vanner in 2001 to utilise waste geothermal water from the Ohaaki Power Station for the purpose of custom kiln drying timber for sawmills in the central North Island. Packets of wet timber arrive by truck to OTKL. The timber is put into "fillets" and is dried in "charges" of between 16 and 20 packets.

Once the fillets have been kiln dried they are returned to the customer. All timber arriving at the site each day must be dried that same day.

[8] The volume of timber sent to the company varies from week to week, month to month, year to year. At the start of each week OTKL will know approximately the number of charges that will be available for drying that week.

[9] The amount of timber arriving each day can range from zero to 80% of OTKL's total drying capacity. A work plan is formulated each day based on the number of fillets to be dried. Once the available fillets have been dried employees are free to leave the work site, although some non-timber work, paid at the applicable hourly rate, is offered to those wishing to earn additional income that day. Employees are not obliged to undertake the additional work.

[10] Initially, after commencing operations, OTKL paid its employees piece rates based on the number of fillets placed in each packet. Mr Vanner told the Authority this was to encourage employees to come to work. Where there was no timber to fillet on any given day, employees would not work and consequently would receive no pay.

[11] This system of payment was not ideal for employees, particularly in the quiet months which are normally December, January, February and June when sawmills traditionally produce lower volumes.

[12] The offer of alternative work on hourly rates is to ensure employees have the ability to receive some income during the quiet times.

[13] Filleters only work on days when there is timber to be dried. Mr Vanner says that because no fillets are ever delivered on a public holidays there will never be a requirement for employees to work on such days.

### **The Holidays Act 2003**

[14] Sections 9 and 9A of the Holidays Act state:

#### **9 Meaning of relevant daily pay**

- (1) In this Act, unless the context otherwise requires, relevant daily pay, for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave,—

- (a) means 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 commission) if those payments would have otherwise been received had the employee worked on the day concerned:
    - (ii) payments for overtime if those payments would have otherwise been received had the employee worked on the day concerned:
    - (iii) the cash value of any board or lodgings provided by the employer to the employee; but
  - (c) excludes any payment of any employer contribution to a superannuation scheme for the benefit of the employee.
- (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 equal to, or greater than, the rate that would otherwise be calculated under subsection [\(1\)](#).
- (3) To avoid doubt, if subsection [\(1\)\(a\)](#) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section [50\(1\)\(a\)](#) (which relates to the requirement to pay time and a half)

## **9A Average daily pay**

- (1) An employer may use an employee's average daily pay for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave if—
- (a) it is not possible or practicable to determine an employee's relevant daily pay under section [9\(1\)](#); or
  - (b) the employee's daily pay varies within the pay period when the holiday or leave falls.
- (2) The employee's average daily pay must be calculated in accordance with the following formula:

$$\frac{a}{b}$$

where—

- a is the employee's gross earnings for the 52 calendar weeks before the end of the pay period immediately before the calculation is made
- b is the number of whole or part days during which the employee earned those gross earnings, including any day on which the employee was on a paid holiday or paid leave; but excluding any other day on which the employee did not actually work.

- (3) To avoid doubt, if subsection [\(2\)](#) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section [50\(1\)\(a\)](#) (which relates to the requirement to pay time and a half).

### **Application of the Holidays Act by Ohaaki Thermal Kilns Limited**

[15] Mr Vanner says that it was too difficult to determine what an employee employed as a Filleter would receive for payment for a public holiday due to the way his business operated in practice.

[16] In 2014 Mr Vanner and his employees reached an agreement that all public holidays, and time take on sick and bereavement leave would be considered non-timber days. On these days employees agreed they would be paid at their applicable hourly rate for 8.5 hours.

[17] Mr Vanner says they also agreed to increase piece rates by \$1-\$2 per metre<sup>3</sup> giving employees the ability to earn more when timber was available.

[18] By way of example of the way the agreement operated in practice Mr Vanner used the 2015 Easter period. At the start of the week leading up to the Good Friday holiday OTKL knew it had a total 18 kiln charges to fillet and dry for the week. From his experience Mr Vanner knew this could be done easily in four days.

[19] The filleting staff on piece rates finished at 3pm on the Thursday and earned an average of \$820 in total for the four days. That was all the work that was available for that week. Mr Vanner says that if it had been a normal week it was highly likely that the receipt of the eighteen charges would have been spread out over five days, with the filleting staff working five short days. That would still have earned employees \$820 total for the week.

[20] Mr Vanner says his employees were advantaged because they received not just the \$820 for the week but they also received payment of 8.5 hours at their applicable hourly rate for the public holiday on the Friday. This resulted in extra earnings of about \$127.50.

[21] This information was conveyed to the Labour Inspector who did not accept that the method used by Mr Vanner met the requirements of section 9 of the Holidays Act.

## **Issues**

[22] This determination deals with an objection by OTKL to the Improvement Notice issued by the Labour Inspector on 26 March 2015. OTKL has applied to have the Improvement Notice rescinded.

[23] The function of the Authority under s.223E of the Act in respect of an objection to an improvement notice is to determine:

- a) whether the employer is failing or has failed to comply with the specified provision of the relevant Acts;
- b) the nature and extent of the failure; and
- c) the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision if applicable.

[24] The Authority may confirm, vary or rescind the Improvement Notice as it thinks fit.

## **Is Ohaaki Thermal Kilns Limited failing or has it failed to comply with section 9 and/or 9A of the Holidays Act 2003?**

[25] To meet its obligations under section 9 of the Holidays Act OTKL must first establish, or attempt to establish, the amount of wages payable to an employee if the employee had worked a public holiday, sick or bereavement or an alternative holiday. If it is not reasonably possible to establish the amount of wages to be paid, then the employer is obliged to apply the averaging formula under section 9A.

[26] Alternatively section 9(2) allows an employer and employee to agree in their employment agreement a special rate of relevant daily pay provided that rate is equal to, or greater than, the rate that would otherwise be calculated under section 9(1).

[27] Mr Vanner says, and I accept, that it is not possible to establish the amount of wages payable to an employee who does not work due to a public holiday, sickness or bereavement or an alternative holiday. This is because the work plan is based on the number of fillets of timber needing to be dried during a week. This varies each week and no timber is delivered on a Public Holiday. Further, employees are paid on a piece rate per fillet and not an hourly rate for each hour worked.

[28] Employees work on the basis that once the fillets have been dried work ceases unless alternative duties can be found. If an employee agrees to undertake alternative duties the employee will receive payment based on the hourly rate for each hour worked undertaking alternative duties. Employees are not obliged to stay and undertake alternative duties.

[29] As I understand the way the business operates, the number of fillets available for drying during the week will not usually increase from the estimated number of fillets notified at the beginning of a week.

[30] Because of the difficulties with assessing the relevant daily pay under section 9(1) Mr Vanner says he entered into agreements with all of his employees pursuant to section 9(2) of the Holidays Act to pay a special rate for public holidays, sick and bereavement leave and alternative holidays.

[31] The employment agreements used by OTKL did not specify the agreed special rate. The employment agreements provide for public holidays and sick and bereavement leave to be taken and paid in accordance with the Holidays Act. When this was put to Mr Vanner at the investigation meeting he explained that the agreements to pay a special rate were verbal agreements entered into with each employee.

[32] The Act at section 65(1)(a) requires employment agreements to be in writing. While the Act provides some discretion about what is included in the employment agreement it is expected that important terms such as an agreement to pay a special rate under section 9(2) of the Holidays Act would have been reduced to writing.

[33] The employment agreement does not specify how variations to the agreement will be dealt with. The Authority has previously upheld oral terms of employment agreements.<sup>1</sup> I am satisfied Mr Vanner had entered into agreed oral terms with each of his employees that a special rate of pay equivalent to an hourly rate multiplied by a standard number of hours of 8.5 would apply to all public holidays as allowed under section 9(2) of the Holidays Act.

---

<sup>1</sup> See *Webb v PDL Holdings Ltd* ERA Christchurch CA2/03, 17 January 2003; *Dowds v Universal College of Learning* ERA Wellington WA157/08, 26 November 2008; *McDaid v Huawei Technologies (New Zealand) Company Ltd* [2014] NZERA Auckland 309.

[34] The wage and time records produced by Mr Vanner show that both he and his employees have relied on their oral agreement and the calculation for the payment of public holidays and sick and bereavement leave has been performed in accordance with that agreement.

[35] Section 9(2) requires the special rate to be equal to, or greater than, the rate that would otherwise be calculated under subsection 9(1) which is the amount of pay the employee would have received had the employee worked on the day concerned.

[36] Mr Vanner says that because no timber is delivered on days that are public holidays, there would be no filleting work available for his employees. If employees did work on a day that a public holiday fell, employees would be offered alternative work at the applicable hourly rate which they would be free to accept or reject.

[37] Mr Vanner told the Authority that payment of the applicable hourly rate for 8.5 hours to all filleting employees on a day on which a public holiday fell was either equal to or more than the amount of pay an employee would have received had the employee worked on the day.

[38] I am satisfied this is correct. I have relied on the example from the 2015 Easter week leading up to Good Friday when the filleting of all timber was completed over four days. I am satisfied that even if the filleting had been spread over five days (which does not happen as the timber has to be dried on the same day as it is received) the employees would have been paid for the number of fillets to be dried which amounted to a payment of \$820.00. Each of the filleters who worked in that Easter week received not only the \$820.00 but a further 8.5 hours at their applicable hourly rate extra.

[39] I find OTKL has not failed to comply with section 9 of the Holidays Act.

**What is the nature and extent of the failure?**

[40] Given my finding above I am not required to answer this question.

**What is the nature and extent of any loss suffered by any employee?**

[41] Given my finding above I am not required to answer this question.

**Determination**

The Improvement Notice dated 26 March 2015 is rescinded.

**Costs**

[42] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so OTKL shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The Labour Inspector shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[43] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards

Vicki Campbell

Member of the Employment Relations Authority