

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 75
5369423

BETWEEN ANDREW WELLER and 63
 OTHERS
 Applicant

AND NEW ZEALAND ALUMINIUM
 SMELTERS LIMITED
 Respondent/s

Member of Authority: Mike Loftus

Representatives: Greg Lloyd, Counsel for Applicants
 Pheroze Jagose, Counsel for Respondent

Investigation Meeting: 19 February 2013 at Invercargill

Submissions received: At the investigation meeting

Determination: 1 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dispute over the interpretation and application of one of the terms contained in various individual employment agreements.

[2] In particular, the parties disagree over how many hours constitute a day for the purposes of calculating leave entitlements.

Background

[3] The applicants are all members of the New Zealand Amalgamated Engineering Printing and Manufacturing Union Incorporated (EPMU). They are employed on shift work by New Zealand Aluminium Smelters Limited in various capacities at the company's smelter at Tiwai Point.

[4] Their terms and conditions are governed by one of three different individual employment agreements (IEA).

[5] IEA “A” was introduced in 1991. It contains a leave provision which deals with both annual leave and public holidays. With respect to public holidays it provides:

Statutory holidays are additional to annual leave for staff on daywork.

Alternatively, the annual leave provision for monthly paid staff on a shift roster that involves working statutory holidays, is at the rate of either 20 paid days leave per annum for a 20 shift per four weeks roster, or 21 paid days leave per annum for a 21 shift per four week roster. Additionally, shift staff as above shall accrue a days leave in lieu of a statutory holiday as it occurs.

[6] The IEA was accompanied by a letter of explanation which advised *For shift workers an extra days leave accrues for each statutory holiday as it occurs.* This does not appear in later letters accompanying subsequent IEA versions.

[7] The provision reflects a reasonably common practice of giving all shift staff eleven days leave in lieu of public holidays, with the entitlement applying irrespective of whether or not the worker would otherwise have worked on each and every public holiday.

[8] IEA “B” was introduced at an unspecified time prior to 1995 and IEA “C” was introduced in 2000. Again statutory holidays are dealt with in a provision entitled annual leave. The content in respect to public holidays is identical and reads:

Statutory holidays are additional to annual leave for staff on daywork.

Alternatively, the annual leave provision for monthly paid staff on a shift roster that involves working statutory holidays, is at the rate of either 20 paid days leave per annum for a 20-shift per four week roster, or 21 paid days leave per annum for a 21-shift per four week roster. For 12-hour shift roster 21 equivalent eight-hour paid days leave per annum applies. Additionally, shift staff as above shall accrue a days leave in lieu of a statutory holiday as it occurs. Shift staff are required to work statutory holidays when these fall on a rostered work day.

[9] The new provision stems from the fact 12 hour shifts had been introduced by agreement after IEA A’s adoption. The allocation of what is in effect eighty eight

hours leave per year in lieu of public holidays reflects the company's belief the introduction of 12 hour shifts was conditional upon a requirement there be no increase in costs.

[10] In 2004 a new Holidays Act came into force. It contained various changes in respect of public holidays which were considered by the Company. This led to IEA "D" which provides for a day in lieu only if an employee works on a public holiday. The applicants did not become parties to these agreements and continued with their earlier agreements. They did however receive a memo advising a preliminary view about how the company saw the changes applying to existing staff and seeking feedback.

[11] Ultimately the company issued a letter advising it was amending existing IEA's to:

- a. confirm the continuing practice of crediting shift workers with 88 hours additional leave each year;
- b. confirm the right of the employees to be paid time and a half for working on a public holiday; and
- c. provide for the alternative day's leave credit (of 12 hours, if working a 12 hour roster), to be deducted from the 88 hour allowance.

[12] The rationale for this is no shift worker would be likely to work more than seven public holidays in any given year and their statutory entitlements have therefore been met. The applicants do not expressly agree, but neither do they strenuously dispute this approach and, for completeness I note a Labour Inspector has concluded the statutory minima are being met as not all public holidays would otherwise be working days for these employees.

[13] Notwithstanding the company's position, the changes were not confirmed by written agreement with individual staff and a dispute has simmered since. The applicants maintain their IEA's give a day's leave for each public holiday. A day is now twelve hours and that is what they should now receive. The Company disagrees with this approach.

Determination

[14] With respect to IEA “A” I conclude the applicants claim has validity. The clause provides for a day’s leave to be added to the employees annual leave entitlement with the passing of each public holiday. It is a *day’s* leave. With the passage of time a day has become twelve hours for these employees and given the absence of the later provision implying a day is eight hours there is no contractual arrangement which alters or limits the effect of that change.

[15] The company’s intent costs remain unchanged does not alter the conclusion. The environment changed and the issue should have been addressed at the time, appropriate action taken and any change formalised through amended employment agreements. This did not occur and the company must now live with the consequence.

[16] Applicants on IEA “A” should be paid twelve hours in lieu of each public holiday.

[17] Turning to IEAs “B” and “C” and the question of whether or not a day is, for the purposes of recognising a day in lieu of a public holiday limited to eight hours.

[18] I conclude employees covered by these agreements are also entitled to receive twelve hours pay for a day’s leave granted in lieu of a public holiday. I reach this conclusion for the following reasons.

[19] A literal reading of the clause leads to a conclusion a day’s length is limited to eight hours only for the purpose of annual leave. The reference to eight hours appears in a sentence which grants, and quantifies, an allocation of annual leave and has the effect of setting the annual leave allocation at 168 hours per annum. The sentence does not go so far as to say the limitation applies to all leave and there is no mention of it in the sentence which grants a day in lieu of public holidays. Again the allocation is a day and a day is now 12 hours. Similarly there is no suggestion or mention of the eighty eight hour total now applied by company.

[20] Even if the above conclusion is wrong, I note these clauses grant a day’s leave in lieu of a public holiday. A day in lieu is, by definition, a day provided *instead of* or *in place of*. It is an alternate and the Act requires a holiday provided as an alternate to

a public holiday be paid at an employees' relevant daily rate as defined in section 9. Again a day is twelve hours and that is the relevant rate.

Conclusion

[21] My conclusion is that, as claimed, the employees are entitled to receive twelve hours pay for each day granted in lieu of a public holiday.

[22] 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.

[23] Costs are reserved.

Mike Loftus

Member of the Employment Relations Authority