

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 290/09  
5153070**

BETWEEN      DEBORAH JAN POTTER  
                         Applicant

AND             ELDERSTOCK LIMITED  
                         Respondent

Member of Authority:      Leon Robinson

Representatives:          Andrew Potter, Advocate for Applicant  
                                 Giles Brant, Counsel for Respondent

Investigation Meeting:      22 July 2009

Further Evidence:          5 August 2009

Submissions:                14 August 2009

Determination:              19 August 2009

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**DETERMINATION OF THE AUTHORITY**

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**The problem**

[1]    The applicant Ms Deborah Jan Potter ("Mrs Potter") asks the Authority to determine her "status" as a means to inform whether she is entitled to be paid for public holidays. Her employer, the respondent Elderstock Limited ("Elders"), had earlier advised Mrs Potter that because she was a casual employee engaged on an "as required" basis, there are not days on which Mrs Potter can expect to work and therefore she cannot expect to work on a day which may be a public holiday.

[2]    The parties were unable to resolve the problem between them by mediation.

[3]    The Authority has been provided with Elders wage and time record in respect of Mrs Potter's employment. It has heard from Mrs Potter, and Elders' manager Mr Keith Russell Hiscock. It has also received a statement from Elders' Northern Region

Livestock Manager Mr Mark Laurence Shuker, and affidavits from sales clerk Ms Raewyn Bartz ("Ms Bartz"), Elders' National Dairy Coordinator Mr Philip John Young, and Elders Tuakau Area Manager Mr David Johnathan Keals Anderson.

## The facts

[4] Ms Potter has been employed by Elders and its predecessor since 1999. The terms of employment were recorded in an individual written employment agreement dated 1 October 2005 ("the IEA").

[5] The IEA contains these terms:-

### *1. The position*

*1.1 You are to work for us as a casual, part-time saleyard clerk at our premises at Tuakau. You must perform the duties specified in schedule 1 and any other work that we reasonably ask you to do.*

### *2. Duration of employment*

#### *Casual employment*

*2.1 Because the hours, and sometimes the days, you work vary, your employment is on a casual 'as and when required' basis.*

### *5. Payment, hours of work*

#### *Hours of work and days of work*

*5.4 Your working hours are variable, as stated in Schedule 2.*

*5.5 Your days of work are variable, as stated in Schedule 2.*

*5.6 The number of days per week and hours per day that you work may vary according to our requirements. We do not guarantee that any hours of work will be provided on any day or in any week. We will determine the hours you work and your starting and finishing times to suit our business needs and timing of the sales. The total number of hours worked per day will be determined by the amount of livestock to be sold at each sale.*

*5.7 You must complete a timesheet for each sale you attend, detailing the number of hours worked. Your Manager or their appointee at each saleyard must approve your timesheet. To be paid, you must submit a correctly filled out and signed timesheet to Elderstock Limited every month.*

### *Public holidays*

*6.3 You are entitled to the paid public holidays specified in the Holidays Act 2003 if they fall on a day that would otherwise be a working day for you. Your entitlements are detailed in Schedule 3.*

*6.4 You must not work on a public holiday unless we ask you to. We may require you to work on a public holiday if the holiday falls on a day that would otherwise be a working day for you.*

### *Schedule 2*

#### *General*

<i>Item 1</i>	<i>Days of work, Hours of work, wages and benefits</i>
	<i>Commencement date: 01 October 2005</i>
	<i>Days of work: As required, but usually Monday, Wednesday and Thursday.</i>
	<i>Hours of work: Starting from 9.00am. Finishing time will depend o(sic) the amount of livestock sold at each sale.</i>
	<i>Rate \$15.00 per hour.</i>
	<i>Travel allowance: We will pay you a travel allowance of \$40.00, as part of your remuneration, if you travel to other locations to work for us (this does not include your base location).</i>

### *Schedule 3*

#### *Public Holiday entitlements*

- 1.If we require you to work on a public holiday that would otherwise be a working day for you, you are entitled to be paid the portion of your relevant daily pay that relates to the time you actually worked on the day plus half that amount. In addition to that payment, you are entitled to an alternative holiday paid at your relevant daily pay.*
- 2.If you agree to work on a public holiday that would not otherwise be a working day for you, you are entitled to be paid the portion (sic)your relevant daily pay that relates to the time worked on the day plus half that amount but you are not entitled to an alternative holiday.*
- 3.You agree to consult with us about the day you will take any alternative holiday that you are entitled to.*
- 4.If we cannot agree on the day you will take the alternative day, you must give us 14 days notice of the day you intend to take the alternative day.*
- 5.If you have not taken your alternative day within 12 months of your entitlement to it, we can give you 14 days notice of the date on which we require you to take the alternative holiday, or you may request us to exchange your entitlement for payment in lieu. If you accept payment in lieu you lose your right to a paid alternative holiday.*

## **The merits**

[6] The issue to be determined is whether Ms Potter is entitled to payment for public holidays. That issue is not determined by the status of Ms Potter's employment.

[7] The *Holidays Act 2003* ("the Act") provides that all employees are entitled to public holidays and there is no distinction between different types of employees. These holidays are to observe days of national, religious or cultural significance. Section 46 of the Act provides:-

46. *Entitlement to public holidays*

- (1) *An employee is entitled to public holidays, and payment for those holidays, in accordance with this subpart.*
- (2) *Public holidays are in addition to annual holidays that an employee is entitled to under this Act or otherwise.*

[8] It is not a question of whether Mrs Potter is entitled but rather, what days she is entitled to be paid for. There is no doubt that Mrs Potter is entitled to payment for public holidays. The express terms of the IEA recognise her statutory entitlement to public holidays:-

*6.3 You are entitled to the paid public holidays specified in the Holidays Act 2003 if they fall on a day that would otherwise be a working day for you. Your entitlements are detailed in Schedule 3.*

[9] Mrs Potter is entitled to payment for days that she does not work but which would otherwise have been working days for her. The question of whether a public holiday would otherwise be a working day for an employee is a question of fact. Where the situation is not clear, the factors at section 12(3) of the Act are taken into account:-

*12. Determination of what would otherwise be working day*

- (1) *This section applies for the purpose of determining an employee's entitlements to a public holiday, an alternative holiday, to sick leave, or to bereavement leave.*
- (2) *If it is not clear whether a day would otherwise be a working day for the employee, the employer and employee must take into account the factors listed in subsection (3), with a view to reaching agreement on the matter.*
- (3) *The factors are—*
  - (a) *the employee's employment agreement;*
  - (b) *the employee's work patterns;*
  - (c) *any other relevant factors, including—*
    - (i) *whether the employee works for the employer only when work is available;*
    - (ii) *the employer's rosters or other similar systems;*
    - (iii) *the reasonable expectations of the employer and the employee that the employee would work on the day concerned.*
- (4) *For the purposes of public holidays, if an employee would otherwise work any amount of time on a public holiday, that day must be treated as a day that would otherwise be a working day for the employee.*

[10] I note that this section contemplates the parties reaching an agreement between them. The parties have not agreed. Mrs Potter claims public holidays since the commencement of her employment with Elders. She does not specify which

particular days she is entitled to have taken as a public holiday. I have agreed that I should assist the parties by determining the question of liability or entitlement and the further question of quantum can then be referred to the parties for informal agreement in the first instance but otherwise further determination by the Authority.

***The employment agreement***

[11] I first look to the IEA to ascertain if it informs as to what would otherwise be a working day. Clause 6.3 provides that Mrs Potter is entitled "*public holidays specified in the Holidays Act 2003 if they fall on a day that would otherwise be a working day for [her]*". The IEA provides that Mrs Potter's position title is "casual part-time saleyard clerk" and the employment is on a "casual 'as and when required' basis".

[12] The days of work are specified "*as required, but usually Monday, Wednesday and Thursday*". That provides some degree of certainty but is not absolute. I therefore find that generally, Monday, Wednesday and Thursdays are working days for Mrs Potter.

***The employee's work patterns***

[13] Mrs Potter works when there are sales at the Tuakau saleyards. The sales are usually held as follows:-

Monday - Sheep, Dairies and Calves;

Wednesday - Prime; and

Thursday - Store Cattle.

[14] The Tuakau saleyards are jointly owned by Elders and PGG Wrightson Limited. Each year, Elders and PGG Wrightson Limited confirm the ordinary sales days and the days where there will be extra sales and fairs. They each produce a calendar of these days. The calendars are widely available.

[15] There are no sales held on public holidays including the traditional Christmas New Year vacation period.

***Other factors***

[16] Mrs Potter is not directed prior to each work day whether she is required to attend work. She simply works on days that are sales and these days are generally known and also being published in the calendar. But the calendar is not always correct. If there is any change or fairs or special sales, Mrs Potter is notified by her manager. The calendar is not the definitive statement of Mrs Potter's days of work. I find it cannot prevail over the express contractual provisions which I have referred to above. Clause 10.8 of the IEA is as follows:-

*Entire agreement*

*10.8 This agreement contains everything the parties have agreed on in relation to the employment. Neither party can rely on an earlier document, or on anything said or done by another party (or by a director, officer, agent or employee of that party) before this agreement was signed.*

[17] On Mondays during the period from about December through to the following end of February/beginning of March there are no bobby calves for sale. Consequently there is only work for one employee. Mrs Potter and her co-worker have an informal arrangement between them to see that one of them works. Mrs Potter prefers to spend school holidays with her children and her co-worker works these Mondays.

**The determination**

[18] Having regard to the factors above, I determine that Mrs Potter is entitled to payment for public holidays that, but for the public holiday, they would otherwise have been working days for her. That determination ought now be of assistance to the parties. **I now direct the parties to reach agreement between them as to the particular public holidays for which Mrs Potter is entitled to payment during the time of her service. The parties have 28 days to reach agreement.** Where they are unable to agree, either party may apply for a telephone conference with me for further directions.

Leon Robinson  
**Member of Employment Relations Authority**