

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 192
5565328

BETWEEN SILVER FERN FARMS
 LIMITED
 Applicant

A N D RICHARD LEWIS (LABOUR
 INSPECTOR)
 Respondent

Member of Authority: James Crichton

Representatives: Tim Cleary, Counsel for the Applicant
 Greg La Hood, Counsel for the Respondent

Submissions Received: 20 October and 24 November 2015 from Applicant
 3 November 2015 from Respondent

Date of Determination: 8 December 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Silver Fern) objects to a determination of the respondent (Mr Lewis or the Labour Inspector) pursuant to s.13 of the Holidays Act 2003 (the 2003 Act) and it disputes an Improvement Notice issued by the Labour Inspector concerning the same subject matter.

[2] Silver Fern asked the Authority to decide that Mr Lewis' determination and subsequent Improvement Notice are wrong in law.

[3] Those claims are resisted by the Labour Inspector.

[4] The parties have helpfully completed an agreed statement of facts which I rely upon in this determination and filed useful submissions on the issue as well.

Factual matrix

[5] Silver Fern is a meat processor and exporter which operates various processing plants around New Zealand. One of those plants is at Hawera.

[6] Like all other export meat processing plants, the Hawera plant is subject to strict food hygiene and animal welfare regulations. A part of that process then involves the extensive use of cleaners.

[7] This particular dispute concerns a group of unionised cleaners known as the pre-op crew. The subject of the dispute is whether Labour Day, Monday, 27 October 2014, was an otherwise working day for the cleaners.

[8] The pre-op crew is engaged on a day prior to the start-up day which is the day when, as a consequence of sufficient livestock being available to process, killing is able to commence.

[9] It is obviously important that the plant is cleaned to a hygienic standard before processing commences.

[10] Typically the season for processing livestock runs from around September/October through to June/July the following year.

[11] The pre-op crew are meat processors as well during the season, are employed pursuant to a collective employment agreement with Silver Fern, and typically get around a week's notice of the start of the new season.

[12] In 2012, the pre-op crew was engaged to clean on Tuesday, 23 and Wednesday, 24 October with the start-up day being Thursday, 25 October 2012.

[13] In 2013, the pre-op crew was engaged to clean on Monday, 23 September 2013 and the start-up day was Tuesday, 24 September 2013. The 2013 season ended later than usual on 19 September 2014.

[14] The 2014/2015 season had the pre-op crew engaged to work Friday, 17 October 2014 with the start-up day scheduled to be Monday, 20 October 2014. However, a decision was made during the cleaning process on Friday, 17 October 2014 to reschedule the start-up day to Tuesday, 28 October 2014.

[15] Accordingly, the pre-op crew began working again on Friday, 24 October 2014. Labour Day in 2014 was Monday, 27 October 2014.

[16] The plant commenced processing product on the rescheduled start-up day of Tuesday, 28 October 2014.

The law

[17] The relevant law is contained in s.12 of the 2003 Act which provides for the situation where it is not clear whether a particular day would otherwise be a working day for the employee for the purposes of determining the employee's entitlements to public holidays. Subsection (3) of the section lists the factors which the parties must take into account in seeking to reach agreement on the matter. Because those factors are central to the issue between the parties, I set out subsection (3) in its entirety.

- (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.*
 - (d) *Whether, but for the day being a public holiday, ... the employee would have worked on the day concerned.*

Analysis

[18] It will be useful if I work through each of the factors mentioned in s.12(3) of the 2003 Act commencing with the employee's employment agreement.

[19] It is common ground that the collective agreement that governs the employment of the subject employees is silent on the pre-op clean. It seems to me that an analysis of the collective agreement indicates that the provisions relate exclusively to the period commencing with the start of processing of product and thus post-date the pre-op clean.

[20] Moreover, evidence for Silver Fern is that, not only are the workers doing the pre-op clean performing work that is not covered by the operative employment agreement (notwithstanding that those same workers will subsequently perform work

that is covered by the operative employment agreement after the pre-op clean), the workers in question doing the pre-op clean are effectively doing it on a casual basis. That means that the totality of the employment starts and finishes on the one engagement, the process being complete within itself.

[21] Conversely, the Labour Inspector says that the employees are “*full time permanent employees*” and he places reliance on clause 28 of the collective agreement which provides first that the seasonal layoff does not constitute termination of employment (which the Inspector relies upon) but also that service-related benefits accumulate in consecutive seasons but therefore, by implication, not during the off-season.

[22] There are, I think, two difficulties with the Labour Inspector’s position. The first is that while it may be arguable that these workers have some form of continuity of employment, none of that addresses the point made by Silver Fern to the effect that there are no references whatever in the collective agreement to the pre-op clean and so the arrangements made for the engagement of these workers for that pre-op clean must be derived elsewhere. On the affidavit evidence of the Assistant Plant Manager of the Hawera plant, the employees are casually engaged for the pre-op clean only and as I have already noted, that means that in effect it is an entire engagement complete within itself and so it seems to me wrong to adduce the employment agreement as supportive of Mr Lewis’ decision since in fact the contrary is the case.

[23] I do not accept the submission of the Labour Inspector that because these employees who do the pre-op clean are covered by the collective agreement it somehow follows that the work associated with the pre-op clean is itself covered by the collective agreement. The difficulty with this contention is that there is simply no provision within the collective agreement for the pre-op clean and that seems to me to make it more likely than not that the correct interpretation of the position is that these workers are subject to a casual employment agreement for the purposes of the pre-op clean, the terms of which may not be reduced to writing anywhere but which are nonetheless real for all that.

[24] I accept the submission for Silver Fern that if I am right in my preference for the view that the employment is casual, then it follows inexorably that Labour Day, Monday, 27 October 2014 could not have been “*an otherwise working day given the limited nature of the engagement*”.

[25] Both parties seem to accept that the pre-op clean is part of a regular pattern of work in that the clean is necessary before the killing season can start. What is in dispute is whether the pre-op clean must be done “*immediately before start-up day*”, as the Labour Inspector maintains, or not, as Silver Fern contends.

[26] Certainly it is true, as I have already identified, that for the two seasons prior to the one in dispute, the pre-op clean was done on the day immediately prior to the restart.

[27] But according to Silver Fern, that fact “*does not create an immutable pattern*”. That premise is demonstrated by the fact that in the year in question, the pre-op clean was originally done on 17 October 2014 in anticipation of a planned restart on 20 October 2014.

[28] That 20 October 2014 restart date had to be put back because of the poor supply of stock such that the restart was rescheduled for 28 October 2014.

[29] Even with that new restart date in prospect, the actual pre-op clean took place on 24 October 2014. That is three days before the eventual restart.

[30] But submissions for the Labour Inspector make the point that the two day gap anyway was explicable because it was a weekend and in effect doing the pre-op clean on a Friday and commencing the processing the succeeding Monday was an example of the clean being done on the working day immediately prior to start-up and accordingly it is contended for the Inspector that that supports his conviction that Monday, 27 October 2014 would otherwise be a working day.

[31] But the difficulty with that thesis is the practical reality that whatever the patterns that might or might not exist, the fact was that the plant had already been cleaned twice for the start of the 2014 season, once on 17 October and again on 24 October 2014. It follows that it is difficult to see why it would be necessary for the plant to be cleaned again on 27 October 2014 and thus why it should logically follow that that date would otherwise be a working day.

[32] Perhaps that argument could be made out if the plant had not already been cleaned twice, but given that fact, it seems to me that the Labour Inspector’s argument falls away.

[33] The next factor is whether the employee works only when work is available. It is clear that work is only performed when workers are called back by the employer to perform the work and that the work is required to be performed before the beginning of the processing season. But there can be no more certainty than that because when the processing season starts, or indeed finishes for that matter, is unable to be determined from one year to the next and will depend on a range of factors which are unable to be predicted in advance, but particularly concern the availability or lack of availability of stock.

[34] Even if I were to accept the submission for Mr Lewis that work was always available on the day before the start-up day and that Silver Fern established that practice and then sought unilaterally to change it in 2014, the fact remains that in 2014 there was no need for a clean on 27 October 2014 because there had already been two previous days of cleaning and so I find it difficult to conclude that, given that fact, Labour Day 2014 ought otherwise to be treated as if it were a working day.

[35] That being the case, I do not think it can be contended that either party could have had a reasonable expectation of work on 27 October 2014 because the clean had already been performed twice already by that date. To suggest, as Mr Lewis does in his submissions, that Silver Fern “*artificially avoided the pre-op clean occurring on 27 October 2014*”, seems to overlook the fact that Silver Fern must have some right to manage its business and it is difficult to see why it should be required to contemplate running its business in such a way as to increase cost without a commensurate increase in benefit.

[36] The same argument seems to apply when considering the final factor identified in the statute, namely the “*but for*” test. This was not a situation where, but for the day being a public holiday, the employee would have worked because the work that was in contemplation had already been done, not once but twice. Fundamentally, unless and until the availability of stock sets the scene for the works to reopen for the season, there can be no triggering of the requirement to do the pre-op clean and it is drawing a long bow indeed to contend that, in this situation, work that had already been performed twice should necessarily be performed yet again.

Determination

[37] For reasons that I have already enunciated, I conclude that Labour Day, Monday, 27 October 2014 would not otherwise be a working day for the employees of Silver Fern Farms Limited at the Hawera plant and it follows from that conclusion that the respondent's determination in terms of s.13 of the Holidays Act 2003 is wrong in law and must be set aside as is the Improvement Notice issued pursuant to s.223E of the Act to the same effect and it also is set aside and for the same reason.

[38] Put simply, I have not been persuaded that the collective employment agreement between the parties to the employment relationship covers the terms of the engagement for the pre-op clean as I consider on the balance of probabilities the pre-op clean is a casual engagement on its own terms. Moreover, because the pre-op clean had already been attended to twice before the season started in October 2014, it seems to me impossible to conclude that a third day of pre-op cleaning would have been necessary and in consequence I am satisfied that 27 October 2014 for the workers affected at the Hawera plant of Silver Fern Limited was not otherwise a working day.

Costs

[39] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority