



Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2013](#) >> [2013] NZEmpC 42

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

New Zealand Merchant Service Guild IUOW Inc [2013] NZEmpC 42 (20 March 2013)

Last Updated: 13 April 2013

IN THE EMPLOYMENT COURT WELLINGTON

[\[2013\] NZEmpC 42](#)

WRC 36/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN NEW ZEALAND MERCHANT SERVICE GUILD IUOW INC

Plaintiff

AND HOLCIM (NZ) LIMITED Defendant

Hearing: 22 June 2012

(Heard at Wellington)

Appearances: Helen McAra, advocate for the plaintiff

Tim Cleary, counsel for the defendant

Judgment: 20 March 2013

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The issue in this case is whether a provision relating to public holidays contained in a collective employment agreement made between the parties complies with the requirements of the [Holidays Act 2003](#) (the Act). The plaintiff seeks a declaration that the clause does not comply. The application is strongly opposed by the defendant.

[2] In a determination¹ dated 31 October 2011, the Employment Relations Authority (the Authority) concluded that the provision in question did not breach the Act and it dismissed the plaintiff's application. The plaintiff has challenged de novo the whole of that determination.

¹ [2011] NZERA Wellington 165.

[3] The Authority determined the matter on the basis of an agreed statement of facts. In this Court the agreed statement was supplemented by oral evidence given on behalf of the plaintiff by Mr John Robert McLeod, a former long serving General Secretary of the plaintiff.

[4] The collective agreement, the Holcim (New Zealand) Limited Masters and Officers Integrated Ships Collective Employment Agreement (the collective agreement), is different from that which was considered by the Authority but it is common ground that the relevant position, sub-clause 15.4, is identically worded. The term of the current agreement runs from 1 May 2010 until 30 April 2013. For completeness, I record that there is one other party to the collective agreement but it is not involved in this proceeding.

Background

[5] The defendant, who for convenience I will refer to as Holcim or the defendant, owns and operates the bulk cement carriers, MV Milburn Carrier II and MV Westport. The collective agreement applies to the work of all masters, deck officers and engineering officers employed on the two named vessels. The New Zealand Merchant Service Guild IUOW Inc has been a party to industrial instruments covering its members employed on various vessels since at least the 1960s.

[6] The Holcim vessels operate all year round. The collective agreement provides at 13.1 that the relevant employees (officers) are:

... deemed to be within the service of the company continuously except during periods of private leave...

The officers work in salaried positions and are paid monthly. Clause 15.1(a) provides for a ratio of work to time off at the rate of one day for each complete day worked in the vessel. It is common ground, however, that pursuant to an agreement outside of the collective agreement, the officers work in equal rotating 28-day, time on/time off periods.

[7] The provision in the collective agreement at the centre of the dispute is sub-clause 15.4 which provides:

15.4 Public Holiday

In accordance with the provisions of the [Holidays Act 2003](#), where an employee works on a designated public holiday, the company shall pay the employee in accordance with [Section 50](#) of the [Holidays Act](#)

2003, and shall be deemed to have granted an alternative holiday (in lieu) and the employee shall be deemed to have taken an alternative holiday (in lieu) during the next time off period.

[8] There is no dispute over the meaning of the sub-clause. The parties agree it means that employees take any alternative holidays, which are earned while working on board the vessel, in the proceeding time off period. The sole issue is whether the parties, by agreeing upon sub-clause 15.4 are contracting out of the minimum entitlements under the Act. [Section 6\(3\)](#) of the Act provides that if an employment agreement excludes, restricts or reduces an employee's entitlements under the Act then it has no effect to the extent that it does so.

[9] [Section 56](#) of the Act provides that an alternative holiday must be granted to an employee who works on a public holiday. The requirements of an alternative holiday are set out in [s 57](#). The plaintiff alleges that sub-clause 15.4 of the collective agreement contravenes the provisions of [s 57\(1\)\(b\)](#) of the Act. [Section 57](#) was amended as from 1 April 2011 by [s 13](#) of the [Holidays Amendment Act 2010](#) but the amendments cannot be taken into account in interpreting the statutory provisions as they stood during the period at issue in this case, see *Postal Workers Union of*

Aotearoa Inc v New Zealand Post Ltd.²

[10] Section 57(1) provided:

57 Requirements of alternative holiday

(1) An alternative holiday provided under section 56 must–

(a) be taken by the employee on a day that is agreed between the employer and employee; and

(b) be a day that would otherwise be a working day for the employee; and

(c) be a whole working day off work for the employee, regardless of the amount of time the employee actually worked on the public holiday;

...

² [\[2012\] NZCA 481](#); [\[2013\] 1 NZLR 66 \(CA\)](#) at [\[22\]](#).

[11] The plaintiff alleges that sub-clause 15.4 of the collective agreement contravenes with s 57(1)(b) of the Act by failing to provide an alternative holiday on a day that would otherwise be a working day for the employee.

[12] In its determination, the Authority concluded:

[10] Applying the principles from the *Fire Service Commission* case, I find the following. Holcim always intended and has given its officers lieu days when a public holiday is worked. There are adequate lieu days provided for in the 28 days off provided after each 28 days on. The parties intended that the lieu days would be taken in the next 28 days. The parties' agreement implies that the lieu days would come out of such of the next 28 days as were required for that purpose. Thus as set out in paragraph 22 of the *Fire Service Commission* case I accept that the parties intended that alternative holidays be

provided in the next period of time off of 28 days and that no breach of the [Holidays Act](#) has occurred. I therefore dismiss the application.

[13] If it is not clear in a given case whether a particular day would otherwise be a working day then [s 12](#) of the Act applies. That provision states:

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.

[14] [Section 13](#) of the Act provides that if an employer and employee cannot agree on whether a day would otherwise be a working day then a Labour Inspector may make a determination taking into account the factors listed in [s 12\(3\)](#). There was no evidence or submissions presented in relation to that provision.

The authorities

[15] Both parties accepted that the leading authority in any consideration of the requirements of an alternative holiday is the decision of the Court of Appeal in *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union*.³ In brief, that case related to the collective employment agreement for firefighters. The issue was whether the agreement had provided for alternative holidays to be taken on days that would otherwise have been working days for the firefighters. The firefighters worked on a 160-day roster of time on and time off and at the end of each 160-day period they had what the Court of Appeal called “a

16-day slot” comprised of a mixture of 14 days’ leave and two days which were “rostered days off which were not leave.” The union contended that none of the days in the 16-day slot were working days for the purposes of [s 57](#) of the Act. A majority in the Court of Appeal (Young P and Chambers J; O’Regan J dissenting) found against the union concluding that the employment arrangements between the Fire Service Commission and the union did comply with the [Holidays Act](#).

[16] The relevant provisions in the collective employment agreement in the

Fire Service case stated:

2.7.1 ...

(a) The parties to this Agreement agree that the formula of 14 days’ leave within each 160 days’ employment gives each employee annual holidays in excess of the three weeks minimum provided in Section 11 of the Holidays Act 1891.

(b) The parties further agree that the additional annual holidays in 2.7.1(a) above, provide compliance with the [Holidays Act 1981](#), Section 7A for work performed on statutory holidays prior to, and since, the passing of the [Holidays Amendment Act 1991](#).

[17] The learned authors of *Brookers Employment Law* state that the majority held:⁴

... As to s 57(1)(b), the alternative days in the 14-day holiday period would otherwise have been working days for the firefighters concerned. But for the leave day provided for by the collective agreement, the firefighter would be working on a rostered day on. The relevant provision in the collective agreement therefore amounted to an agreement between the employer and each employee as to when alternative holidays would be provided.

[18] Perhaps somewhat ironically given the strong reliance placed on the authority in the present case, in their comments on the *Fire Service* decision the learned authors of *Mazengarb's Employment Law* make the observation:⁵

... The decision on this point is likely to be of limited application as precedent because it turned on the fact that previous collective contracts and agreements between the parties had contained the same rostering arrangements and the Union had accepted that the 14 days in question were working days for the purposes of being able to be lieu days under the 1981

Act. On that basis, the majority held, they were also working days for the purposes of the 2003 Act.

Case for the plaintiff

[19] The advocate for the plaintiff, Ms McAra, submitted that “the *Fire Service* case is distinguishable from the present one on fundamental facts.” The point Ms McAra was making in this regard was that while the present case is concerned with the notion of “time off”, the *Fire Service* case “was concerned with alternative holidays taken during periods of ‘leave,’ i.e. a 16 day slot which comprised annual leave plus days in lieu, introduced following the 1991 Amendment Act and the *Telecom* decision”. As Ms McAra expressed it:

6.8 The Fire Service Commission successfully argued that the days at issue were otherwise working days because they were not rostered days off but “*days that were carved out of the roster as leave days*”. The argument was, that in order to be annual leave days, those days must, by definition and logic, be otherwise working days.

[20] At the conclusion of that particular section of her submissions, Ms McAra stated:

⁴ At HA57.01.

⁵ At 3257.5.

6.22 The present case is distinguishable in that it involves a clause which deems the alternative holidays to be taken during periods of existing time off, rather than leave.

6.23 And we emphasise again that time off under clause 15 is not annual leave or days in lieu. It is rostered time off which has been earned on a 1:1 ratio from working “time on”.

6.24 In our submission, periods of time off, using the “*but for*” or any other tests, can never be regarded as otherwise working days.

[21] Ms McAra submitted that the *Fire Service* case could be further distinguished because the majority “inferred” from the agreement referred to in [16] above, “that the parties were agreeing to the days in question as being otherwise working days”. Ms McAra contended that there was no express agreement in cl 15.4 of the collective agreement in the present case that “there is compliance with the relevant statute.” In the advocate’s words:

7.7 ... We submit that it would be unreasonable in the extreme to interpret a reference to a period of time off as an agreement by the parties to deem a day or days in that period as “otherwise working days”.

[22] Ms McAra referred to a passage in the majority judgment⁶ which stated in reference to the 16-day slot period: “We also know adequate lieu days have been provided in that period; indeed, the period is generous in that respect as it potentially provides more days’ leave than a particular firefighter may be entitled to by way of annual leave and lieu days.” Ms McAra’s reference to that particular passage appears in her written submissions under the heading “Other distinguishing factors in the *Fire Service* Commission case” but, with respect, I have difficulty identifying the distinguishing factor referred to unless it is the point made later in her submissions that, “An overall entitlements approach is not appropriate for questions determining minimum statutory entitlements”. No authority was cited for that proposition.

[23] Ms McAra also alleged that cl 15.4 of the collective agreement in the present case was “unlawful” because it breached s 44.3 of the Act which stated that an agreement must not diminish the total number of paid public holidays that would otherwise be available. Section s 44.3, however, was repealed in 2008.

Case for the defendant

[24] In his written submissions counsel for the defendant, Mr Cleary, dealt first with an allegation purportedly made by the plaintiff that the collective agreement fails to comply with s 57(1)(a) of the Act as well as s 57(1)(b)⁷ but, although s 57(1)(a) may have been in issue in the Authority investigation, it does not appear to have been raised in the proceeding in this Court either in the pleadings or submissions. For the record, however, I agree with counsel that the majority decision in the *Fire Service* case⁸ made it clear that it is not necessary for the alternative holiday to be specifically identified provided that provision is made for sufficient alternative days to compensate for any public holidays worked.

[25] Mr Cleary stressed as a “most fundamental” point the fact that “Holcim runs a 365 day a year business so, before any

roster is agreed, every day of the year is a potential working day.” In response to Ms McAra’s submission⁹ that there is no express agreement in cl 15.4 of the collective agreement that there is compliance with the Act, Mr Cleary submitted that such agreement is a necessary implication from the opening words of cl 15.4 which state, “In accordance with the provisions of the [Holidays Act 2003 ...](#)”.

[26] Mr Cleary referred to and relied upon the directions and guidance given in the majority judgment in the *Fire Service* case for determining compliance issues under the Act, in particular in determining what would otherwise be a working day under s 12 and the requirements of an alternative holiday under s 57. In relation to s 12, counsel referred to the following passage in the majority judgment:

[12] Whether a day would otherwise be a working day is an intensely practical question. In the first instance, employers and employees have to try to agree on the answer; s 12(2). And the factors they are bound to take into account are very open ended and flexible; s 12(3). ...

[27] Turning to s 57(1)(b), Mr Cleary cited the following passage from [22] of the majority judgment:

[22] With that background, we turn now to construe clause 2.7.1 of the collective agreement. It is clear from clause 2.7.1(b) that the 16-day slot was

⁷ At [9] above.

⁸ At [22].

intended to cover lieu days (if required) in circumstances where, in the previous 144 days, the firefighter had been required to work on one or more public holidays. Since 1991 and *Telecom*, any lieu day had to be taken on what otherwise would have been a working day: otherwise, it would not have met the statutory requirements of a lieu day, as interpreted in *Telecom*. A Monday to Friday worker could not have been told to work on the Queen’s Birthday and then to take the following Saturday off in lieu. So a firefighter’s lieu day under the 1991 Act had to be on what would otherwise have been a working day – and that means it would have had to be one of the

⁸ “working days” in the 16-day slot (days 1-5 and 9-13). Which one of those days it was did not matter under the 1991 Act. But the parties’ agreement under clause 2.7.1(b) that the agreement complied with the 1991

Act necessarily carried an implication that the lieu days were such of days

1-5 and 9-13 as were required for that purpose. The other “working days” (ie those not so required) and the “non-working days” within the 16-day slot

then counted towards the minimum 3 weeks’ annual leave.

[28] Mr Cleary did not dispute the fact that “there is no work expected on a time off day” but he submitted that the directions given in the majority judgment in the *Fire Service* case were binding, particularly in relation to the interpretation of ss 12 and 57 of the Act. Mr Cleary submitted that in the circumstances of this particular case:

22. ... it is clear that any day in the rostered time off would otherwise have been a working day because that is unambiguously what the parties have agreed and it is a reasonable and lawful agreement in the circumstances.

He further submitted that the agreement was lawful because that was the only way to

make the Act work. In counsel’s words:

23. ... An alternative holiday, for these employees, may not in a legal sense, be taken on board a vessel. That in turn has the effect of reducing the right to take an alternative holiday under the Act.

[29] Finally, Mr Cleary submitted, in the alternative, that if it was not accepted that the terms of cl 15.4 of the collective agreement had made it clear that any day in the rostered time off would otherwise have been a working day then, that conclusion could be drawn by applying the factors listed in s 12(3) of the Act in accordance with the directions given in the majority judgment in the *Fire Service* case. In this regard, counsel accepted that factor 12(3)(c)(iii) was not supportive of his submission but he stressed that the factors listed were not exhaustive and he highlighted “the legal impossibility of taking an alternative holiday at sea”.

Discussion

[30] The point made by Mr Cleary about the legal impossibility of taking an alternative holiday at sea is, in my view, a fundamental consideration. Clause 3.2 of the collective agreement provides that: “Each day served on a vessel including public holidays and weekends shall be a working day.” As was stated in the *Fire Service* case: “It is fundamental that a holiday for an employee represents time off work.” Mr McLeod accepted in his evidence that it was not an option for the officers to

take a holiday while on board the vessel. He agreed that operations require everyone who is on board a vessel to be available for work on board. The requirement in s 57(1)(b) of the Act for an alternative holiday to be provided on a day that would otherwise be a working day for the employee must be seen against that background.

[31] To overcome the practical problems resulting from the nature of the employment in this case, the parties entered into the arrangement recorded in cl 15.4 of the collective agreement whereby it was agreed that an alternative holiday under the Act would be deemed to have been taken in the next time off period. In other words, they have agreed in advance that the relevant day off will be counted as a paid alternative holiday. Ms McAra submitted that cl 15.4 is not as specific as the agreement in the *Fire Service* case in that it does not expressly record “that there is compliance with the relevant statute” but I agree with Mr Cleary that that is the obvious inference from the opening words: “In accordance with the provisions of the [Holidays Act 2003](#) ...”.

[32] Mr Cleary highlighted the observations made at [23] of the *Fire Service* case to the effect that if none of the days in the 16-day slot would have been a working day for the purposes of s 57 of the 2003 Act, then none of the days would have been a working day under the 1991 Act either which meant that cl 2.7.1(b) of the agreement in that case would not have complied with the 1991 Act as far as lieu days for public holidays was concerned. The Court of Appeal observed that such a state of affairs was contrary to the union’s agreement. I agree with Mr Cleary that those observations have equal application to the present case. The Court of Appeal stated

that:10 “Since 1991 and *Telecom* any lieu day had to be taken on what otherwise would have been a working day: otherwise, it would not have met the statutory requirements of a lieu day, as interpreted in *Telecom*.” In the present case, the comparable collective employment contract for the years 1993 to 1996 contained an almost identical provision to cl 15.411 save that the legislation referred to was the “[Holidays Act 1981](#)”, incorporating the 1991 amendment. Although I did not hear argument on the point, given the limited jurisdiction of this Court in relation to the making of declarations - see *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union*,¹² I would not consider it appropriate to make a declaration which could affect such a long-standing employment arrangement.

[33] For the reasons stated, I accept Mr Cleary’s primary submission that, “it is clear that any day in the rostered time off would otherwise have been a working day because that is unambiguously what the parties have agreed and it is a reasonable and lawful agreement in the circumstances.” In short, given the unusual circumstances of this case, that approach, as counsel expressed it: “is the only way to make the Act work.” Significantly Ms McAra did not proffer any other practical formula which, in the circumstances of this case, would allow for an alternative holiday to be taken on what otherwise would be a working day and there was no evidence which would have supported any other approach.

[34] I also agree with Mr Cleary that the same outcome would result if the factors listed in s 12(3) of the Act for determining what would otherwise be a working day were applied as directed in the *Fire Service* case. The s 12(3) factors have relevance only when it is not clear whether a day would otherwise be a working day for the employee. The Court of Appeal described the factors as “very open-ended and flexible”. It stated that whether a day would otherwise be a working day “is an intensely practical question.”¹³ With respect, that description appears to be entirely

apt to the factual circumstances in the present case. A “working day” for an officer is a day served on a vessel. The evidence clearly established, however, that it is not an option for an officer to take an alternative holiday on board a vessel at sea nor is it

a practical option to hold a vessel in port to allow an alternative holiday to be taken.

¹⁰ At [22].

¹¹ At [7] above.

¹² [\[2007\] NZEmpC 63](#); [\[2007\] ERNZ 405](#).

¹³ At [12].

In my view, the provisions in cl 15.4 of the collective agreement provide the only realistic and practical solution. I also record that, as in the *Fire Service* case, the total time off period for officers is generous in that it potentially provides more days’ leave than a particular officer might be entitled to by way of annual leave and alternative holidays.

[35] For the above stated reasons, the plaintiff’s claim for a declaration is dismissed.

[36] The plaintiff submitted that costs should lie where they fall but the defendant indicated that costs were sought. If that is still the position, and the parties are unable to reach agreement on the issue, then Mr Cleary is to file submissions within 28 days and Ms McAra will have a like period of time from the date of service in which to file submissions in response.

Judgment signed at 2.00 pm on 20 March 2013

NZLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)

URL: <http://www.nzlii.org/nz/cases/NZEmpC/2013/42.html>