IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 169
3030051

	BETWEEN	DES FLOWERS Applicant
	AND	ALLIED INVESTMENTS LIMITED trading as ALLIED SECURITY Respondent
Member of Authority:	Andrew Dallas	
Representatives:	Peter Cranney, counsel for the Applicant Ben Nevell, counsel for the Respondent	
Investigation Meeting	14 September 2018 at Dunedin	
Date of the Determination	21 November 2018	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Des Flowers is employed by Allied Investments Limited trading as Allied Security (Allied) as a security officer. He performs his duties at Fonterra's Edendale dairy factory in Southland.

[2] Mr Flowers and Allied entered into an individual employment agreement on 29 September 2016. The parties are now in dispute about public holidays, alternative holidays and, if Mr Flowers is successful, arrears of wages.

[3] Specifically, the parties' dispute arises in circumstances where shifts start on a day prior to a public holiday and finish on the public holiday. Mr Flowers says that time worked after midnight in such circumstances is work on public holiday and should be recognised and

paid as such, including the grant of a full alternative holiday. Allied disagrees and says the time worked on a public holiday in such circumstances is paid at ordinary time and does not attract an alternative holiday. The days in question are 1 January 2017 (New Year's Day) and 2 April 2018 (Easter Monday).

The Authority's investigation

[4] During the Authority's investigation meeting, I heard evidence from Des Flowers and Allied director, Damian Black.

[5] Having regard to s 174E of the Employment Relations Act 2000 while I have not referred to all the evidence received from witnesses or the submissions advanced by the representatives in this determination, I record that I have fully considered this material.

The respective positions of the parties

Mr Flowers

[6] Mr Flowers says he ought to be paid time and a half for working on a public holiday and also receive a full alternative holiday. Mr Flowers said the Holidays Act 2003 (the Act) required this unless there was a written agreement under s 44A (transferring part of a public holiday) or s 44B (transferring a whole public holiday) of the Act. Mr Flowers said no such agreement existed.

[7] Mr Flowers said cl 14.3 of his employment agreement was ineffective as a "written agreement" within this context, as it did not comply with the express requirements of s 44A or s 44B of the Act. This clause relevantly provides:

> 14 Public or Statutory Days
>
> ….
>
> 14.3 Transfer of a Public Holiday Clause
>
> The Employer and Employee agree to transfer the public holiday to accommodate the Employers operational hours. The transfer of a public holiday will occur either when

the shift starts on the public holiday and transfers into the non-public holiday or when the shift starts on a non-public holiday and moves into a public holiday.

Example:

Public holiday on a Monday: works shift Monday 7am to 7pm and Monday 7pm to Tuesday 7am may be treated as the 24hrs of the Public Holiday period. Further information on this can be found at www.legislation.govt.nz/act/public/2008

[8] Mr Flowers said what must be agreed in writing between the parties for the purposes of s 44(A)(2) of the Act is: (i) the part of the public holiday that is to be treated as not part of a public holiday and (ii) a period of 24 hours to be treated as a public holiday if the period is to start or finish during a day specified in s 44(1). Mr Flowers said for a whole day to be transferred, any written agreement would need to specify which public holiday is to be transferred: s 44B(2)(a)(i) of the Act; and the 24 hour period to which the public holiday is to be transferred: s 44B2(a)(ii).

Allied

[9] Allied said due to operational requirements if it could not transfer part of each public holiday so that it ran from 6am to 6am rather than midnight to midnight, it would have to pay two employees 6 hours at ordinary time and 6 hours at time and a half, and all three employees would also need to be provided with a full alternative holiday.

[10] Allied said these were the consequences s 44A and s 44B of the Act were designed to avoid. Allied said it had agreed with its employees that all public holidays run from 6am on the morning of the public holiday until 6am on the day following the public holiday. The effect of this in practice for Allied's above example is that two employees receive time and a half for their entire 12 hour shift and an alternative holiday. The third employee receives ordinary time and no alternative holiday because they did not work within the 24 hour period of the transferred public holiday (6am – 6am).

[11] Allied said the effect of cl 14.3 of the employment agreement is the parties agreed to transfer the public holiday where a "shift starts on the public holiday and transfers into the non-public holiday *or* when the shift starts on a non-public holiday and moves into a public holiday" (emphasis added). Allied also said the transfer arrangements are "clarified" in its leave applications and entitlements policy that the transfer arrangement only applies to the first limb of the stated conditions and not the second.

[12] Allied said the transfer agreement it had with its employees was not designed to avoid employee entitlements under the Act. Allied said while Mr Flowers has not received time and a half and an alternative holiday for working on Easter Sunday 2018, he did receive time and a half and an alternative holiday on Good Friday 2018 (which based on its transfer, ran from 6am on Good Friday to 6am the following day).

Evaluation

[13] I find the purported transfer agreement contained in cl 14.3 of Mr Flowers' employment agreement is ineffective for the purposes of either s 44A and/or s 44B of the Act.

[14] The essential reasoning behind this finding is that there is no written agreement between Allied and Mr Flowers which allows it to transfer public holidays in the way it currently practices. To the extent there is a purported agreement contained in Mr Flowers' employment agreement, this is deficient in several major respects.

[15] First, cl 14.3 does not constitute an entire written agreement. The clause references an internet link to the Act which, upon review, is no longer available. Within that context, no explanation is given as to whether the Act is incorporated into the clause or, even if is, how it is. Also based on Mr Black's evidence, Allied's leave policy unilaterally changed the written agreement reached in cl 14.3 by "clarifying" the transfer only relates to shifts which *start* on the public holiday and transfers into the non-public holiday. Further, as a consequence, the example given in the clause as to how cl 14.3 works in practice does not clearly or accurately reflect Allied's interpretation or, indeed, the operation of the clause.

[16] Second, cl 7 of Mr Flowers' employment agreement provides Allied is "entitled from time to time to amend, cancel or introduce such rules policies and procedures as it considers necessary". It is unarguable the leave policy is a policy that would fall within the ambit of this clause. Unilateral action of the kind envisaged by cl 7 does not constitute mutual agreement and would clearly not be a "written agreement" for the purposes of s 44A and s 44B of the Act.

[17] Third, for completeness, I accept Mr Flowers' submissions about what actually needs to be agreed in writing between the parties. For the purposes of s 44(A) of the Act, this is the identification of the part of the public holiday to be treated as not being part of a public holiday and the period of 24 hours that is to be treated as a holiday, if the period is to start or finish during a day specified in s 44(1). For the purposes of s 44(B), the identification of which public holiday is to be transferred and the 24 period to which the holiday is transferred to. Clause 14.3 of Mr Flowers' employment agreement effectively does none of these things.

Next steps

[18] The parties are directed to use their best endeavours to calculate Mr Flowers' arrears and alternative holiday shortfall – likely on the evidence to be two days – and submit these to the Authority for approval.

Costs

[19] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Mr Flowers has 28 days from the date of this determination in which to file and serve a memorandum on costs. Allied has a further 14 days in which to file and serve a memorandum in reply.

[20] 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.[1]

Andrew Dallas
Member of the Employment Relations Authority

[1] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.