Determination Number: CA 155/06
File Number: 5037221

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY OFFICE

BETWEEN	Gordon Holt (First Applicant) Rail & Maritime Transport Union Incorporated (Second Applicant)
AND	Toll NZ Consolidated Limited (Respondent)
REPRESENTATIVES	Geoff Davenport, counsel for the applicants Richard Harrison, counsel for the respondent
MEMBER OF AUTHORITY	Philip Cheyne
INVESTIGATION MEETING	Christchurch 9 October 2006
DATE OF DETERMINATION	14 November 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Gordon Holt works as a remote control operator for Toll NZ Consolidated Limited. Toll requires him and others to work in accordance with a roster that rotates through nine distinct weekly shift patterns to ensure staffing across its hours of operation. That means that Mr Holt sometimes works on the public holidays referred to in the applicable collective employment agreement and the Holidays Act 2003. When he does this, he becomes entitled to an alternative day off on pay. In September 2005, Mr Holt submitted a staff leave notification form to take an alternative holiday on Sunday 30 October 2005. The request was denied. Mr Holt seeks a determination to the effect that he has the right under the Holidays Act 2003 to determine when he will take an alternative holiday, and that Toll's refusal was unlawful and a breach of the Act and the collective employment agreement. Mr Holt seeks remedial orders treating him for leave and pay purposes as if he had taken an alternative holiday in accordance with his request. There are also claims for the imposition of penalties for alleged breaches of the Act and the collective agreement.

[2] In its statement in reply, Toll acknowledges that it refused to allow Mr Holt to take the day off as an alternative holiday but says that it has not breached the Holidays Act 2003 or the collective agreement. It says that there is a dispute between it, Mr Holt and his union (RMTU) and it poses several questions for the Authority to answer.

[3] At the beginning of the investigation meeting, counsel for Toll advised the Authority that Toll had taken several steps to remedy the pay and leave situation for Mr Holt but Toll still sought answers in respect of the dispute at the centre of this problem. In large measure, the concession makes it unnecessary to resolve the factual differences between the parties over what happened with Mr Holt's *staff leave notification* form. However, more should be said about what happened to give context to the conclusions in this determination.

[4] There are two distinct aspects to the problem. In part, it is about the proper interpretation of section 57 of the Holidays Act. The second aspect is a dispute about the interpretation, application or operation of clause 12.4 (ii) in the collective employment agreement. Its wording is similar but not identical to the Act. It will be helpful to set out the two provisions before turning to a fuller description of what happened after Mr Holt submitted his form.

The disputed provisions

[5] Section 57 is set out below:

> ***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) If an employer and employee cannot agree under subsection (1)(a) on when an alternative holiday is to be taken, then the day may be taken—*
> *(a) on a date determined by the employee, taking into account the employer's view as to when it is convenient for the employee to take the day; and*
> *(b) within 12 months of the employee's entitlement to the alternative holiday having arisen.*
> *(3) An employee must give an employer at least 14 days' notice of his or her intention to take the alternative holiday.*

[6] The relevant clause from the collective agreement is set out below:

> *12.4 It is recognised that the employer operates a year round business and in some divisions operates a 24/7 roster operation. As such you may be requested to work on a public holiday if you are rostered to work on that day. If you work on a public holiday:*
> *(i) you will receive double your Relevant Daily Pay …and*
> *(ii) if that day would otherwise be a working day, you will be granted an alternative day off on pay …to be taken on a day that is agreed with the employer, or if agreement cannot be reached within 12 months of the entitlement having arisen, at a time determined by you, taking into account the employer's view as to when it is convenient for you to take the alternative day off and with 14 days notice.*

[7] I turn now to an outline of events after Mr Holt submitted his leave notification form.

The response to Mr Holt's leave notification form

[8] Mr Holt filled out the leave form on 20 September 2005 and handed it in to the roster foreman, Dave Groves. Mr Groves had been instructed by his manger (Richard Priddle) to give alternative holiday requests for weekend days to him so he gave the form to Mr Priddle. The instruction had been issued by Mr Priddle because of his concern that there appeared to be a pattern of alternative holidays being taken at the weekend. This was a general concern, not specifically directed at Mr Holt. Alternative holiday days taken during a weekend rather than on a weekday result in extra cost to Toll. It also potentially upsets other employees who have to cover the shift. The roster rotation includes shifts marked *ASL*. The employees on *ASL* are used to cover absent staff. Overtime is also used sometimes.

[9] Mr Priddle says that he checked on his computer to ascertain that no *ASL* cover was available. Mr Priddle did not check with the roster foreman but there is no reason to doubt his evidence that he did check the computer information. Mr Priddle marked the *Not Granted* box

on the form and returned it to Mr Holt's pigeon hole on 20 September 2005. There is not exact agreement in the evidence about what else happened on 20 September but it is clear that Mr Holt initiated a discussion with Mr Priddle about the refusal and was told that it was not convenient as there was no *ASL* cover or something similar. A little later, Mr Holt had a second conversation with Mr Priddle who said that Mr Holt could not have the day off because of Labour weekend, that it was not convenient and that there was no *ASL* cover. Mr Holt says that he told Mr Priddle that it felt like he was playing God with his life and Mr Priddle said *that's right – that's who I* am. The exchange was heard by several others. Mr Priddle accepts in evidence that he may have said something of that sort. It perhaps sounds in the cold light of day more arrogant than was intended but it is clear that Mr Priddle thought the matter would end by managerial fiat.

[10] It did not. Mr Holt spoke with the RMTU industrial officer (Brian Cronin) who sent an email on 22 September 2005 to Mr Priddle quoting the Holidays Act 2003 and asking Mr Priddle to reconsider, grant the alternative holiday and get back to Mr Cronin. Mr Priddle's email in response quoted section 57(2) of the Holidays Act 2003, said that it was not convenient as all *ASL* cover was utilised and that alternatives had been offered. On 27 September 2005 Mr Cronin responded by email asking what alternatives had been offered. Mr Priddle did not respond. Mr Cronin sent a further email on 25 October 2005 but there was no response. Mr Priddle's evidence is that he was taking advice from head office and expected that they would follow up with Mr Cronin. It is not necessary to attribute responsibility for Toll's failure to contact Mr Cronin. He was entitled to receive a timely response. RMTU's solicitor was instructed and sent a first letter by fax on 31 October 2005.

[11] Early on during the email exchanges Mr Holt learnt that another employee had been allowed to take an alternative holiday on a Sunday at short notice. That reinforced his sense of grievance about the refusal. He spoke to the roster foreman who told him that there was *ASL* cover available for 30 October 2005. Mr Holt asked him to pencil in that person to cover his intended alternative holiday and went to speak to Mr Priddle again. He told Mr Priddle about the cover but Mr Priddle told him that he would not be getting the day off as an alternative holiday because of the additional costs involved. Later, Mr Holt was approached by another Toll manager who indicated that Mr Holt could have the day off on annual leave. Mr Holt insisted that he wanted the day as an alternative holiday but the manager insisted that it would only be granted as annual leave. Eventually, Mr Holt relented and applied for annual leave.

[12] In the event, Mr Holt was stood down from duty for a time which included 30 October 2005. It is not necessary to canvass the reasons for that.

[13] Toll and RMTU met to discuss this dispute, they exchanged respective legal opinions and also participated in mediation but were unable to resolve the specific issue for Mr Holt or the general issue about the proper interpretation and application of the Holidays Act 2003 and the provisions of the collective agreement.

Interpreting & Applying the Holidays Act 2003

[14] The staring point is the purpose of the Act as it relates to the current problem. Section 3 states that the Act's purpose is to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to public holidays for the observance of days of national, religious, or cultural significance. Following on, section 4 says that the Act replaces the Holidays Act 1981 and Part 2 confers minimum entitlements to public holidays. Subpart 3 of Part 2 deals with public holidays. Section 43

states that the purpose of Subpart 3 is to provide employees with an entitlement to 11 public holidays if they fall on days that would otherwise be working days for the employee; and to enable employees to agree to work on a public holiday in exchange for another day's paid leave.

[15] The provisions giving effect to these purposes relevant to the current problem are sections 56, 57 and 58 of the Act. There is no dispute that Mr Holt has worked in accordance with his employment agreement on various public holidays that fell on his working days. Accordingly, under section 56 (2) Toll must provide Mr Holt with alternative holidays. That entitlement remains in force until Mr Holt has taken the holiday. There is no dispute that Mr Holt had an entitlement to one or more alternative holidays when he put in his request.

[16] Section 58 deals with when an employee may be required by the employer to take an alternative holiday. It defines the only circumstance in which the employer may require an employee to take an alternative holiday on a date determined by the employer. It is common ground that this circumstance does not arise in the present matter. However, the use of the word *only* makes it clear that an employer cannot determine the date of an alternative holiday in any other circumstances. This meaning is plain from the words used and consistent with the purpose of the Act. I note also the conclusion of the Full Court in *New Zealand Professional Firefighters Union Inc v Chief Executive of the New Zealand Fire Service* [2005] 1 ERNZ 645 that the 2003 Act is more prescriptive and more directed to individual employee entitlements than was the former Act.

[17] Turning to section 57, subclause (1) provides that the alternative holiday must be taken on a day that is agreed between the employer and the employer while subclause (2) addresses what happens if the employer and the employee cannot agree. Logically, there must first be some communication between the employer and the employee to establish whether there is agreement about a date for the observance of the alternative holiday before the employee's entitlement to determine that date under subclause (2) arises. In the present case, Mr Holt completed and submitted Toll's leave request notification form. It was returned marked as declined. Mr Holt then sought reasons for that and subsequently involved his union. He cannot be criticised for these attempts to get his employer's agreement to the date for his alternative holiday. Toll was entitled to indicate its disagreement to the date proposed by Mr Holt but Mr Priddle took matters too far in his exchanges with Mr Holt on 20 September 2005 and subsequently. In any event, it is clear that by 20 September 2005 there was no agreement as to when Mr Holt would take his alternative holiday.

[18] For Toll, the crux of this dispute is whether it can refuse to allow an employee to take an alternative holiday to which s/he is otherwise entitled because of a failure by the employee to take account of the employer's view as to when it would be convenient for it to be taken. However, in the present case, Mr Holt's actions confirm that he did take into account his employer's view. He was told that there was no *ASL* cover and he investigated that assertion. As a result, he was able to establish that there was cover available.

[19] A second reason given by Toll to Mr Holt was the additional costs caused by the proposed date for the alternative holiday. In *New Zealand Engineering Printing and Manufacturing Union Inc v ACI Operations New Zealand Ltd* 29 June 2006, Colgan CJ, Travis & Couch JJ, AC 34/06 the employer argued that the extra cost of employees choosing to take alternative holidays on financially advantageous days (weekends in that case) mitigated in favour of some constraint on employees' rights under section 57 of the Act. In that case the employer required employees to take the oldest of their alternative holidays first which generally meant the employer could determine the date of the holiday under section 58. As a

result, the employer sometimes prevented employees taking alternative holidays at weekends, thereby minimising holiday costs. The full bench of the Employment Court understood the concern but held it was not for the Court to imply into the Act a constraint that was inconsistent with its plain meaning. The same reasoning applies here. Generally one would expect an employer to want to minimise the extra cost incurred by the employee's choice of day but that consideration cannot defeat the plain words of the Act. In the present case, Mr Holt did take into account the employer's view about cost but he still wanted to take the particular day for family reasons. The decision was his to make, not Toll's. In the end, it is for the employee to determine when they take the alternative holiday within 12 months of the entitlement provided they give at least 14 days notice.

[20] Toll argues that a determination by an employee about when they take an alternative holiday must be subject to reasonableness, as with any exercise of a statutory discretion. In that way, it is argued that there will be circumstances when it is unreasonable for the employee to take an alternative holiday such as when no cover is available, potentially giving rise to health and safety concerns for those left to work. A concept of administrative law, reasonableness is required of public authorities exercising a power of decision under statute. It is not a requirement imported into the dealings between two private individuals when one is exercising a right granted by statute. The argument is an attempt to put a gloss on the words of the statute which plainly give to the employee the right to determine in the first 12 months when to take any alternative holiday whether or not the employer considers the timing reasonable.

[21] Toll also argues that Mr Holt was obliged to disclose the reasons why he wanted to have his alternative holiday on the particular day. During the investigation meeting it was not difficult to suggest reasons why an employee might not want to disclose that information to his or her employer. Those reasons seem more or less compelling depending on your perspective. Not unlike the idea of reasonableness, it would raise the question of whose perspective should be adopted to judge the situation. However, there is no express or implied requirement in the Holidays Act 2003 for an employee to give reasons when determining when they will take an alternative holiday. It would be an unwarranted gloss on the plain words of the Act to import such a requirement.

[22] Finally Toll also asks if the employee, in the absence of agreement, must give notice of intention to take leave, invite the employer to respond and then give reasons for his or her decision taking into account any considerations put forward by the employer. The Act stipulates no particular process nor is there a requirement for written communications. It must be a question of fact in each situation whether the employee has given at least 14 days' notice of their intention to take an alternative holiday. In the present case, there is no doubt that Mr Holt gave substantially more than 14 days' notice of his intention. There is no obligation under the Act for the employee to give the employer reasons for his or her decision.

[23] I find that Toll failed to comply with the Holidays Act 2003 by not accepting that Mr Holt was entitled to take his alternative holiday on Sunday 30 October 2005.

Interpreting & applying the collective employment agreement

[24] There is an argument that the clause in the collective agreement extends the rights of an employee, empowering them to determine when they take an alternative holiday after 12 months from the entitlement arising. The necessary implication would be that the employer loses the right in section 58 of the Act to determine when older alternative holidays

are taken. Arguably, that enhancement of employees' rights is permitted under section 6 of the Act. The argument is created by the absence of a comma after *reached* and before *within*.

[25] When interpreting employment agreements, it is important to remember that often they are not drafted by lawyers and may not have been drafted with the precision of commercial contracts.

[26] If it is assumed for a moment that the clause enhances the rights of employees as argued, then what does the collective agreement say about taking alternative holidays within 12 months of the entitlement arising? It deals with taking alternative holidays on agreed days but does not specify what happens in the absence of agreement. Assuming the comma has been left out by mistake on the other hand means that the clause simply explains the provisions of the Act regarding how alternative holidays within the first 12 months of entitlement are to be taken: by agreement or as determined by the employee after taking into account the employer's view and with at least 14 days' notice.

[27] There is no reason to think that the drafters of the clause intended to create the ambiguity and partial reference to the Act that arises if the RMTU argument is accepted. Rather, ambiguity and illogicality are avoided if the clause is read as if there is a comma between *reached* and *within*. I find that the parties intended to do no more than describe the provisions of the Act as to when and how alternative holidays are to be taken within 12 months of the entitlement.

Remedies

[28] In his statement of problem, Mr Holt seeks the imposition on Toll of a penalty for breach of the Holidays Act 2003 and a further penalty for breach of the collective employment agreement arising from Toll's refusal to comply with the respective provisions regarding alternative holidays. The penalty provisions of the Holidays Act 2003 do not extend to non compliance with section 57 of the Act: see section 75 of the Act. However, there remains the failure to comply with the collective employment agreement.

[29] If things had continued on the expected course, the imposition of a penalty may have been an appropriate response. However, an unrelated intervening event several days before 30 October 2005 meant that Mr Holt was suspended for a period including 30 October 2005. Toll apparently deducted an annual leave day from Mr Holt's leave balance because, before the suspension, he had converted his alternative holiday request to an annual leave day request (at Toll's insistence) to ensure he could have the day off. Because of the suspension however, Mr Holt was not on annual leave nor was he on an alternative holiday. During the course of these proceedings, Toll remedied the pay and annual leave consequences for Mr Holt arising from its failure to recognise 30 October 2005 as his alternative holiday. In these circumstances, it is appropriate not to impose any penalty.

[30] As noted above, Mr Holt was entitled to determine 30 October 2005 as an alternative holiday despite Toll's view that this day was not convenient.

[31] Toll acted unlawfully in breach of the Holidays Act 2003 and the collective employment agreement in not recognising Mr Holt's right to determine 30 October 2005 as an alternative holiday.

[32] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority