



[3] Following the sale, Wendco registered a change of name to Lendco.

### *Previous Litigation*

[4] Wendco (as the entity was then known) has been a party to previous litigation before the Authority, involving similar legal issues to those before the Authority in this current matter.

[5] In 2017, the Authority determined a previous objection to an improvement notice.<sup>1</sup> That proceeding involved a dispute around determining what constituted an otherwise working day as it related to alternative holiday entitlements.

[6] In addition, in 2023, the Authority in *Unite Union Inc v Wendco (NZ) Limited*,<sup>2</sup> considered whether Christmas day was an otherwise working day, and the issue of the requirement for an employee to volunteer to work on a public holiday.

[7] Both previous matters involved a dispute around public holiday entitlements under the Holidays Act 2003 (the Holidays Act). This determination does not disturb the Authority's findings in either of these previous matters.

### *The improvement notice*

[8] Lendco was issued with an improvement notice by the Labour Inspector on 19 June 2024 (the improvement notice). The improvement notice set out that Lendco had breached ss 49, 50, 56 and 21 of the Holidays Act.

[9] The improvement notice records the nature and extent of Lendco's failures to comply:

#### **4. Nature & Extent of Failure**

4.1. The nature and extent of the employer's failure to comply with the provisions of employment legislation (as listed in section 2.1 of this notice) are:

4.1.1 The failure to pay public holidays that were not worked but were an [otherwise working day] affected [named employees A-D] and is likely to have affected other employees.

4.1.2. The failure to calculate and pay time-and-a-half for a public holiday worked affected one sampled employee and is likely to affect other employees who worked on Monday 4 January 2021.

4.1.3. The failure to provide an alternative holiday for a public holiday worked on an [otherwise working day] affected one sampled employee

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<sup>1</sup> *Wendco (NZ) Limited v A Labour Inspector* [2017] NZERA 199.

<sup>2</sup> *Unite Union Inc v Wendco (NZ) Limited* [2023] NZERA 218.

and is likely to affect other employees who worked on Monday 4 January 2021 for whom that day was an [otherwise working day].

- 4.1.4. The failure to calculate and pay annual holiday is based on the greater of [ordinary weekly pay] and [average weekly earnings] affected one employee and is likely to affect other employees who worked on a public holiday and were paid time-and-a-half within four weeks of taking annual holidays.

[10] The improvement notice also records the nature and extent of the loss suffered by employees as a result of Lendco's failures to comply:

### **5. Nature & Extent of Loss**

- 5.1. The nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provisions of employment legislation (as listed in section 2.1 of this notice) are:
- 5.1.1 [Named employees A-D] had been financially disadvantaged as a result of the employer's failure to assess [otherwise working days] correctly and the resulting failure to calculate and pay public holidays not worked.
- 5.1.2. Due to the employer's methodology for assessing an [otherwise working day] for public holidays not worked, the Inspector believes that other employees are likely to have been affected.
- 5.1.3. [Named employee C] has been financially disadvantaged as a result of the employer's failure to pay time-and-a-half for a public holiday worked.
- 5.1.4. [Named employee C] has been financially disadvantaged as a result the employer's failure to provide an alternative holiday for a public holiday worked that was an [otherwise working day].
- 5.1.5. The employer has acknowledged that the observance of the Day After New Year's Day 2021 had not been transferred to the following Monday (4 January 2021) for [Named employee C] due to the manual remediation of their public holiday entitlements. It is likely that other employees who worked Monday 4 January 2021 will have been similarly affected.
- 5.1.6. [Named employee B] has been financially disadvantaged as a result of the employer's failure to correctly calculate and pay annual holidays at a rate that is the greater of [ordinary weekly pay] and [average weekly earnings].
- 5.1.7. The employer has acknowledged that their payroll system did not include the half portion of time-and-a-half when calculating [ordinary weekly pay] for the purposes of annual holiday pay. It is likely that other employees will have been similarly affected.

[11] Lendco accepted that it had breached ss 21 and 50 of the Holidays Act, and advised it would take steps to review and where necessary, remediate any found breach of these sections of the Holidays Act.

[12] The employment relationship problem under consideration in this matter arises because Lendco does not accept it has breached ss 49 and 56 of the Holiday Act.

[13] The improvement notice provided a specific remediation process:

#### **6. Steps to comply**

- 6.1. the steps that the employer must take to comply with the provisions of the employment legislation (as listed in section 2.1 of this notice) are:
  - 6.1.1. Review the wages and time records and holiday and leave records for all current and former employees employed going back six years from the date that this improvement notice is issued (the “remediation period”) and identify all unworked public holidays. Determine whether each public holiday fell on a day that would otherwise have been a working day for each employee, using the factors set out in the individual employment agreement but excluding the requirement for the employee to “volunteer” to work on the public holiday. For the avoidance of doubt, this review must include all Christmas Days during the remediation period.
  - 6.1.2. Calculate and pay all affected current and former employees for public holidays which were not worked but were an [otherwise working day] at a rate that is not less than the employee’s [relevant daily pay] or [average daily pay].
  - 6.1.3. Where applicable, update all affected current and former employees’ holiday and leave records to show that they have been paid their public holiday entitlements, including the date and payment for all unworked public holidays, in accordance with section 49 of the [Holidays Act].
  - 6.1.4. Review the wages and time records and holiday and leave records for all current and former employees and determine whether Saturday, 1 January 2021 (New Year’s Day public holiday) was an [otherwise working day]. If Saturday was not an [otherwise working day], transfer observance of the public holiday to Monday 4 January 2021 in accordance with section 45 of the [Holidays Act]. Identify any employees who worked on Monday 4 January 2021 and who were not paid time-and-a-half for the actual hours worked.

[14] Lendco objects to clauses 6.1.1 to 6.1.4 of the improvement notice, as set out above.

#### **Different types of employment agreements**

[15] Lendco says that the majority of its workforce is employed under individual employment agreements. Lendco says that this cohort is able to decline rostered shifts.

[16] A small portion (Lendco says approximately 20 per cent) of the workforce is employed under a collective agreement with Unite Union. Under the collective agreement, once the roster is posted, an employee cannot decline a shift.

[17] In addition, Lendco says that about 15 per cent of its workforce is employed as shift supervisors and managers. These roles attract additional obligations, and therefore have different terms and conditions.

[18] This proceeding requires the Authority to interpret certain provisions of the Holidays Act. The provisions of the Holidays Act considered under this determination apply universally, irrespective of the type of employment agreement entered into by the parties.

### **The Authority's investigation**

[19] For the Authority's investigation, a written witness statement was lodged by Danielle Lendich, former chief executive officer of Wendco, and current director of Lendco. Ms Lendich also lodged a comprehensive witness statement in reply.

[20] A witness statement was lodged by Angela Vaai, the Labour Inspector.

[21] Under oath or affirmation, both Ms Lendich and Ms Vaai gave extensive evidence at the investigation meeting.

[22] After the investigation meeting had concluded, both parties lodged written submissions in accordance with timetable directions. In addition, submissions in reply were lodged on behalf of Lendco.

[23] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received from the parties, but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

[24] The Authority has carefully considered all the material provided.

### **Objection to improvement notice**

[25] Under s 223E of the Act, an employer may lodge with the Authority, an objection to an improvement notice.

[26] Section 223E of the Act provides:

- (2) The function of the Authority in respect of an objection is to determine-
  - (a) whether the employer is failing, or has failed, to comply with the specified provision of the relevant acts; and
  - (b) the nature and extent of the employer's failure to comply with the provision; and
  - (c) the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).

- (3) The Authority may confirm, vary, or rescind the improvement notice as the Authority thinks fit.

### **The issues**

[27] the issues for investigation and determination are:

- (a) whether, under s 223E(3) of the Act, a variation should be made to the 19 June 2024 improvement notice issued by the Labour Inspector, rescinding the steps to comply set out under clauses 6.1.1 to 6.1.4 (as set out above)?
- (b) Whether a finding should be made that Lendco has met its obligations under ss 49 and 56 of the Holidays Act?
- (c) Should either party be required to contribute to the other's costs?

### **Relevant provisions of the Holidays Act**

#### *Otherwise working day*

[28] Section 12 of the Holidays Act provides:

- (1) This section applies for the purpose of determining an employee's entitlements to a public holiday, an alternative holiday, to sick leave, to bereavement leave, or to family violence 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 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 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, an alternative holiday, or a day on which the employee was on sick leave or bereavement leave for family violence leave, the employee would have worked on the day concerned.
- (3A) If the public holiday, alternative holiday, or day on which the employee was on sick leave or family violence leave falls during a closedown period, the factors listed in subsection (3) must be taken into account as if the closedown period were not in effect.

- (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.

*Public holiday not worked*

[29] Section 49 of the Holidays Act provides:

**Payment if the employee does not work on public holiday**

If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay or average daily pay for that day.

*Alternative holiday*

[30] Section 56 of the Holidays Act provides:

**Alternative holiday must be provided if the employee works on public holiday**

- (1) An employee is entitled to another day's holiday (an alternative holiday) instead of a public holiday if-
- (a) the public holiday falls on a day that would otherwise be a working day for any employee; and
  - (b) the employee works (in accordance with his or her employment agreement) on any part of that day.
- (2) If subsection (1) applies, an employer must-
- (a) provide the employee with an alternative holiday; and
  - (b) pay the employee for working on the public holiday in accordance with section 50.
- (3) The entitlement to an alternative holiday remains in force until-
- (a) the employee has taken the holiday; or
  - (b) the employee has been paid for the holiday in accordance with section 60(2) or section 61.
- (4) An employee is not entitled to an alternative holiday under this section if the employee works for the employer only on public holidays.

[31] Determining whether a day would otherwise be a working day is an "intensely practical question",<sup>3</sup> and that what is required is for each public holiday to be looked at separately in light of the work patterns around it.<sup>4</sup>

**Key areas of dispute**

[32] This matter largely arises from two key areas of dispute; the requirement for an employee to 'volunteer' to work on a public holiday, and the issue of whether Christmas

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<sup>3</sup> *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* CA270/05, 21 December 2006 at [12].

<sup>4</sup> *Murdoch v Labour Inspector* [2008] ERNZ 38 at [59].

Day is an otherwise working day for any employee.

## **Volunteering**

### *Agreed working times*

[33] Ms Lendich's evidence is that:

At the outset of employment all employees are required to specify the days and times when they are available to be rostered for work. Agreed working times are settled by the parties at the commencement of employment... There would be no expectation from either party that employees would work on a day that is not within their agreed working times. If the employee has not volunteered (agreed that they are available to be rostered) there would be no expectation that the employee would work on the day concerned.

[34] The effect of the agreed working times is that an employee cannot be rostered to work outside of this agreed period.

[35] In respect of determining whether a public holiday was an otherwise working day (and therefore whether an employee was to be paid for a public holiday on which he or she did not work), the agreed working times are material. As the Authority observed in *Unite Union*,<sup>5</sup>

... the public holiday had to fall within the employee's Agreed Working Hours at the time it occurred. If it did not, then it was clearly not an otherwise working day for the employee.

### *Volunteering to work on a public holiday*

[36] Ms Lendich's evidence is that it does not require 'crew' employees to work on public holidays. Instead, these employees are required to indicate whether they are available to be rostered for a particular public holiday. Ms Lendich says that this "... became known as "volunteering" because like with other additional hours we wanted to emphasise that this was entirely voluntary". Employees 'volunteer' to work on specific shifts on particular public holidays, via Kronos, Lendco's rostering platform.

[37] An example of an individual employment agreement provided by Lendco includes the following provisions:

17.1 ...Employees are only required the work on a public holiday if they have volunteered and have been rostered to work on a public holiday.

...

17.4 If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer will pay the employee the employee's relevant or average a pay for that day. It

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<sup>5</sup> Above n 2, at [91].

is agreed that determination of what would otherwise be a working day will be based on all the factors set out in section 12(3) of the [Holidays] Act, including whether the employee volunteered to work on the day, whether a pattern of work had arisen because the employee had worked for more than 50% of the same day in the previous 13 weeks or if worked for the company for less than 13 weeks more than 50% of the time worked or worked on the same day as a public holiday in each of the previous 5 preceding weeks and whether an expectation had formed that the employee would have worked today had the day not been a public holiday.

[38] For employees employed under earlier employment agreements, their agreement may not have contained such a clause, but the requirement for a “volunteer Sheet” to be signed, as the Labour Inspector submits, has the same operational effect.

[39] In addition, by a memorandum to all staff dated 6 December 2021, Lendco advised under its Public Holidays Policy, the determination of an otherwise working day would be “... based on all the factors set out in section 12(3) of the Holidays Act, including whether the employee volunteered to work the day...”

[40] The Court of Appeal has held that a contract of employment may comprise terms arising from a number of different sources, and that the written employment agreement is never the entire source of contractually binding terms.<sup>6</sup> Lendco’s 6 December 2021 memorandum became a term of employment for all employees.

[41] A public holiday therefore displaces the parties’ prior agreement under the agreed working times. No employee is required to work on a public holiday, regardless of their agreed working times, unless they have volunteered to work the particular public holiday, and have actually been rostered to work it.

[42] The Labour Inspector submits that the requirement for an employee to volunteer for a shift before it can be considered an otherwise working day is a contractual provision that excludes, restricts or reduces the entitlement to be paid for an otherwise working day under sections 49 and 56 of the Holidays Act, and should be regarded as of no effect (under s 6(3) of the Holidays Act).

[43] In response to questions from the Authority at the investigation meeting, Ms Lendich’s evidence was that in terms of determining whether a public holiday not worked (PHNW) was an otherwise working day for a crew member, Lendco would start by looking at whether the employee had volunteered to work the public holiday, or if they

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<sup>6</sup> *Metropolitan Glass & Glazing v Labour Inspector* [2021] NZCA 560 at [26].

had declined the shift. If an employee had not made themselves available to work via the volunteering process, Lendco would determine that the public holiday was not an otherwise working day for the employee.

[44] Ms Lendich also confirmed that employees who declined or swapped a rostered shift on the day of a public holiday, or failed to show up for a rostered shift on a public holiday were also removed from consideration for a PHNW.

[45] Requiring employees to “volunteer” to work on a public holiday in order to be eligible for payment for a PHNW, excludes all employees who do not volunteer. The Labour Inspector submits that this contravenes the purpose of section 49, which entitles an employee to paid time off regardless of their willingness or availability to work on the public holiday in question. Nothing in s 49 conditions the entitlement on the employee agreeing or being available to work.

[46] I accept this submission.

[47] Lendco submits that in assessing an *otherwise working day* for the purposes of PHNW, availability is a determinative factor, and volunteering is a component of availability. Lendco further submits that the requirement to volunteer does not represent a restriction outside of the factors provided for under s 12(3) of the Holidays Act (the s 12(3) factors).

[48] I do not accept this submission.

[49] Under Lendco’s approach, the only way an affected employee can get a paid day off for a public holiday, is to first volunteer to work on the public holiday, and then hope they will not be rostered to work the particular public holiday.

[50] The illogical nature of this approach is obvious.

[51] In addition, this approach is inconsistent with the purpose of the Holidays Act, being (inter alia) to provide employees with minimum entitlements to public holidays (including as to payment).<sup>7</sup> The Court of Appeal has held that:<sup>8</sup>

The plain intention of the [Holidays] Act was to provide to employees who had not worked on a public holiday or while taking bereavement leave or sick leave, a statutory entitlement to a minimum daily sum based on the pay the

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<sup>7</sup> Holidays Act 2003, ss 3(b) and 46(1).

<sup>8</sup> *Postal Workers Union of Aotearoa Inc v New Zealand Post Limited* [2012] NZCA 481 at [27].

employee would otherwise have received if he or she had worked on the day or days concerned.

[52] As the Authority found in *Unite Union*:<sup>9</sup>

whether or not an employee has volunteered to work on a public holiday was irrelevant to the assessment of whether or not public holiday would otherwise have been a working day for the employee.

If the employee normally worked that particular day, and if they would have likely worked that same day had it not been a public holiday, then it will otherwise be a working day for the employee. It is therefore the work pattern that is decisive of that question, not whether the employee had volunteered to work on a particular public holiday.

[53] Lendco submits that Parliament did not create an entitlement to 12 paid public holidays when it introduced the Holidays Act. A public holiday is only paid, if the day is an otherwise working day. I accept this submission. However, the requirement for an employee to volunteer (in Lendco's assessment of an otherwise working day), is an unnecessary and additional threshold not contemplated by the Holidays Act, and not required under the s 12(3) factors.

[54] There is no requirement for volunteering under the s 12(3) factors. For Lendco to unilaterally include such a requirement in its assessment of an *otherwise working day* is inconsistent with s 12 of the Holidays Act. Such a requirement can only exclude, restrict, or reduce an employee's entitlements under the Holidays Act, and therefore under s 6(3)(a), any such arrangement is of no effect.

[55] Lendco has not complied with the provisions of s 12 of the Holidays Act, and its requirement for employees to volunteer suggests a systemic inconsistency with its statutory obligations.

### **Christmas day**

[56] Lendco says that none of its Wendy's restaurants open on Christmas Day. This is not treated as a closedown period,<sup>10</sup> and employees are not required to take annual leave for this day.

*If it is not clear whether a day would otherwise be a working day*

[57] Under s 12(2) of the Holidays Act, if it is not clear whether a day would otherwise be a working day, the employer and employee must take into account the s 12(3) factors

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<sup>9</sup> Above n 2, at [95] and [96].

<sup>10</sup> Section 29.

with a view to reaching agreement on the matter.

[58] Lendco submits that because none of its Wendy's restaurants are open on Christmas day, this day is "... treated as an exception to all work expectations...". Lendco submits that no employee could have an expectation, regardless of the day on which Christmas Day fell, that they would have worked on 25 December, as its stores do not open on this day, and that therefore it is clear that this day is not an otherwise working day.

[59] Lendco submits that the s 12(3) factors are therefore not relevant, as it clear that Christmas day is not an otherwise working day.

[60] Lendco further submits that s 12 of the Holidays Act refers to *day* rather than *calendar day*. Lendco submits that to interpret *day* as meaning *calendar day* restricts its meaning, and that the meaning of *day* in s 49 must include Christmas day. Consequently, Lendco submits that if *day* was interpreted to mean *Christmas day*, then it is clear that *Christmas day* is not an otherwise working day.

[61] I do not accept this submission.

[62] I accept the submission for the Labour Inspector, that under s 12(2) of the Holidays Act, all that is required is a consideration of whether, but for the *day in question* being a public holiday, the employee would have worked that day.

[63] I note that under s 5(1) of the Holidays Act, if there is a written agreement under s 44A (transferring part of a public holiday), the definition of public holiday "includes a calendar day...". Lendco's employment agreements do contain a provision under s 44A. As such, in the context of determining if it is clear whether a day would otherwise be a working day, the interpretation of *day* as meaning *calendar day* is not completely strained, as submitted by Lendco. Rather, the concept of a *calendar day* is included under the meaning of a *public holiday*.

#### *Shop Trading Hours Act 1990*

[64] Under the Shop Trading Hours Act 1990 (the Shop Trading Hours Act), the general rule is that all shops are to be closed on Christmas Day.<sup>11</sup> Section 4 of the Shop Trading Hours Act provides an exemption for shops selling prepared or cooked food

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<sup>11</sup> Shop Trading Hours Act 1990, s 3.

ready to be eaten.<sup>12</sup> Under this exemption, the Wendy's restaurants could open. The decision not to open the restaurants on Christmas Day is therefore a business decision Lendco has made, as it is entitled to do.

[65] However, this business decision by Lendco not to open its restaurants is not the decision of the employees who work at these restaurants. Lendco could open its restaurants, but chooses not to.

[66] In this regard Lendco's position is no different from the significant number of other New Zealand businesses that do not open on public holidays.

[67] Under Lendco's approach, a business could decide not to open on any of the 12 public holidays (as is the case for a significant number of New Zealand businesses). Following Lendco's approach, it would be clear these public holidays were not otherwise working days, and therefore none of its employees could have an expectation of working on these days. Under this approach, no employees of this business would ever receive payment for a public holiday.

[68] The erroneous aspect of such an approach is obvious.

[69] Parties cannot contract out of the Holidays Act. Entitlements under the Holidays Act are minimum entitlements.<sup>13</sup> Under s 49 of the Holidays Act, if the day was an otherwise working day, an employee is entitled to be paid for a PHNW. An employer cannot avoid its obligations to pay employees for a PHNW by deciding not to open its stores on a public holiday.

*Reasonable expectation of work if contractual hours met on other days of the week*

[70] Lendco submits that employees are not disadvantaged by not receiving a PHNW if their shifts are rostered around the public holiday. In one example, Lendco says a particular employee was not disadvantaged by not receiving a PHNW for Christmas Day in 2022, because he was still rostered for five shifts that week.

[71] The Labour Inspector submits that this approach is inconsistent with the purpose of the Holidays Act, which is to promote balance between work and other aspects of an

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<sup>12</sup> Section 4(1)(b)(iii).

<sup>13</sup> Holidays Act 2003, s 6(1).

employee's life. The Labour Inspector submits that an employee does not gain balance between work and other aspects of their life by having to work an extra day, just to put themselves in the same financial position they would have been in had they been provided the minimum entitlement of a PHNW.

[72] I accept this submission. In *Unite Union*, the Authority noted that minimum rights and entitlements (to a PHNW) cannot be 'rostered' away.<sup>14</sup> In that matter, the Authority also determined that whether or not an employee had worked their individual guaranteed hours in a week in which a public holiday occurred, was not a factor relevant to the assessment of whether a public holiday would otherwise be a working day. That approach is apposite.

[73] An employee's work pattern will be relevant in determining whether a PHNW would have been an otherwise working day, not whether Lendco's own rostering software had not allocated the employee a shift on the public holiday, or had rostered the employee's shifts around the PHNW (and in doing so had avoided paying a statutory entitlement).

#### *Volunteering and Christmas Day*

[74] The Labour Inspector submits that in respect of Christmas Day, the mischief of using volunteering as a threshold requirement for the assessment of an otherwise working day, becomes clear. As all Wendy's restaurants are closed on this day, nobody can volunteer to work. Lendco says that on the basis of this, Christmas Day cannot be an otherwise working day for any employee, and no employee could have an expectation of working on Christmas Day.

[75] I accept this submission. Lendco's approach suggests it is trying to 'have it both ways'. It has adopted a requirement that in order to be paid for a PHNW an employee must first volunteer to work on the public holiday (in this case Christmas Day), but at the same time has taken the business decision to close all its restaurants on Christmas day, meaning that it is impossible for any employee to volunteer to work on this day.

[76] Even if unintentional, such an approach can only be seen as excluding, restricting or reducing an employee's statutory entitlements, and is therefore inconsistent with the purpose of the Holidays Act, and the public holidays provisions, as set out in ss 3 and 43.

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<sup>14</sup> Above n 2, at [115].

## **Lendco's obligations under ss 49 and 56 of the Holidays Act**

[77] Lendco seeks a finding that it has met its obligations under ss 49 and 56 of the Holidays Act.

### *Section 49*

[78] As set out above, Lendco's requirement for an employee to volunteer excludes, restricts or reduces entitlements under the Holidays Act. The effect of which is that Lendco's determination of whether a day was an otherwise working day is inconsistent with the Holidays Act.

[79] To this extent, Lendco cannot be said to have met its obligations under s 49 of the Holidays Act, rather it has failed to comply.

### *Section 56*

[80] Under s 56 of the Holidays Act, Lendco must provide an alternative holiday to an employee that works on a public holiday that would otherwise be a working day.

[81] Having found that Lendco's assessment of an otherwise working day is deficient, the Authority cannot make a finding that Lendco has complied with s 56. This section also requires an assessment of an otherwise working day, and Lendco's approach to this assessment is inconsistent with the Holidays Act. The Authority declines to make a determination that Lendco has complied with its obligations under s 56 of the Holidays Act.

## **The nature and extent of found breaches**

[82] Under s 223E(2)(b) and (c) of the Act, the Authority is required to determine the nature and extent of an employer's failure to comply with a specified provision, and the nature and extent of any loss suffered by any employee as a result of the failure to comply with the specified provision (or provisions).

[83] For the Labour Inspector, it is submitted that it would not be practicable for the Authority to engage in an arithmetical assessment of the nature and extent of each employee's loss. Instead, the Labour Inspector submits that the Authority would sufficiently discharge its functions under s 223E(2) of the Act if it were to determine, as a matter of law, whether Lendco's approach to determining otherwise working days has

led to a failure to correctly calculate and pay worked public holidays and PHNW in the terms set out under the improvement notice.

[84] The deficiencies identified above have led to a failure to correctly calculate and pay worked and unworked public holidays, as recorded at clauses 4.1 and 5.1 of the improvement notice, as set out above at [9] and [10].

### **Outcome**

[85] For the above reasons, Lendco's application for a variation to the improvement notice (rescinding the steps to comply set out in 6.1.1 to 6.1.4 of the improvement notice) is declined.

[86] The improvement notice is confirmed in its entirety.

### **Direction to mediation**

[87] The parties are directed to attend mediation.

[88] Having confirmed the improvement notice, I consider further mediation is appropriate, in order that the parties attempt to reach agreement on all outstanding matters, including as to the required remediation.

### **Additional determinations sought**

[89] In its reply submissions, Lendco (for the first time) sought various additional determinations. Lendco sought that the Authority determine how an otherwise working day should be determined in a situation in which:

- (a) an employee was rostered to work on a public holiday but declined the shift;
- (b) an employee was rostered to work but was a "no-show";
- (c) where an employee swapped a rostered shift;
- (d) where an employee had requested a period of time off from being rostered, including over a public holiday.

[90] Such matters cannot properly be raised for the first time in submissions in reply. These matters could have been included Lendco's statement of problem (or in an amended statement of problem) so that the Labour Inspector was provided with the opportunity to respond, and if required, provide evidence or submissions as to these matters.

[91] Lendco's request for these additional determinations is declined. However, as set out above, the parties are directed to attend mediation in respect of issues arising from the improvement notice. The parties are free to discuss the additional issues set out at [89] at mediation.

### **Costs**

[92] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[93] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the Labour Inspector may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Lendco will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[94] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>15</sup>

Jeremy Lynch  
Member of the Employment Relations Authority

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<sup>15</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)