

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN New Zealand Engineering Printing and Manufacturers Union
(Applicant)

AND ACI New Zealand Limited (Respondent)

REPRESENTATIVES G Pollak, counsel for Applicant
D Mackinnon, counsel for Respondent

MEMBER OF AUTHORITY R A Monaghan

DATE OF DETERMINATION 31 January 2006

DETERMINATION OF THE AUTHORITY

[1] The New Zealand Engineering, Printing and Manufacturers Union (“EPMU”) seeks various orders that ACI New Zealand Limited (“ACI”) comply with the Holidays Act 2003.

[2] ACI has applied pursuant to s 178 of the Employment Relations Act 2000 for an order for the removal of the entire matter to the Employment Court. Counsel for the EPMU filed a response to that application, in effect agreeing that removal to the court was appropriate. This determination addresses the application for removal.

Facts underlying the application for removal

[3] ACI and the EPMU are parties to a collective employment agreement (“the agreement”) which commenced on 1 March 2003 and expires on 28 February 2006.

[4] The first area of dispute between the parties concerns the entitlements to sick and domestic leave of certain shift workers. ACI’s operations run on a 24 hour day, 7 day week basis. Some staff work on a Monday – Friday day shift while others work 12 hour shifts on a 4 days on, 4 days off roster. The agreement, negotiated when the Holidays Act 1981 (“the 1981 Act”) was in force, provided employees on the 12 hour shifts with four days’ sick leave per annum and a further two days’ domestic leave when a spouse or dependent child was sick. Bereavement leave was provided for separately. All of this leave was for 12 hours per day.

[5] The Holidays Act 2003 (“the 2003 Act”), which came into force during the term of the agreement, provided for 5 days’ sick leave per annum, inclusive of what I refer to as domestic leave available when a spouse or dependent is sick or injured. Bereavement leave was provided for separately. In response to the coming into force of the 2003 Act ACI provides its 12 hour shift employees with what it says are the exact entitlements under the Act, namely 5 days of sick leave plus one additional day (based on the four days’ sick leave plus two days’ domestic leave provided for in the agreement) as well as bereavement leave - all at 12 hours per day. The EPMU says ACI must also provide the two days of domestic leave under the agreement.

[6] The second area of dispute between the parties concerns the taking of alternative holidays by employees who have worked on a public holiday, in terms of the entitlements in the 2003 Act. The dispute focuses on circumstances where employees have large numbers of accrued alternative holidays and where more than 12 months have passed since the entitlement to at least some of those alternative holidays arose.

[7] ACI says it received advice from the Department of Labour that:

- (a) the employer can determine when alternative holidays can be taken if 12 months have passed since the employee's entitlement has arisen, no agreement has been reached on the date on which the holiday will be taken, and the employer has given the required notice; and
- (b) if an employee wishes to take an alternative holiday on the basis of a public holiday worked within the last 12 months, and the employer wishes the employee to use an alternative holiday more than 12 months old, it is reasonable for the employer to require that the oldest accrued day be used first ("the chronological approach"). If no agreement can be reached, the employer decides.

[8] ACI says it has adopted the chronological approach.

[9] However the EPMU has taken the view that the 2003 Act created two categories of leave; leave that has accrued in the current year (category A), and leave that has accrued more than a year earlier (category B). The EPMU says employees can insist on taking category A leave even if they have category B leave accrued, and even if the employer wishes them to use up their category B leave first.

Grounds of application for removal

[10] Both parties agreed that at least two questions of law arise in respect of the foregoing, that the issues directly affect the public interest and that they require urgent resolution. The questions have not been precisely identified, rather have been described as follows.

1. Sick leave and domestic leave

[11] Section 90 of the 2003 Act retains entitlements to special leave arising under the 1981 Act but not taken, and says the entitlements must be treated as if they were sick leave to which the employee is entitled under subpart 4 of Part 2 of the 2003 Act. If the parties' agreement separated the special leave entitlements under the 1981 Act into entitlements to personal sickness, domestic leave and bereavement leave, while subpart 4 Part 2 created entitlements to sick leave (inclusive of domestic leave) and bereavement leave, does all of this mean:

- (a) ACI is obliged to continue to meet the obligation in the agreement to provide domestic leave in addition to the sick leave it says it is providing under the 2003 Act; or
- (b) ACI is correct in combining as 'sick leave' for the purposes of its obligations under the 2003 Act both the sick leave and domestic leave entitlements from the agreement, so there is no further entitlement to domestic leave?

2. Alternative holidays

[12] Sections 57 and 58 of the 2003 Act set out a procedure by which an employer and an employee determine when an alternative holiday is to be taken, with s 57(2) setting out the right of an employee to determine when the holiday is to be taken in the event the parties cannot agree. Section 57(2)(b) provides for the chosen day to be taken "within 12 months of the employee's entitlement to

the alternative holiday having arisen". Section 58 sets out the right of an employer to require an employee to take an alternative holiday on a date determined by it, when the parties have been unable to agree. The employer may do so only if, among other things, "12 months have passed since the employee's entitlement to the alternative holiday arose". The parties agree it is not clear what is to occur if an employee and employer cannot agree on the timing for an alternative holiday and, -

- . the employer wishes the employee to utilise an alternative holiday based on an entitlement arising more than 12 months earlier, while
- . the employee wishes to utilise an entitlement arising within the last 12 months.

[13] More specifically is ACI entitled to apply the chronological approach it has been applying, and require the oldest accrued day to be used first?

Conclusion

[14] I accept that these matters raise important questions of law other than incidentally, that it is in the public interest that the case be removed to the Employment Court, and that in all of the circumstances the court should determine it.

[15] I therefore order the removal of the entire employment relationship problem to the Court.

Costs

[16] Costs are reserved. If either party seeks an order from the Authority in respect of costs they should file and serve a memorandum on the matter within 28 days of the date of this determination. The other party may have a further 7 days from receipt of the memorandum in which to file and serve a reply.

R A Monaghan
Member, Employment Relations Authority