ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION REFERRED TO IN THIS DETERMINATION

IN THE EMPLOYMENT RELATIONS AUTHORITY

WELLINGTON

WA 139A /09

File Number: 5280319

	BETWEEN	KiwiRail Limited Applicant
	AND	Maritime Union of New Zealand First Respondent
	AND	New Zealand Merchant Service Guild Industrial Union of Workers Inc Second Respondent
	AND	Aviation and Marine Engineers Association Inc Third Respondent
Member of Authority:	Denis Asher	
Representatives:	Michael Quigg & Tim Sissons for the Company Peter Cranney for the first and third respondents and Helen McAra for the second respondent	
Investigation Meeting	Wellington, 23 September 2009	
Submissions	By 29 September 2009	
Determination:	29 September 2009	

DETERMINATION OF THE AUTHORITY

The Problem

[1] In my determination dated 18 September 2009 I declined the Company's application for urgent removal to the Employment Court (WA 139/09).

[2] Consistent with the agreed urgent nature of this problem the parties undertook an investigation on 23 September and agreed also to the timetabling for submissions and the date of the Authority's determination as set out above.

Background

[3] It is useful to repeat the summary of the Company's position as set out in the 18 September determination:

[4] The Company operates three Cook Strait ferries.

[5] As a result of economic downturn the Company has experienced a significant reduction in freight volumes. Relevant financial information had been provided in respect of which the Company seeks – and is granted – an ongoing prohibition of publication order.

[6] Many of the Company's employees have considerable annual holiday balances.

[7] Since May 2009 the Company has been consulting with the respondents about temporarily either withdrawing the Arahura from service or reducing the number of sailings undertaken by that vessel.

[8] A reduced sailing schedule for Arahura is of considerable financial significance as it would reduce up to 2.7 employees for each position on the vessel to instead a very small crew.

[9] The Company decided to reduce the number of sailings undertaken by the Arahura during the winter of 2009. Because of the seasonal nature of the Company's business this arrangement would need to cease by November.

[10] By letters dated 1 September the Company wrote to those members of the three respondents who are employed on Arahura seeking their agreement to take annual holidays as part of the reduction in the number of Arahura sailings. They have withheld their agreement.

[11] The Company now asks that the Authority determine the following:

Applicant's Current Position Summarised

[12] The Company has eight issues:

Issue One

What do sections 18 (3) and 19 (1) (a) of the Holidays Act require in terms of employer and employee attempting to reach agreement as to when the employee will take his or her annual holidays?

[13] Section 18 (3) provides:

When annual holidays are to be taken by the employee is to be agreed between the employer and employee.

[14] Section 19 (1) provides:

An employer may require an employee to take annual holidays if-

(a) the employer and employee are unable to reach agreement under section 18 (3) as to when the employee will take his or her annual holidays …

[15] Section 18 (3) must be read as subject to section 19.

[16] What is required is that the employer and employee attempt to agree.

[17] The Holidays Act provides no procedure by which parties should attempt to agree. What is required is that they must make some effort to reach agreement.

[18] In assessing whether the parties were unable to reach agreement the Authority should consider the full history of their discussions on the issue.

Issue Two

Can the requirements of sections 18 (3) and 19 (1) (a) of the Holidays Act be satisfied by an employer attempting to reach agreement with its employees via those employees' union representatives?

[19] Under section 236 of the Employment Relations Act where the Holidays Act confers on any employee the right to do anything or take any action in respect of an employer, the employee may choose any other person to represent the employee for the purpose.

[20] Because sections 18 and 19 of the Holidays Act confer rights on an employee an employer can satisfy those sections by attempting to reach agreement with their authorised representatives, the affected employees themselves or both.

Issue Three

Did the applicant through:

(i) its communications with the affected employees;

(ii) its communications with the affected employees' union representatives; or

(iii) both

satisfy the requirements of sections 18 and 19 of the Holidays Act?

[21] The Company raised a possible reduction of Arahura sailings with its employees and by letter dated 29 May 2009.

[22] Between 29 May and 12 August the Company attempted in various meetings to reach agreement with the unions on the issue of crew members taking annual holidays during the reduction of Arahura sailings.

[23] The Company wrote to the unions on 12 August setting out the relevant details including the reasons for the arrangements, the envisaged duration and proposed new timetable, the fact that crew would need to take 4 days' leave per 14 days cycle and what would happen for crew who lacked sufficient leave.

[24] The Company then met with the unions to discuss the issue but no agreement was reached.

[25] The Company again wrote to the affected crew members by letter dated 1 September: it allowed them to agree to the proposal, disagree or indicate when they would prefer to take leave. Only 3 replies to 18 letters were received; none of the replies agreed with the proposal.

[26] Unable to reach agreement with the employees either collectively or individually the Company by letter dated 7 September required the affected employees to take annual leave and thereby complied with the requirements of sections 18 and 19 of the Holidays Act.

Issue Four

Where an employer has either:

(i) in the preceding 12 months allowed an employee to take at least 2 weeks of his or her annual holidays entitlement in a continuous period (and the employee has done so); or

(ii) allowed that employee to retain a sufficient annual holidays entitlement so that he or she will be able to take at least 2 weeks' holidays in a continuous period

is the employer entitled to require (by way of s 19 (3) of the Holidays Act) that employee to take annual holidays?

[27] Section 18 (2) provides:

If an employee elects to do so, the employer must allow the employee to take at least 2 weeks of his or her annual holidays entitlement in a continuous period.

[28] The entitlement to 2 weeks' annual holidays in a continuous period is an annual one.

[29] The affected employees have a number of different dates on which their annual holiday entitlements arise.

[30] The Company only requires an employee to take annual holidays if:

- in the previous 12 months that person had taken at least 2 weeks' annual holidays in a continuous period; or

- the employee had a sufficient annual holiday entitlement so as to be able to take at least 2 weeks' annual holidays in a continuous period at the end of the reduction of Arahura sailings; and

- the employee has taken at least 2 weeks' annual holidays in a continuous period since the employee's entitlement to annual holidays last arose; or

- the employee has a sufficient annual holiday entitlement so as to be able to take at least 2 weeks' annual holidays in a continuous period at the end of the reduction of Arahura sailings and before the employee's next entitlement to annual holidays will arise.

[31] As the Company has only required those employees who meet the criteria set out in par 29 above it was entitled to require by way of section 19 of the Holidays Act those employees to take annual holidays.

Issue Five

Under the relevant collective agreements is the applicant entitled to require its employees to take annual holidays in periods of less than one roster cycle (i.e. 14 days)?

[32] None of the collective agreements states any minimum period in which annual holidays must be taken and nor does the Holiday Act. The collective agreements allow for the Company to require its employees to take annual holidays (cl 8.2 of each CA). The Holidays Act and CAs therefore allow for annual holidays on a piecemeal basis.

[33] The employees covered by the three CAs take annual holidays in periods of less than one roster cycle: they can therefore do the same at the employer's direction.

Issue Six

What is the effect of clause 8.1.2 and the words "In addition to the time on and time off days" *in clause 8.2 in each of the collective agreements?*

[34] The Unions have stated that the collective agreements contain agreed rosters and that annual leave is in addition to time on and time off, which is rostered

on a 7 on, 7 off cycle and that the Company is attempting to unilaterally change the agreed contractual roster by unlawfully imposing compulsory annual leave.

[35] Clauses 8.1.2 of the MUNZ CA, 8.1.2 and 8.1.3 of the MSG CA and 8.1.3 and 8.1.4 of the AMEA CAs set out breakdowns of the yearly roster cycle: they variously refer to *"time off"*, *"days clear of the vessel"*, *"time off"*, *"work"* and *"days off"* in setting out a breakdown of each year.

[36] The Company's roster cycle (as set out in the CAs) for the relevant employees is a 7 days on, 7 days off arrangement. This means that every day is notionally a time on or time off day.

[37] The CAs cannot be read literally as they contemplate all of each employee's annual holiday balance being used each year and this does not occur. And even if each employee's annual holiday balance was used each year the breakdown does not fit with a 7 days on, 7 days off roster as the number of days on and days off is different and for some employees that difference is too large to accommodated without more than one on cycle in a row. On a perpetual cycle the exact breakdown of on/off days would need to change from year to year as each year will begin at a different time in the roster cycle. Finally, the breakdowns do not take into account sick/domestic, long service, special or training leave.

[38] Despite the strict wording of the clauses referred to above annual holidays cannot literally be 'in addition to time on and time off' as every day is either rostered time on or time off for each affected employee.

[39] If the Unions were correct in their assertion then employees taking annual holidays at their own request would also be varying the rosters and would therefore need both the Company and relevant union's agreement.

[40] The breakdown provisions in the CAs have never operated in practice; employees are employed on a 7 days on 7 days off roster but may take annual leave as an overlay to that roster; and employees take leave in varying amounts and not only in 7 day blocks.

[41] In *Jinkinson* v *Oceana Gold (NZ) Limited*, unreported, CC 9/09, Couch J, 13 August 2009, the Employment Court found the arrangement described in the agreement to have been abandoned in favour of an ongoing employment relationship, and *" … the real nature of the relationship between the parties as evidenced by their conduct was essentially different in nature to what was described in the*(ir) *agreement and fundamentally inconsistent with it. The effect of the parties' conduct, therefore, was to rescind the original agreement and replace it … . Formal requirements which may be necessary to enter into a contract or* (vary) *it do not prevent it being rescinded by … conduct*".

[42] There is therefore no breach of the CAs rostering provisions.

Issue Seven

Does the Company's requirement:

(i) *…*

(ii) *by way of its direction that the 'changeover date' be altered*

constitute a breach of the rostering requirements set out in the CAs?

[43] An alteration to the changeover date is not a breach of the rostering clauses as long as a 7 on 7 off pattern is maintained.

[44] Changeover dates have drifted in the past, without the Company's agreement.

[45] Many of the affected crew live outside Wellington or Picton and fly in and out at their own expense at the beginning and end of each 7 day time on period: the reason for the Company's alteration of the changeover date was to avoid inconveniencing crew members by requiring them to take annual holidays in the middle of a time on period.

[46] The Company's annual holidays requirement and direction that the changeover date be altered do not constitute a breach of the rostering requirements of the CAs.

Issue Eight

Has the Company provided sufficient notice under the Holidays Act and CAs of the requirement to take annual holidays?

[47] The Company's requirements as regards annual holidays were apparent to its employees from either its 12 August or 1 September letters or both, and its 7 September letter.

[48] The date on which the first annual holidays were required to be taken has since been deferred, so as to allow discussion with the Unions and as a result of their representative's availability with regard to filing submissions with the Authority.

[49] The first annual holidays will now be required to be taken on Saturday 3 October: that is more than 21 days after 7 September.

[50] The deferrals did not change the pattern by which leave was to be taken and do no invalidate the Company's requirements in respect of any other periods of annual holidays; they should not be found to invalidate the requirement that is the subject of this dispute.

[51] The Company has complied with the notice requirements of the Holidays Act and CAs.

Company's Conclusion

[52] The Company's initiative is in response to today's economic climate.

[53] Both the Holidays Act and the CAs allow the Company to direct its employees to take annual holidays.

[54] The effect on employees is significantly less than options such as redundancies and is moderate by the fact of employees having considerable annual holiday balances.

[55] The proposal is not a surprise to crew members or their Unions, whereas the response of the latter has been limited.

[56] A decision by the Authority is now required in a situation where the Company has behaved appropriately and is entitled under the Holidays Act and the CAs to require directed annual leave.

Respondents' Joint Position Summarised

[57] The respondents agree that the issues for the Authority are whether the Company breached sections 18 & 19 of the Holidays Act in requiring its employees to take annual holidays, and whether the Company requiring the respondents' members to take annual holidays in the manner proposed constitutes a breach and/or unilateral variation of the collective agreements.

[58] The ability to require an employee to take annual holidays is only available to an employer when there has been an unsuccessful attempt to reach agreement with an employee. The Company has not made any genuine attempt to reach agreement in this case.

[59] The Company's letter purporting to give employees notice of the requirement to take annual holidays breached the Holidays Act and the collective agreements. It was withdrawn in any event and cannot now be relied on.

[60] The 7 days on 7 days off roster is a condition of the respondents' members' CAs and the Company's annual leave proposal would change that roster. The parties to the CAs do not agree to any such change.

[61] Requiring the taking of annual leave in regular weekly two day lots constitutes an intention to (unilaterally) vary the existing CAs and also breaches for many employees the two week requirements of the Holiday Act (s 18).

[62] The letter of 7 September 2009 to individual employees advised the dates on which the different crews were to take annual holidays.

[63] The last par of the letter states:

> *The purpose of this letter is to formally notify you that* ***notwithstanding any response you may have made****, you will be required to take leave as indicated above, and that* ***you have received notice*** *as provided by the relevant provisions of your Collective Agreements.*
>
> (emphasis added)

[64] In other words, it was unknown and immaterial whether or not any employee had agreed or not to the earlier letter, but that the Company was proceeding along a predetermined path of varying the roster and deducting leave.

[65] The Holidays Act is a piece of social legislation that was adopted for the protection of employees and not for the convenience of employers. Goddard CJ held in *Whaanga* v *Cityline (New Zealand) Ltd* [2001] ERN 222 that the Act *"should be construed liberally in favour of employees"*.

[66] The Company is attempting to use its employees' annual holiday entitlements as a means of introducing a change to the contractual roster pattern. It is elementary law that any variation to a term of employment requires both parties' agreement. Commercial necessity does not justify a unilateral variation: see *Niao & Anor* v *Tasman Pulp & Paper Co Ltd* [1999] 2 ERNZ 805.

Respondents' Conclusion

[67] The Company has not complied with the Holidays Act in purporting to require its employees to take annual leave. The Company cannot say it is unable to reach agreement with employees because it never tried to. What it did instead amounts to a failed attempt to negotiate a roster change.

[68] The Company has not acted in good faith and is in breach of the Holidays Act.

[69] The Company is not entitled to unilaterally impose its proposal on employees, and to do so would amount to a breach of the collective agreements and members' conditions of employment.

Discussion and Findings

[70] Despite the applicant setting out eight separate issues, and in the interest of meeting the urgency of this matter, and because I am satisfied there is an appropriate sword to this knot, I am satisfied I can determine this problem in the following manner having regard to the primacy of the Holidays Act:

[71] Put at its simplest, the Company is seeking to have most of the crew of Arahura take outstanding annual leave at the same time so that it can derive the economic benefit of laying up their vessel.

[72] Section 18 (3) of the Holidays Act requires that it is to be agreed between the employer and the employee when annual holidays are to be taken by the employee.

[73] No direct evidence on this matter has been provided the Authority by either party but it can be fairly read into the respondents' common position that a significant percentage of their members are opposed to taking annual leave at the time and in the manner proposed by the Company.

[74] Section 18 (4) of the Holidays Act requires an employer to not unreasonably withhold consent to an employee's request to take annual holidays.

[75] Section 19 of the Holidays Act provides that an employer may require an employee to take annual holidays if agreement is not forthcoming under s 18 (3) or if s. 32 (closedown periods) applies. The latter is not argued in this case.

[76] I have to speculate that in this case, but in the absence of direct evidence other than that implied by the respondents' common position, that a significant percentage of crew wish to take their leave or some of it on dates other than those proposed by the Company. Why they wish to do so is similarly unclear, as is whether their request is unreasonable or not.

[77] While it is the Company that is initiating a leave proposal, it follows from ss. 18 (4) that the applicant must not unreasonably withhold consent to an employee effectively seeking leave at another time. The primary reason for the Company declining their preference is an economic one, i.e. the benefit of laying up Arahura. A secondary reason is a wish to reduce *"some crew members … considerable leave stockpiles"* (par 20 applicant's submissions of 29 September). Both are genuine and significant reasons and warrant fair consideration by the respondents and their members.

[78] But, as the legislation makes clear, the onus lies on an employer not unreasonably withholding consent to an employees' request to take annual

leave. Notwithstanding the lack of individualised explanations for their (apparently) collective refusal, I can only conclude the Company's proposals as reflected above must fail given the statutory test set out in ss. 18 (4) of the Holidays Act. That is because a fair and reasonable employer would test each individual's position before assuming an across the board directive as set out in the Company's letter of 7 September. That instruction states, *"notwithstanding any response you may have made, you will be required to take leave as indicated"*. In the absence of evidence of clear, one on one communication between the Company and individual crew, and notwithstanding the Company's efforts to date to trigger dialogue (by way of earlier, individual letters to crew members dated 1 September seeking their response) I am satisfied that direction breaches the clear obligation implied by the Holidays Act to measure each individuals request and not unreasonably withhold consent (in this case to their declining to take leave at a time nominated by their employer).

[79] Put another way, I am not confident the Company can rely on its communications to date to say, on a balance of probabilities basis, that it has met its statutory obligation to consult with each crew member in respect of the latter's request to take annual holidays and has taken account of the reasons for their request in coming to a decision to reject that request.

[80] Two observations are appropriate: it is deeply disturbing to hear uncontested evidence from the Company that some of its employees have outstanding leave entitlements of 50 to 200 + days: while separate to the matter for determination by the Authority these figures may suggest significant issues of health and safety in respect of both employees and travelling members of the public. A question of the parties meeting their affirmative duty to actively manage staff/members' statutory entitlement arises. To that end I accept the Company's claim its initiative was also prompted by the desire to reduce considerable leave stockpiles.

[81] Secondly, the Company has legitimate economic reason to attempt to make savings: the respondents' members' interests lie in working cooperatively with the Company in respect of what is sooner or later a mutual problem, not least because of the significance of s. 19 of the Holidays Act and the relevant provisions in the respondents' members' collective stipulating the Company, after consultation, can direct when annual leave is to be taken.

Determination

[82] The Company's proposal has not complied with the Holidays Act and it thereby fails.

[83] I repeat what is set out in par 5 above: the financial information provided by the Company continues to be prohibited from publication: Clause 10 (2) of Schedule 2 of the Employment Relations Act 2000 applied.

[84] Costs are reserved.

Denis Asher
Member of the Employment Relations Authority