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**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 139/09

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: On the papers, Wellington, 18 September 2009

Submissions: On the day

Determination: 18 September 2009

DETERMINATION OF THE AUTHORITY: Application for Urgent Removal

The Problem

- [1] By way of an application filed on 11 September 2009 the Company said the problem it wanted resolved, by urgent referral to the Employment Court, was a dispute between it and the respondents as to the interpretation, application and operation of the relevant collective agreements and the Holidays Act 2003 in relation to the Company's requirement that some of its employees take annual holidays.
- [2] The purpose of filing the proceedings on 11 September was that of providing the Authority with the earliest possible notice of the dispute while the parties were in the meantime proceeding to meet with one another and undertake mediation in respect of the dispute.
- [3] Mediation on 17 September did not resolve the problem. An amended statement of problem was filed on the same day.
- [4] No statements in reply have yet been filed by the respondents.
- [5] By prior agreement, a conference call of the parties was convened this morning. Following discussion during which the respondents expressed their opposition to the matter being referred to the Employment Court it was agreed that, before the Authority issued a determination in respect of the application, the Company would file its submissions by 11.00 a.m. today and the respondents would reciprocate by 2.00 p.m.

Applicant's Position Summarised

- [6] The Company operates three Cook Strait ferries.
- [7] 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 – a prohibition of publication order.
- [8] Many of the Company's employees have considerable annual holiday balances.

- [9] 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.
- [10] 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.
- [11] 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.
- [12] 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. I note here that it is not clear what their replies if any were but assume they withheld their agreement.
- [13] The Company only requires those employees who have taken 2 weeks' annual holidays in the last 12 months and who have sufficient annual holiday balances to take annual holidays (par 1.15 of the applicant's 18 September submissions; I note that the word "not" may be missing, i.e. "*those employees who have **not** taken 2 weeks ...*").
- [14] By letters dated 7 September the Company wrote to those members of the three respondents who are employed on Arahura requiring them to take annual holidays on specified dates.
- [15] The applicant's initial requirement was for annual holidays to be taken from 12 September for the departing crew and 14 September for the replacement crew: the proceedings before the Authority and the hope of resolving matters at mediation delayed that requirement by a week.
- [16] The first and second respondents have claimed that the Company can not, in accordance with the relevant collective agreements and the Holidays Act, require its employees to take annual holidays as required by the letters of 7 September.

- [17] The Company seeks a declaration that it was entitled in accordance with the three collective agreements and the Holidays Act to require its employees to take annual holidays as set out in the letters of 7 September.
- [18] The Company seeks urgent removal of this matter to the Employment Court under ss 178 (2) (a), (b) and (d) of the Employment Relations Act 2000. The grounds are:

Important Questions of Law

- [19] The issues as to the collective agreements and the Holidays Act are of considerable complexity.
- [20] The important questions of law that are likely to arise in this matter relate to the three applicable collective agreements, the Holidays Act and the relationship between that statute and those agreements. The questions of law centre on what the Company understands to be the respondents' key contention that it is not able to require their members to take annual leave on a 'piecemeal' basis. The Company understands the respondents' position is that this is an issue that has implications beyond the parties.

Public Interest

- [21] The nature and urgency of the matter that mean that it is in the public interest that it be removed immediately to the Court is: that the changed sailing schedule is dependent on the Company's requirement its Arahura employees take leave; the changed sailing schedule is needed as soon as possible; the Company and its employees need certainty as to the operation of the applicant's ferries' services; uncertainty as to the Company's ability to introduce a changed sailing schedule may mean its employees do not follow the applicant's direction thereby disrupting sailing and inconveniencing the travelling passengers and freight; the changed sailing schedule can not be delayed due to the seasonal variations of the Company's business and the costs to the Company of being unable to proceed with the changed sailing schedule are very significant.
- [22] Other maritime collective agreements contain similar arrangements.

- [23] If the first and third respondents' contention that the collective agreements do not allow the Company to direct that annual holidays be taken then it and other employers bound by collective agreements with similar terms will be severely limited in the circumstances in which employees can be directed to take annual holidays.
- [24] There is therefore a public interest in a ruling by the Employment Court on this matter.

In all the Circumstances

- [25] The circumstances that mean the Court should determine the matter are the significant financial circumstances of the Company, the affect on the working arrangements of a considerable number of employees and the affect on a service of considerable significance to the New Zealand public.
- [26] Given the significance of this issue for the parties a decision of the Authority's is likely to be appealed: it is in the parties' interests that a final decision be reached as soon as possible.
- [27] It is highly unlikely the Court would order the return of the proceedings to the Authority.

Respondents' Position Summarised

- [28] The Holidays Act allows an employee to take at least two weeks annual holiday entitlement in a continuous period: s 18 (2).
- [29] When the holiday is to be taken is to be agreed between the employer and employee: s 18 (3).
- [30] An employer must not unreasonably withhold consent to an employee's request to take annual holidays: s 18 (4).
- [31] The employer may require an employee to take annual leave only if agreement is not reached under s 18 (3): s 19

- [32] Fourteen days notice by an employer of its requirement an employee take annual leave is mandatory: s 19 (2).
- [33] No agreement has been reached in this instance between the employer and the employee per s 18 (3).
- [34] The Company's letters of 7 September make it clear it reached a decision regardless of any input from employees.
- [35] Notice by the company to employees was for many less than the 14 days required by the Holidays Act and the relevant employment agreements (one of which requires 3 weeks' notice).
- [36] If the Company wishes to compel its employees to take leave it must first comply with the statutory requirements summarised above. In the meantime it has unilaterally and unlawfully set its own requirements for annual leave.
- [37] There can be no mandatory annual leave next week because the law prohibits its imposition.
- [38] The employment agreements binding on the Company contain agreed rosters, comprising 7 days on and 7 days off. They also provide that annual leave is in addition to rostered days on and off. The provision to alter the roster pattern requires mutual agreement: there is no agreement by the respondents to change existing rosters.
- [39] There is no urgency as the Company cannot require any employee to take annual leave until at least 14 days hence. Employees will continue to comply with their rostered 7 days on and 7 days off.
- [40] There are no clearly articulated grounds for removal to the Employment Court. Complexity is not a ground for removal in the Act. The matter is not beyond the Authority's grasp and the claimed complexity is any way denied. There is no evidence of any general importance.
- [41] The respondents do not want to be difficult (but) it is the Company that has left this litigation to the very last minute. It may be that, as a result, it has not articulated its issues as clearly as it could have. The Company should file its

substantive evidence and argument as soon as possible so that the question of removal can then be properly dealt with.

Discussion and Findings

[42] I am not persuaded there is an important question of law contained in this application other than incidentally.

[43] The concerns raised by the Company while no doubt grounded in financial reality are not clearly particularised or made out as important questions of law as envisaged for removal to the Court.

[44] I am also not persuaded the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court.

[45] Given the Company's stated intention to require employees to start taking leave from this weekend I am also not confident that the Court could, given the late hour of this application (and notwithstanding the commendable speed with which the parties have responded following today's scheduled conference call) meaningfully address the problem. With all respect to the applicant, the urgency appears to be entirely of its making.

[46] Given the matrix of the Holidays Act and three collective agreements, and the unilateral, across the board approach adopted by the Company rather than the individual employee/employer dealings envisaged of the Holidays Act, I am satisfied that this matter would be best dealt with in the first instance by way of a measured but urgent Authority investigation: I am available on an urgent basis (and no doubt other Authority Members also) as soon as 21 September or other dates shortly thereafter.

Determination

[47] The Company's application for urgent removal is declined.

[48] I repeat what is set out in par 7 above: the financial information provided by the Company is prohibited from publication: Clause 10 (2) of Schedule 2 of the Employment Relations Act 2000 applied.

[49] Costs are reserved.

Denis Asher
Member of the Employment Relations Authority