

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 252/10
5293516

BETWEEN NEW ZEALAND MAORI ARTS
 & CRAFTS INSTITUTE t/a TE
 PUIA
 Applicant

AND NATIONAL DISTRIBUTION
 UNION

AND NORTHERN AMALGAMATED
 WORKERS UNION
 INCORPORATED
 Respondents

Member of Authority: G J Wood

Representatives: Ken Raureti for the Applicant
 Clare Abaffy for the Respondents

Investigation Meeting: 20 May 2010 at Rotorua

Determination: 25 May 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a dispute about the interpretation of the parties' collective employment agreement. It relates to whether or not the applicant (Te Puia) can require the respondents' (the unions) members to work on public holidays other than Christmas Day.

The Facts

[2] Te Puia runs the Maori Arts & Crafts Institute, which is primarily a tourism business. Accordingly, it operates 365 days a year. Staff are required to be rostered

on each day. Traditionally, Te Puia has allowed staff to decide, if rostered to work on public holidays, whether they wish to work or not. However, for sound commercial reasons, due to a national and international downturn in the tourist trade, it decided last year that this situation could not continue. It believes it has the right under the parties' collective agreement, now expired, to require employees, if a public holiday falls on a normal rostered working day, to work those days, except on Christmas Day. It gave its staff several months' notice of this change, which was to take effect from Christmas/New Year 2009/2010. The unions have consistently advocated that Te Puia could not require staff to work on public holidays.

[3] Matters came to a head after Christmas 2009 when two National Distribution Union members failed to attend work on days they claim were public holidays. As well as instituting disciplinary proceedings (now properly abandoned by Te Puia because of the genuine nature of the dispute that led to the disciplinary proceedings), it also docked the workers' pay for those days. Te Puia accepts that if its interpretation of the agreement is wrong, then the workers will need to be paid for any unpaid public holidays.

[4] The matter falls to be determined on an interpretation of the collective employment agreement and the provisions of the Holidays Act 2003. The relevant portions of the collective agreement include the following:

12 *Hours of work*

- (a) *The employer's business is open every day of the year. Hours of opening are determined by trading patterns, public and school holidays, daylight saving, tour parties, and other sales and marketing criteria. The employer's operation requires different and flexible hours of activity and the availability of employees.*
- (b) *The employer shall set up a roster of ordinary working hours of each employee. This roster may change from time to time according to the needs of the business. Except in cases of sickness, accident, absentee or by agreement of the employee, the employer shall give seven days notice to employees of any change to the roster. Any interchange of shifts shall only be with prior approval of the employer...*

19 *Public holidays*

- (a) *Unless the employer and the employee otherwise agree, the following days shall be granted as whole*

holidays where they fall on days that would otherwise be a working day for the employee:

*Christmas Day
Boxing Day
New Year's Day
The second day of January
Good Friday
Easter Monday
Anzac Day
Labour Day
The birthday of the reigning sovereign
Waitangi Day
The day of the anniversary of the province*

- (b) *No employee shall be required to work on Christmas Day.*
- (c) *These holidays shall be observed on the day on which they fall.*
- (d) *Where the employee does not work on any of the days specified in subclause (a) above (it being a day that would otherwise be a working day for the employee), then the employee shall be paid at the relevant daily rate.*
- (e) *With the exception of Christmas Day employees who work on any of the days specified in subclause (a) above shall be paid at a rate of time and one half at the relevant daily pay for each hour worked. The employee shall also be allowed a whole day off, as an alternative day, to be taken at a time mutually agreed between the employer and the employee, regardless of whether the day worked was an ordinary day of work for the employee or not. For work carried out on Christmas Day employees shall be paid at double time rates of pay and shall be entitled to an alternative paid day as set above.*
- (f) *The provision of a whole paid day off as an alternative day, for work performed on any of the days specified in subclause (a) above shall be an agreement pursuant to the Holidays Act 2003 and those days shall be recognised as the employee's holiday.*

[5] Section 6 of the Holidays Act 2003 effectively provides for no contracting out of the Act. Section 45 of the Act covers the transfer of public holidays. Section 47 of the Act provides:

An employer may require an employee to work on a public holiday if

—

- (a) *The public holiday falls on a day on which, but for it being a public holiday, would otherwise be a working day for the employee; and*
- (b) *The employee is required to work on a public holiday under the employee's employment agreement.*

Analysis

[6] The parties have negotiated collective arrangements for many years. The clause relating to public holidays has changed little over that time. Clause 19(b), concerning employees not being required to work on Christmas Day, can be traced back at least to a composite agreement registered in 1988. Te Puia has not, however, attempted to require its staff to work on other public holidays until the last Christmas/New Year period.

[7] The requirements under the Holidays Act have, however, significantly changed over that time and the parties must be deemed to have negotiated in full knowledge of the legislative arrangements at the time their agreements were reached. In this case, therefore, those relevant provisions in the Holidays Act set out above form part of the matrix of the parties' wider employment agreement.

[8] In essence, Te Puia claims that it can be implied from clause 19(b) that it can require employees to work on public holidays other than Christmas Day. It also claims that this is consistent with clause 12, which covers its operation being open every day of the year and the requirement for employees to undertake different and flexible hours of activity, and be available for work accordingly. Similarly, such an interpretation is consistent with its right of rostering and the arrangements made for employees who do or not work on public holidays, whereby employees working on Christmas Day are paid more than those working on other public holidays.

[9] By contrast, the unions claim that the key provision is in clause 19(a), which provides for the granting of whole holidays for each day that would otherwise be a working day unless the employer and the employee agree otherwise. The unions submit that this clearly indicates that a worker's agreement is required in respect of all public holidays and not just Christmas Day. Clause 19(b) is seen as just an historical anomaly, with no significant effect except to show how sacrosanct Christmas Day is. It also notes that clause 12(b) only allows an employer to set up a roster of ordinary

working hours and that public holidays are not ordinary working days or ordinary working hours.

[10] Furthermore, the unions point to s.47 of the Holidays Act, which only allows employers to require employees to work on public holidays if the employees' employment agreements so provide. It is submitted that clause 19(a) does not so require, but indeed the reverse.

[11] The unions therefore submit that to accept Te Puia's interpretation would be to read down clause 19(a) in its requirement for the parties' agreement over any change to the granting of whole holidays where public holidays would otherwise be working days. The unions also note that clauses 19(d), (e) and (f) can just as easily be interpreted to support arrangements where employees choose to work public holidays. The importance of Christmas Day is specifically acknowledged in clause 19(b).

[12] In conclusion, it is submitted that the Authority should prefer to accept an interpretation that does not require any need for terms to be accepted by implication, rather than to do so and read down the clear wording of clause 19(a).

[13] Clearly, this is a genuine dispute and hence Te Puia's reference of the dispute to the Authority was entirely proper, especially given that the unions had undertaken to do so in the course of the disciplinary process, but had never done so. Similarly, it was entirely appropriate for Te Puia to accept that the disciplinary proceedings be put on hold, as well as to not pursue action against any employees for conduct over past public holidays, whatever the Authority's determination.

[14] The parties' employment agreement needs clearer wording. Clause 19(a) simply does not sit well with clause 19(b). It is as a matter of determining which is to be given priority. I conclude that clause 19(a) can not be read down by implication of clause 19(b) for the following reasons.

[15] The Holidays Act cannot be contracted out and it provides that an employer may only require an employee to work on a public holiday if the employee is required to do so under the employee's employment agreement. *Required* is a very strong term and therefore one would expect that issue to be clearly provided for under the employment agreement, rather than by implication.

[16] Clause 19(a) of the employment agreement does clearly provide that the employees will be granted public holidays as whole holidays, unless there is agreement to the contrary. There is no agreement to the contrary. Rather, this is something that can only be implied by the absence of reference to the other public holidays than Christmas Day in clause 19(b). Such an absence of wording does not provide a requirement for employees to work on public holidays other than Christmas Day when set against the clear wording of clause 19(a).

[17] Clause 19(b) is not without effect under the unions' interpretation, in the sense that it provides the justification for greater payments for that work in clause 19(e). Finally, clauses 19(d) to (f) are equally effective whether or not they relate to workers who choose, or who are required, to work on public holidays.

[18] It therefore follows that the unions' interpretation must prevail and I therefore dismiss the New Zealand Maori Arts & Crafts Institute's claims accordingly.

[19] As Te Puia has undertaken to pay the workers for any relevant periods, there will be no formal orders made unless later required by the respondents on formal notice.

Costs

[20] Costs are reserved.

G J Wood
Member of the Employment Relations Authority