IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2011] NZERA Wellington 165
5326358

	BETWEEN	NEW ZEALAND MERCHANT SERVICE GUILD IUOW INC. Applicant
	AND	HOLCIM (NZ) LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	Helen McAra for the Applicant Tim Cleary for the Respondent
Investigation Meeting:	9 August 2011 at Wellington
Submissions Received:	By 10 August 2011
Determination:	31 October 2011

DETERMINATION OF THE AUTHORITY

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[1] The issue for determination is whether or not the collective agreement between the parties complies with the provisions of the Holidays Act 2003 with respect to alternative holidays.

[2] The agreed statement of facts states as follows:

> *The parties to this dispute are parties to the Holcim (NZ) Limited Masters and Officers Integrated Ships Collective Employment Agreement ("the Collective Agreement").*
>
> *The other party to the Collective Agreement is the Aviation and Marine Engineers Association Incorporated ("the Association").*
>
> *The Association is not a party to this proceeding.*
>
> *The Applicant's members are employed on the Respondent's two vessels on a cycle of 28 days on, and 28 days off. The employees live aboard the vessel for the duration of the cycle and then go ashore for 28 days time off.*

> *The Collective Agreement is expressed to commence on 1 May 2009 and expire on 30 April 2010 and the applicant and respondent accept the Collective Agreement was in force during this time.*
>
> *Since the Collective Agreement expired the union parties to the Collective Agreement have been in separate bargaining meetings with the respondent for a new collective agreement but have not yet concluded bargaining.*
>
> *The applicant, on behalf of its members, has tabled the issue of alternative holidays (claimed in this proceeding) as a claim in the bargaining.*

[3] The new Collective Agreement is still under negotiation by the parties.

[4] Clause 15.4 of the Collective Agreement deals with public holidays. It states:

> *In accordance with the provisions of the Holidays Act 2003, where an employee works on a designated public holiday, the company shall pay the employee in accordance with s.50 of the Holidays Act 2003, and shall be deemed to have granted an alternative holiday (in lieu) and the employee shall be deemed to have taken an alternative holiday (in lieu) during the next time off period.*

[5] By contrast annual leave of 28 days per annum is taken *as directed by the employer after consultation* and *with two months notice*.

[6] The Court of Appeal dealt with a 24/7 industry, similar to the maritime industry, in *New Zealand Fire Service Commission v. New Zealand Professional Firefighters Union* [2006] ERNZ 1109. As here the issue was whether or not provision for alternative holidays during time that firefighters/ship officers were not at work were days that would otherwise be working days for them, as it was part of their regular rostered time off. To answer such a question the majority of the Court of Appeal held that o*ne needs to look at how the relationship works in practice*. At para.12 ff it stated:

> *Whether a day would otherwise be a working day is an intensely practical question. In the first instance, the employers and employees have to try and agree on the answer: s.12(2). And the factors they are bound to take into account are very open ended and flexible: s.12(3). If they cannot agree, then a Labour Inspector can determine the matter for them: s.13 …*
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> *13. We begin our discussion with some general comments. It is fundamental that a holiday for an employee represents time off work. Different holidays have different purposes see s.3. …*
>
> *14. …In order to work out what would otherwise have been a working day for the employee, one looks at the standard*

working week or period for that employee. For instance, a Monday to Friday worker on the minimum entitlement who takes annual leave from Wednesday one week through Sunday the following week will have taken eight days' leave from his or her 15 days bank of annual leave. … If a public holiday fall on the Monday during that leave period, then the period of annual leave taken would drop seven days from the 15 day bank: s.40(1).

15. *It makes no difference under the Act whether the period or periods of annual leave are pre-determined in the employment contract or are determined in an ad hoc way during the year. …*

16. *A like regime governs public holidays as we shall show.*

17. *Having set out those general comments, we now turn to the specifics of this case. The way the firefighters roster is designed, a firefighter works days 1 to 5 and then has days 6 to 8 off. That cycle repeats itself, within periods and from period to period. It is the equivalent of an employee who works Monday to Friday, week in, week out, year by year.*

18. *In the case of the Monday to Friday worker, it is clear that Mondays to Fridays are working days and Saturdays and Sundays are non-working days. Accordingly, any alternative holiday for the purposes of s.57 would have to be taken on a Monday, Tuesday, Wednesday, Thursday, or Friday. They are that employee's "working days" year in and year out. Any holiday (annual leave or public holiday) falling on such a day will be a holiday falling on what would otherwise be a working day. If such an employee works on a public holiday, the alternative day could be any Monday to Friday in the year (except another public holiday).*

19. *The case of firefighters falls within the same rubric, save that, instead of the time from the start of one working cycle to the next being seven days, the period is eight days.* [There is a 160 day roster, comprising of 18 eight day cycles and 14 days of leave and 2 days of rostered off days which are not leave.] *The timing of annual leave and alternative days has been agreed in advance, but for the reasons already given, that places a firefighter in no different position from the employee who negotiates those holidays on an ad hoc basis.*

20. *So what do we know by way of background about firefighters and their employment contract? We know first that, but for the leave provision, the firefighter would be working on days 1 to 5 and 9 to 13 of the 16 day slot. They would be in the normal course, but for leave entitlements, be working days.*

21. *What we also know is that the Commission has always intended to give and has given a lieu day to firefighters who have to work on a public holiday. This agreement was drafted before the Holidays Act 2003 came into force. At least from the time the Holidays Amendment Act 1991 came into force, employees who worked on a public holiday have been entitled to a lieu day:* Labour Inspector v. Telecom

> [1993] 1 ERNZ 492 (CA). *It is common ground this Collective Agreement complied with that, by providing for lieu days in the16 day slot. Under the 1991 Act, it was not necessary to specify any particular day within the 16 day slot as a lieu day (as opposed to part of annual leave), but there can be no doubt that it was within this slot that the lieu days were, by agreement, to be found. We also know adequate lieu days have been provided in that period; indeed, the period is generous in that respect as it potentially provides more days leave that a particular firefighter might be entitled to by way of annual leave and lieu days.*
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> *22. With that background, we turn now to construe clause 2.7.1 of the Collective Agreement. It is clear from clause 2.7.1(b) that the 16 day slot was intended to cover lieu days (if required) in circumstances where, in the previous 144 days, the firefighter had been required to work on one or more public holidays. Since 1991 and* Telecom, *any lieu day had to be taken on what otherwise would have been a working day: otherwise, it would not have met the statutory requirements of a lieu day, as interpreted in* Telecom. *A Monday to Friday worker could not have been told to work on the Queens Birthday and then to take the following Saturday off in lieu. So a firefighter's lieu day under the 1991 Act had to be on what would otherwise have been a working day – and that means it would have had to be one of the eight "working days" in the 16 day slot (days 1 to 5 and 9 to 13). Which one of these days it was did not matter under the 1991 Act. But the parties' agreement under clause 2.7.1(b) that the agreement complied with the 1991 Act necessarily carried an implication that the lieu days were such of days 1 to 5 and 9 to 13 as were required for that purpose. The other "working days" (ie, those not so required) and the "non working days" within the 16 day slot then counted towards the minimum three weeks annual leave.*
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> *23. … the concept of the lieu (alternative) day having to be a day that would otherwise have been a working day for the employee is not new. It is explicit now, but it was inherent under the 1991 Act as well. It goes back to the fundamental nature of holidays, as we discussed at [13].*
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> *24. In our view, this agreement does comply with s. 57(1)(b), in that the alternative days are days that would otherwise have been working days for the firefighter concerned.*

[7] I accept that the case relied on by the union of *New Zealand Airline Pilots Association Inc. v. Air Nelson Ltd* [2010] NZEMPC 130 is distinguishable, because of the specific wording of the parties' employment agreement there, which dealt with what would happen when staff wanted a weekend off. Under the particular terms of the agreement, Air Nelson was held to be unable to rely on requiring staff to take an alternative public holiday to deny them their number of particular weekends off in a set period. That issue does not arise here.

[8] The difficulty with the union's argument that the alternative holidays can only be taken during periods of existing time on rather than time off, is that the parties have agreed that the alternative days may be taken during the next 28 day non-working period. That is effectively the same as what the firefighters had done with the Fire Service Commission. Thus I accept Mr Cleary's submission that the parties have had a long-standing agreement that days in lieu/alternative holidays are to be taken in the "working days" in the 28 days off period.

[9] From a practical perspective the parties have agreed on the period during which the alternative days shall be granted. It is agreed to be part of the time off work period, which far exceeds the requirements under the Holidays Act for leave, being seven days off for every seven days on. I do not accept that under the agreement the term *days off* necessarily means that none of them may be classified as otherwise working days. This is particularly so when the parties' separate arrangements for annual leave is taken into account.

[10] Applying the principles from the *Fire Service Commission* case, I find the following. Holcim always intended and has given its officers lieu days when a public holiday is worked. There are adequate lieu days provided for in the 28 days off provided after each 28 days on. The parties intended that the lieu days would be taken in the next 28 days. The parties' agreement implies that the lieu days would come out of such of the next 28 days as were required for that purpose. Thus as set out in paragraph 22 of the *Fire Service Commission* case I accept that the parties intended that alternative holidays be provided in the next period of time off of 28 days and that no breach of the Holidays Act has occurred. I therefore dismiss the application.

Costs

[11] Costs are reserved.

G J Wood
Member of the Employment Relations Authority