

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 486
3129474

BETWEEN	NEW ZEALAND PUBLIC SERVICE ASSOCIATION – TE PUKENGĀ HERE TIKANGA MAHI INCORPORATED Applicant
AND	CHRISTCHURCH CITY COUNCIL Respondent

Member of Authority: Philip Cheyne

Representatives: Ben Thompson, counsel for the Applicant
Blair Scotland, counsel for the Respondent

Investigation Meeting: 5 August 2021 at Wellington

Date of Determination: 1 November 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Christchurch City Council employs a number of people to provide a cycle skills education programme for school students. The staff are employed during school terms. They worked set days and hours, usually Monday to Friday but some staff are engaged to work fewer days each week during the school terms. Staff are paid a wage for each hour they work.

[2] New Zealand Public Service Association – Te Pukenga Here Tikanga Mahi Incorporated is the union to which a number of the Cycle Skills employees belong.

[3] An issue has arisen over whether the long-standing practice of allowing the Cycle Skills employees to take annual leave during the school holiday period is compliant with the Holidays Act 2003.

[4] CCC and PSA jointly apply to the Authority to determine the issue. There is a joint statement of facts, each party provided submissions and some further information was provided during the investigation meeting in response to my questions. The parties seek a determination as to whether the practice of allowing Cycle Skills employees to take annual holidays during school holidays is lawful.

[5] I am grateful to the parties for their submissions. They have enabled me to determine the matter, but it is not necessary to set them out.

Agreed facts

[6] It is helpful to set out more detail from the joint application, agreed facts and information provided during the investigation meeting.

[7] Cycle Skills employees are engaged on individual employee agreements, based on the terms of the PSA/CCC Salaried Staff Collective Agreement. They are offered employment by a standard appointment letter. It includes:

I am pleased to offer you permanent employment ... on the terms and conditions set out in this Letter of Offer and the enclosed collective employment agreement.

...

Hours of work: ... hours per week during school terms, plus one day during school holidays per year for professional development.

The school terms are as specified by the Ministry of Education each year. As you are employed on a permanent basis during the school term, the Council will only be required to provide you with work during the school term each year. You will not be required to perform your duties under your employment agreement outside the school term, but you will continue to be an employee of the Council during the school holidays. Further, you may be offered work on a casual basis outside of the school term on an as and when required basis. There shall be no express or implied obligation on either party to provide any amount of work during the school holidays.

...

Annual leave: 4 weeks after the completion of each 12 months of current continuous service.

[8] The collective agreement includes comprehensive leave provisions. Clause 22 Leave includes statements of principle, by way of introduction to subsequent clauses setting out specific leave provisions. It says:

The parties ...recognise that leave for rest and recreation is important for the health and well-being of all employees and their families.

...

The leave conditions that follow are intended to meet these reasonable needs.

...

...additional leave may be negotiated on terms that are acceptable to both parties.

[9] Clause 23 is headed "ANNUAL HOLIDAYS". It deals comprehensively with annual leave entitlements:

Each employee shall be entitled to annual holidays of four weeks upon the completion of each year of service, increasing to five weeks annual holidays on the completion of the fifth and subsequent years of service.

...

Annual holidays shall be paid for in accordance with the provisions of the Holidays Act 2003 in respect of the calculation of payments for annual holidays.

Annual holidays will be taken at a time mutually agreed upon between the employee and his/her Team Leader.

...

[10] Subsequent clauses provide for public holidays, bereavement leave, graduate leave, jury service leave, leave without pay, parental leave, sick leave and study leave. These provisions are not part of the present matter.

[11] Days and hours of work are not set by roster. They are generally fixed. Many, but not all Cycle Skills employees are Monday – Friday workers. Some work part-time and some are casual employees.

[12] CCC does not require Cycle Skills employees to take some or all of their holidays outside of term times. However, whenever it is to be taken, employees are required to make a formal leave application for paid annual leave. Sometimes employees apply for and take

annual leave during term time and sometimes over the Christmas period. The periods outside of school terms are not periods of leave without pay that the Cycle Skills employees need to apply for, or that the Council needs to approve.

Analysis

[13] The Authority's role is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities. The Authority must comply with natural justice, promote good faith behaviour, support successful employment relationships and generally further the Act's objects. The Authority must act as it thinks fit in equity and good conscience, but it may not do anything inconsistent with the Employment Relations Act 2000 or the relevant employment agreement.¹

[14] The purpose of the Holidays Act 2003 is to promote balance between work and other aspects of employees' lives and to that end, (as presently relevant) to provide minimum entitlements to annual holidays to provide the opportunity for rest and recreation. The Act does not prevent an employer providing enhanced or additional entitlements on a basis agreed with the employee. However, an employment agreement that excludes, restricts or reduces an employee's entitlement has no effect to the extent it does so.²

[15] Cycle Skills employees' leave entitlement, whether expressed as "annual holidays of four weeks upon the completion of each year of service" (clause 22 of the collective agreement) or "4 weeks after the completion of each 12 months of current continuous" (appointment letter), does not exclude, restrict or reduce employees' entitlements under the Holidays Act 2003.

[16] The Holidays Act at s 17 entitles an employer and an employee to agree on how the employee's entitlement to 4 weeks' annual holidays is to be met based on what genuinely constitutes a working week for the employee. The Act goes on to provide at s 18 "When annual holidays are to be taken by the employee is to be agreed between the employer and the employee." The back-up provision in s 19 that entitles an employer to require an employee to

¹ Employment Relations Act 2000, s 157.

² Holidays Act 2003, s 6.

take annual holidays if they are unable to agree timing under s 18 has no application to this case.

[17] The individual employment agreements reflect s 18 of the Act, providing at clause 23 of the collective agreement that annual holidays will be taken at a time mutually agreed between the employee and their team leader.

[18] A leave application by a Cycles Skills employee for paid annual holidays during term time, once agreed to by the employee's team leader, is an agreement between the employee and the employer for the purposes of the employment agreement and s 17 and s 18 of the Act. CCC would pay that employee for the duration of the annual leave, in accordance with the employment agreement and s 21 (or s 22, if applicable) of the Act. The employee would have been provided with annual holidays paid at the time the holidays are taken.

[19] An application by a Cycles Skills employee for paid annual holidays during school holidays, once accepted by CCC, is also an agreement between the employee and the employer, for the purposes of the employment agreement and s 17 and s 18 of the Act. CCC would pay for the period of annual holiday, in accordance with the employment agreement and s 21 (or s 22) of the Act. The employee would have been provided with annual holidays paid at the time the holidays are taken.

[20] In either case, the agreed period of paid leave would be "leave for rest and recreation"³ and would count towards the employee's entitlement under the employment agreement of four weeks annual holidays (five weeks for longer service). In either case, the arrangement meets the purpose of the Holidays Act. In either case, the agreed arrangement under the employment agreement, about how and when annual leave was taken, would not exclude, restrict or reduce the employee's entitlements under the Holidays Act 2003.⁴ As a result, I conclude that CCC's previous practice was compliant with its obligations under the Holidays Act 2003.

[21] It is not necessary to canvass whether the previous practice falls within the statutory arrangements for an employer to operate a closedown period.

³ PSA/CCC Salaried Staff Collective Agreement, clause 22.

⁴ In *Metropolitan Glass & Glazing Limited v Labour Inspector* [2021] NZCA 560 the Court at [23] accepted that "employment agreement" in s 6 of the Holiday Act 2003 does not have a limited meaning.

[22] There have been a number of cases⁵ determining what would otherwise be a working day for the purposes of determining entitlement to public holidays and alternative holidays. I was referred to some statements in those judgments, but they are not binding in this case. The present employment relationship problem does not concern public holidays or alternative holidays. As this problem does not directly engage the issue arising in those cases, it is not necessary to review those judgments. To the extent necessary, I would treat the present situation as more analogous to that in *Jukes v Sealord Group Limited*.⁶

Conclusion

[23] I determine that the previous practice of Christchurch City Council in agreeing to allow certain employees, in the circumstances set out in this application, to take annual holidays in periods they do not work is consistent with the Holidays Act 2003.

[24] As a joint application, costs are not likely to be an issue. In case I am wrong, I reserve costs. Any application is to be made within 14 days, with another 14 days for any reply.

Philip Cheyne
Member of the Employment Relations Authority

⁵ For example, *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2006] ERNZ 1109, *New Zealand Merchant Service Guild IUOW Inc v Holcim (NZ) Ltd* [2013] NZEmpC 42 and *Morgan v Transit Coachlines Wairarapa Ltd* [2015] NZEmpC 121.

⁶ *Jukes v Sealord Group Limited* [2013] ERA Christchurch 76.