

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 218  
3131335

BETWEEN

UNITE UNION  
INCORPORATED  
Applicant

AND

WENDCO (NZ) LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: John Crocker advocate for the Applicant  
Jenni Trotman counsel for the Respondent

Investigation Meeting: 16 and 17 November 2022 at Auckland

Submissions and Further Information Received: 12 December 2022 from the Applicant  
20 December 2022 from the Respondent  
23 December 2022 from the Applicant  
1 February 2023 from the Respondent

Date of Determination: 2 May 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

*Overview of the employment relationship problem*

[1] The underlying problem was that the parties held different views about:

- (a) Whether or not it was clear that any of the Christmas 2020 and New Year 2021 public holidays “*would otherwise have been a working day*” for each of the affected union members; and
- (b) If not, then how the factors in s 12(3) of the Holidays Act (“*the HA03*”) should be applied in order to determine whether or not a particular public holiday “*would otherwise a working day*” for each of the affected union members.

### *Wendco*

[2] Wendco (NZ) Limited (Wendco) is a family owned and operated company which has the exclusive New Zealand licence to operate Wendy's Hamburgers, a USA franchise. In mid-2022 Wendco operated 22 fast service restaurants in New Zealand that trade as "*Wendy's Hamburgers*". Wendco has approximately 450 employees.

[3] Wendco is owned by the Lendich Group Limited ("*Lendich Group*"). Danielle Lendich is Wendco's CEO. Ms Lendich and her parents are shareholders and directors of Lendich Group and the three of them are also directors of Wendco.

[4] Ms Lendich is a 'hands on' CEO who is involved in all aspects of the business. That included personal involvement in negotiating collective agreements between Wendco and Unite Union Incorporated (Unite). Wendco has had a collective agreement with Unite since 2007.

### *Unite*

[5] Unite is a registered trade union that represents members who are employed by Wendco. At the time these proceedings were lodged, Unite had 45 members who worked for Wendco.

[6] Unite claimed that Wendco breached the previous collective agreement, regarding the way it assessed union members' contractual public holiday entitlements. Unite claimed that 33 of its members had not received their contractual public holiday entitlements for the Christmas 2020 and New Year 2021 period ("*the affected members*"). These proceedings address that concern.

[7] Unite's members are entitled to a minimum number of hours work each week, but they do not have fixed days or hours of work. Wendco decides what days and hours each union member will work, by allocating them weekly rostered shifts that fall within their agreed availability period. They therefore work a variable roster pattern.

[8] Job applicants must identify to Wendco when they are available to work. Wendco will then offer employment based on the working times the job applicant has identified. There is a contractual process in place for union members to be employed on the basis of "*Agreed*

*Working Times*” for a guaranteed number of hours (between 10 and 40 hours) per week. Employees can only be rostered to work within their Agreed Working Times.

[9] There is also a contractual process in place for an employee’s Agreed Working Times to be varied. Union members each have “*Individual Guaranteed Hours*”, which Wendco must roster them each week. If the rostered hours are not available for the employee to work then Wendco must still pay the employee not less than their Individual Guaranteed Hours of work in that week.

#### *Collective Agreements*

[10] The Collective Agreement that was in place between the parties from 21 May 2015 to 21 May 2017 (“*the Former Agreement*”) required Unite members to work on a public holiday, if Wendco rostered them to. Wendco therefore had exclusive control over who would be required to work on a public holiday.

[11] The next collective agreement that was entered into by the parties was ratified after the Authority had issued its determination in *Wendco v A Labour Inspector*.<sup>1</sup> This subsequent collective agreement contained new terms regarding rostering, guaranteed hours and the need for union members to volunteer to work on a public holiday, before Wendco could roster them to work on a public holiday.

[12] The Collective Agreement between the parties dated 12 November 2018 to 22 May 2020 (“*the CA*”) included clause 13.1, which only required Unite members to work on a public holiday if they had volunteered, and had been rostered, to do so. This is the CA that was in force at the time the alleged breaches occurred, as it had continued in force in accordance with s 53(3) of the Employment Relations Act 2000 (“*the Act*”).

[13] The parties’ current Collective Agreement dated 23 May 2020 to 22 May 2023 is not relevant to these proceedings, because it was ratified (so came into effect) after the breach of contract claims in these proceedings had occurred.

#### *Unite’s claims*

[14] Unite claimed that Wendco breached the following clauses in the CA:

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<sup>1</sup> [2017] NZERA 199.

- (a) Clause 13.3, by failing to correctly ‘Mondayise’ the 26 December 2020 (Boxing Day) and 2 January 2021 public holidays.

This claim involved Unite members who worked on 28 December 2020 and/or 4 January 2021 not being provided with an alternative holiday, when Unite believed those days should have been treated as an otherwise working day for them; and

- (b) Clause 13.4, by failing to pay some Unite members their average daily pay for unworked public holidays that fell within the Christmas 2020 and New Year 2021 public holiday periods.

This claim involved the public holidays that fell on 25 December 2020 (Christmas Day), 26 December 2020 (Boxing Day), 28 December 2020 (Mondayised Boxing Day public holiday), 2 January 2021 and 4 January 2021 (Mondayised 2 January 2021 public holiday).

[15] Unite initially sought a finding that Wendco had breached clauses 13.3 and 13.4 of the CA and the associated sections in the HA03 Holidays Act 2003 and it sought an order that Wendco remediate these breaches. Unite later withdrew the standalone claims that Wendco had breached the HA03 but then again sought findings on that in its submissions. Unite also sought penalties, interest and costs. In addition, Unite applied for a compliance order that Wendco complied with the CA and the HA03.

[16] This employment relationship problem arose because Unite believed Wendco failed to correctly determine whether the Christmas 2020 and New Year 2021 public holidays “*would otherwise be a working day*” for each of the affected members. Unite said that it was clear for many of the affected members that the public holidays in issue “*would otherwise be a working day*”, which meant they should have automatically got the contractual public holiday entitlements in clauses 13.3 and/or 13.4 of the CA.

[17] Unite said that where it was not clear if a particular public holiday would otherwise be a working day for an affected member, then Wendco had to attempt to agree on whether or not it was with the employee (or union), as required by s 12(2) of the HA03. The s 12(3) factors in the HA03 were to be considered as part of the process of attempting to agree on whether or not a public holiday would otherwise be a working day for the employee.

[18] Unite claimed Wendco unilaterally and incorrectly applied the s 12(3) factors in the HA03, that meant affected members were deprived of their contractual public holiday entitlements.

[19] Unite also said that, because the public holiday entitlements in the CA mirrored those in s 49 and s 56 of the HA03, a failure by Wendco to give the affected employees their correct contractual public holiday entitlements would mean those employee had also not received their minimum statutory public holiday entitlements in s 49 and s 56 of the HA03.

#### *Affected members*

[20] The parties provided the Authority with differing evidence, which changed over time, regarding who the Unite members were who had been affected by the alleged breaches of the CA.

[21] The Authority's liability determination on the alleged breach of contract claims is necessarily limited to the specific claims, and union members, identified in Unite's Amended Statement of Problem and subsequent evidence.

[22] Now that this determination has been issued, the parties will need to provide the Authority with updated evidence about the particular breaches of the CA that have allegedly occurred for each affected employee, for each public holiday in issue. A Minute has been issued to the parties to facilitate that process.

#### *Wendco's response*

[23] Wendco denied Unite's claims. Wendco maintained that the public holiday entitlements in clauses 13.3 and 13.4 of the CA had been correctly paid to all Unite members who were entitled to them, subject to an admitted 'Mondayisation' error, which is discussed later.

[24] Wendco said it had properly assessed each affected member's contractual public holiday entitlement by appropriately asking itself whether the public holidays identified by Unite would otherwise have been a working day for each affected employee. Ms Lendich undertook that exercise herself, so Wendco believed it had done that correctly, subject to the 'Mondayisation' errors it recently identified.

(a) Holidays Act claims

[25] Wendco said that because Unite had withdrawn its claim for alleged breaches of the HA03 and because it did not have authorisation from its members to represent them in relation to HA03 claims, Unite lacked standing to pursue standalone claims (in this matter) for breaches of the HA03 on behalf of its members.<sup>2</sup>

(b) Christmas Day

[26] Wendco said that because it always closed all of its restaurants on Christmas Day, then 25 December 2020 would not otherwise have been a working day for any of the affected employees.

(c) 'Mondayisation' errors

[27] After Unite filed its submissions, Wendco acknowledged it had established that;

- (a) Five affected members had not received an alternative holiday for working on 28 December 2020, which was the Mondayised' Boxing Day public holiday; and
- (b) One employee had not received an alternative holiday for working on 4 January 2021, which was the Mondayised 2 January 2021 public holiday.

(d) Rectification of 'Mondayisation' errors

[28] Wendco said it was in the process of rectifying the 'Mondayisation' errors it had identified.

[29] Wendco had also reviewed its 'Mondayisation' of other public holidays for Unite members (who were not part of this investigation) and discovered several other errors, which it said will be rectified. Wendco attached a Schedule A to its submissions that identified the employees who would receive their alternative holiday entitlement as a result of this voluntary rectification process.

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<sup>2</sup> *E Tu v Carter Holt Harvey Ltd* [2022] NZEmpC 141.

(e) Guaranteed Hours

[30] Rosters are prepared two weeks in advance of public holidays, so it is clear if an employee who volunteered to work on a public holiday has been rostered to do so or not. If they did work on the public holiday, those hours counted towards their Guaranteed Hours.

[31] Clause 7.14 of the CA required Wendco to roster Eligible Employees not less than their Guaranteed Hours in each confirmed roster. Eligible Employees could only change their Guaranteed Hours by mutual agreement, which had to be recorded in writing.

[32] Wendco said that if the affected members had worked their Guaranteed Hours during the week in which the public holiday fell, then the public holiday would not otherwise be a working day for them, so they were not entitled to an unworked paid public holiday under clause 13.4 of the CA.

(f) Paid Public Holiday Not Worked

[33] In her affidavit dated 15 October 2021 Ms Lendich said “*Where the business does not have sufficient hours available (this sometimes happens because of Christmas Day), the employee may become entitled to payment for the public holiday on which they do not work, [...].*”

[34] The only union members who received an unworked paid public holiday on 25 December 2020 (Christmas Day) were those who had not had their Guaranteed Hours met that week, without the public holiday having been included in the rostered hours for the week. That only happened in Christmas week because the restaurants were closed on Christmas Day.

[35] No employees received an unworked paid public holiday on the Boxing Day 2020, 28 December 2020 (Mondayised), New Year’s Day 2021, 2 January 2021 or 4 January 2021 (Mondayised) public holidays.

[36] Ms Lendich’s evidence was that an employee would receive an unworked paid public holiday if they had been rostered to work that day but called in sick on the day of the public holiday.. She said that had occurred four times, and instead of being paid sick leave the employee received an unworked paid public holiday, on the basis that had the employee not been sick then they would have worked the public holiday.

(g) Boxing Day 2020

[37] Wendco said the affected members were not entitled to an unworked paid public holiday on Boxing Day 2020, because it was not an otherwise working day for them. Wendco also noted that one of the individuals Unite had identified was not covered by the CA, because she was a manager who was on an individual employment agreement, and therefore outside the scope of the Authority's investigation.

(h) 28 December 2020

[38] In terms of the 28 December 2020 claims, five members would be given an alternative holiday. However, claims relating to other union members identified in work Schedules Unite presented were denied.

[39] Wendco said one union member had adjusted her "*Agreed Working Times*" to make herself unavailable to work on 28 December 2020. Wendco also said for four of Unite's members the 28 December 2020 public holiday was not within their "*Agreed Working Times*" (they did not volunteer to work the public holiday) and their guaranteed hours of work had been met by rostering them to work on other days that week.

[40] Wendco also said that another one of Unite's members did not work on 26 or 28 December 2020, but had worked their guaranteed hours on other days that week.

(i) 1 January 2021

[41] Unite said 1 January 2021 was not otherwise a working day for affected members (they did not volunteer and their guaranteed hours of work had been met on other days of the week). Wendco also noted some of the affected members were not covered by the CA. These employees were managers who were working on IEAs, so they were outside the scope of the Authority's investigation.

[42] Wendco said that one of affected members had joined the union on 21 December 2020, so she did not have guaranteed hours at the time the rosters for 25 January 2020 and 1 January 2021 was created.

(j) 2 January 2021

[43] Wendco said 2 January 2021 was not an otherwise working day for the 17 affected members Unite claimed should have been paid for an unworked public holiday. Wendco said

2 January 2020 did not fall within the affected members' Agreed Hours of Work (because they did not volunteered to work the public holiday) and their guaranteed hours of work had been met by rostering them to work on other days that week.

(l) 4 January 2021

[44] In terms of the 4 January 2021 (Mondayisation of 2 January 2021 public holiday), claim, Wendco noted that the affected member Unite claimed had not received an alternative holiday was a manager who was on an IEA, so was outside the scope of the Authority's investigation.

[45] In terms of the other affected members, who Unite claimed had been disentitled from an unworked paid public holiday, Wendco said that for seven of them 4 January 2021 was not within their Agreed Hours of Work (because they had not volunteered to work that public holiday) and their guaranteed hours of work had been met by rostering them to work on other days that week.

(k) Individuals not covered by the CA

[46] Wendco identified a number of affected employees who it said were not covered by the CA, so were therefore outside the scope of the Authority's investigation. Three employees were managers on individual employment agreements ("IEAs") and another employee had joined Unite on 21 December 2020, so did not have any guaranteed hours of work at the time Wendco prepared the roster for 2 January 2020.

(m) Alternative holiday entitlement

[47] For the purposes of assessing the alternative holiday entitlement for employees who worked on a public holiday, Wendco treated a public holiday as clearly an "*otherwise working day*" for an employee if they had worked:

- (a) The same day of the week for the four weeks preceding the public holiday; or
- (b) The same calendar day for seven of the 13 weeks preceding the public holiday;  
or
- (c) More than 50 percent of the same calendar day preceding the public holiday, if the employee had been employed for less than 13 weeks.

### *Record of Settlement*

[48] The parties entered into a Record of Settlement dated 2 June 2022 that recorded their agreement that the relevant work pattern in determining “*whether a day would otherwise be a working day*” for Unite members under s 12(3)(b) of the HA03 (regarding the work pattern) was:

- (a) In the 13 weeks preceding the public holiday an employee worked 7 or more of the same calendar day as the public holiday; or
- (b) If an employee had not worked for Wendco NZ Ltd for 13 weeks, in the period of employment the employee worked more than 50% of the same calendar day as the public holiday; or
- (c) The employee had worked on the same calendar day as the public holiday in the four previous weeks.

### **Authority’s investigation**

[49] By agreement with the parties, the Authority initially attempted an ‘on the papers’ investigation of Unite’s claims. However, it became clear after reviewing the evidence that an in person investigation meeting was required.

[50] The parties had also not attempted to agree on how the factors in s 12(3) of the HA03 should be taken into account in order to reach agreement on whether or not a public holiday would otherwise be a working day for each of the affected employees. Wendco had done that exercise itself, without Unite’s input. Unite also believed that Wendco had not done that assessment correctly.

[51] Unite lodged an Amended Statement of Problem on 19 August 2022 that expanded its original claims. An in-person investigation meeting was held in Auckland. Mike Treen gave evidence for Unite and Danielle Lendich gave evidence for Wendco. Both parties filed written submissions after the investigation meeting.

[52] It was agreed that liability would be determined before the penalties and interest claims or the compliance order application would be determined. This determination therefore addresses the alleged breaches of clauses 13.3 and 13.4 of the CA.

[53] The Authority considered there were some ambiguities regarding the evidence it currently had that needed to be clarified or further investigated before it determined whether or

not each affected member had received their contractual public holiday entitlements for each of the public holidays in issue.

[54] The Authority has set out in a Minute to the parties its preliminary views regarding the public holidays it considered clearly “*would otherwise have been a working day*” for the affected employees.

[55] This determination also sets out the approach the parties needed to adopt in terms of assessing the affected employees’ contractual public holiday entitlements, where it was not clear if a public holiday would otherwise be a working day for the employee.

[56] The parties have been encouraged to attempt to agree on that in light of the findings in this determination, consistent with the Authority’s problem resolution focus. If agreement cannot be reached, then the Authority will determine the outstanding contractual public holiday entitlements for each affected employee, in light of the updated evidence that it anticipates will be filed by the parties.

### **Issues**

[57] The following issues are to be determined:

- (a) Findings on the disputed material facts;
- (b) How will the parties know if it is clear that a public holiday would otherwise be a working day for an affected member?
- (c) Was it clear that any of the Christmas 2020 and/or New Year 2021 public holidays “*would otherwise be a working day*” for any of the affected members?
- (d) Where it was not clear, did Wendco correctly assess whether a particular day “*would otherwise be a working day for the employee*”?
- (e) If not, how should the factors in s 12(3) of the HA03 be applied for each affected member?
- (f) What else do the parties need to take into account when assessing whether or not a public holiday would otherwise be a working day for each affected member, where that is not clear?
- (g) Has Wendco breached clause 13.3 of the CA?

- (h) Has Wendco breached clause 13.4 of the CA?
- (i) What outstanding contractual public holiday entitlement is each affected member owed?
- (j) What costs and disbursements should the successful party be awarded?

### **Holidays Act 2003**

[58] The HA03 provides employees with minimum statutory entitlements to annual holidays, public holidays, sick leave, bereavement leave and family violence leave. An employer can provide an employee with more favourable entitlements but it cannot provide less than the HA03 does.

[59] Section 6 provides that the entitlements in the HA03 are minimum entitlements that cannot be contracted out of. An employment agreement that excludes, restricts or reduces an employee's HA03 entitlements has no effect, to the extent that it does so.

[60] Section 29 of the HA03 defines the meaning of "*closedown period*". It is a period during which the employer customarily closes down operations or discontinues the work of one or more employees and requires the employees to take some or all of their annual holidays.

[61] Because Wendco is only closed on Christmas Day, and no employees are required to take annual holiday on that day, Christmas Day is not a closedown. Wendco accepted that was the case. The closedown provisions in s 29 of the HA03 therefore are not relevant to an assessment of whether or not Christmas Day would otherwise be a working day for any of Unite's members.

[62] Section 12 of the HA03 deals with what would otherwise be a working day for the purposes of determining an employee's HA03 entitlements. Section 12(2) requires a two-step inquiry, for each employee, for each public holiday:

- (a) First - is the public holiday clearly a working day for the employee? If so, then employee receives the public holiday entitlements in s 49 and 56 of the HA03, which are those set out in clauses 13.3 and 13.4 of the CA.
- (b) Second – if it is not clear whether the public holiday would normally be a working day for the employee, then the employer and employee must try to

reach agree on whether to not it is. In doing so, they must consider the factors in s 12(3) of the Act.

[63] The s 12(3) of the HA03 factors that must be taken into account are:

- (a) The employment agreement;
- (b) The work patterns;
- (c) Any other relevant factor, including –
  - (i) Whether the employee only works when work is available;
  - (ii) Rosters or other similar systems;
  - (iii) The parties' reasonable expectations that employee would work on the day concerned.
- (d) Whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick, or bereavement, or family violence leave, the employee would have worked the day concerned.

[64] In addition to s 12 of HA03, the other material sections in the HA03 for the purposes of the Authority's investigation are:

- (a) Section 45 which deals with the transfer of public holidays over Christmas and New Year;
- (b) Section 46 which sets out the minimum statutory entitlement all employees have to public holidays.
- (c) Section 48 deals with how s 46 must be complied with.
- (d) Section 49 deals with payment if an employee does not work on a public holiday and it states:
 

If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay or average pay for that day.
- (e) Section 56 provides that an alternative day holiday must be provided if an employee works on a public holiday that falls on a day that would otherwise be a working day for the employee.

[65] The public holiday entitlements in s 49 of the HA03 are reflected in clause 13.3 of the CA and the public holiday entitlements in s 56 of the HA03 are reflected in clause 13.4 of the CA.

### **Case law on ‘otherwise working day’**

[66] Sometimes it will be clear in light of an employee’s particular circumstances that a public holiday would otherwise be a working day for them. That could arise from the employee’s normal work pattern or from the applicable contractual or other agreed terms.

[67] In *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* the Court of Appeal recognised that determining whether a day “*would otherwise be a working day*” involved an intensely factual inquiry.<sup>3</sup> Section 12(2) of the HA03 required the parties to attempt to agree on it, with the s 12(3) factors they could take into account being very open-ended and flexible.

[68] The Employment Court in *Murdoch v Labour Inspector* noted that the HA03 required that each public holiday was looked at separately in light of the work patterns around it.<sup>4</sup>

[69] The Employment Court in *Tranzit Coachlines Wairarapa Limited v Morgan*<sup>5</sup> and in *Progressive Meats Ltd v Meat & Related Trades Workers Union of Aotearoa Inc*<sup>6</sup> recognised that whether a particular public holiday would otherwise have been a working day for the workers in question was essentially a question of fact.

[70] Where that was not clear, then the formulaic approach in s 12 of the HA03 is to be adopted. The purpose of the HA03 factors are to assist the parties to agree on what would have been a ‘normal’ day of work for an employee. That must occur for each employee, for each public holiday, with the aim being for the parties to reach agreement on it. If agreement cannot be reached, a Labour Inspector or the Authority could determine it for them.

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<sup>3</sup> [2006] ERNZ 1109.

<sup>4</sup> [2008] ERNZ 38.

<sup>5</sup> (2008) 5 NZELR 219.

<sup>6</sup> [2013] ERNZ 638.

## **The Authority's 2017 determination**

### *The 2017 determination*

[71] In 2017 the Authority issued a determination in *Wendco v Labour Inspector* that involved compliance with sections 56 and 60 of the HA03, relating to alternative holiday entitlements (“*the 2017 determination*”).<sup>7</sup> That case involved Wendco lodging an Objection Notice to the Improvement Notice the Labour Inspector had served on it.

[72] The Labour Inspector in that matter challenged Wendco’s method of determining, for an employee who worked on a public holiday whether that day “*would otherwise be a working day for the employee*”. The Labour Inspector believed Wendco had been assessing that incorrectly, which meant employees had not received an alternative holiday that they were entitled to under s 56 of the HA03, because the work period Wendco used was too short.

[73] At the time of the Labour Inspector matter the Former Agreement applied. Under the Former Agreement Wendco could require employees to work on a public holiday. Employees could therefore be rostered by Wendco to work on a public holiday, when they may not have been rostered on that particular day generally as part of their work pattern. The variable roster also meant that it was therefore not always clear whether a worked public holiday “*would otherwise be a working day*” for an employee.

[74] The Authority in that case said that for the purposes of s 12 of the HA03, where an employee had worked for three months or more then that was a sensible period to assess what would otherwise be a working day for the employee. If an employee had worked less than 13 weeks then the employee’s full work history should be considered.

[75] The Authority determined that if it was unclear if a day “*would otherwise be a working day*” under s 56 of HA03, then Wendco was required to “*adopt a formulaic approach for each employee using the criteria in s 12(2) and 12(3) of HA03 for each public holiday.*”

[76] The Authority also noted that Wendco should be careful when assessing these factors that it did not do so in a way that would exclude, restrict or reduce an employee’s entitlements under the HA03.

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<sup>7</sup> [2017] NZERA 199.

*Remediation by Wendco of alternative holiday entitlements*

[77] After the Authority's 2017 determination, Wendco conducted a remediation process in consultation with the Labour Inspector and established a system for determining what "*would otherwise be a working day*" under clause 13.3 of the CA, by reference to the s 12(3) criteria in HA03.

[78] On 18 February 2019 Wendco emailed Unite explaining how it had gone about remediating the alternative holiday entitlement. Wendco explained that if an employee worked on a public holiday and met **any one** of the following criteria, the public holiday would be treated as an otherwise working day, for the purposes of the alternative holiday entitlement; (emphasis added)

- (a) The employment agreement indicated the day would otherwise be a working day for the employee; or
- (b) If the employee met **any** of the following work patterns:
  - (i) in the 13 weeks preceding the public holiday the employee worked 7 or more of the same calendar day as the public holiday; or
  - (ii) the employee had not worked for Wendco for 13 weeks, but in the period of employment had worked more than 50% of the same calendar day as the public holiday; or
  - (iii) The employee had worked on the same calendar day as the public holiday in the four previous weeks; or
  - (iv) If there was a disruption to the employee's work pattern because of extended absence by reason of parental leave, sickness, injury or bereavement and in the last 13 weeks worked, the employee worked 7 or more of the same calendar day as the public holiday; or
- (c) There was a reasonable expectation that the employee would work on the day concerned; or
- (d) But for the day being a public holiday, the employee would have worked on the day concerned.

[79] Wendco informed Unite that the other factors in s 12(3) of the HA03 were not of assistance because:

- (a) Employees did not only work when work was available, see s 12(3)(c)(i) HA03; and
- (b) All employees had variable (not fixed or rotating) rosters and historical roster information was not available, see s 12(3)(c)(ii) HA03.

[80] The Labour Inspector confirmed on 7 January 2020 that it was satisfied Wendco had complied with the 2017 determination.

### **Overview of the CA**

[81] The CA did not contradict or override the rectification criteria (above) that the Authority considered should also be applied to the assessment of whether a particular public holiday would otherwise be a working day for an employee.

[82] The parties had seen the 2017 determination before the CA was concluded. The CA did not define what would otherwise be a working day. Nor did the CA set out criteria or a specific process for the parties to apply in order to establish whether or not a public holiday “*would otherwise be a working day*” for an employee.

[83] The CA provided for Unite members to work guaranteed minimum hours each week. The CA also removed Wendco’s ability to require Unite’s members to work on public holidays and instead put in place clause 13.1, which provides that an employee could only be required to work on a public holiday if they had first volunteered to work.

[84] An employee volunteered to work on a public holiday by recording their name on the Volunteer Sheet. Wendco could then use the Volunteer Sheet when rostering staff to work on public holidays. An employee who had not volunteered (by recording their name on the Volunteer Sheet) to work on a public holiday could not be rostered to work that day.

[85] However, the fact an employee had volunteered to work on a public holiday did not mean Wendco was required to roster the employee to work the public holiday. Whether or not an employee who had volunteered to work on a public holiday would be rostered to do so was up to Wendco to decide. The employee could only be rostered to work on a public holiday if it fell within their Agreed Working Times.

**Relevant clauses in the CA**

[86] The material clauses in the CA are clause 7 that deals with rosters, Agreed Working Times, and Individual Guaranteed Hours and clause 13 that deals with the public holiday entitlements. The relevant terms in the CA are:

- (a) Clause 7.1 states that the working hours arrangements are not intended to create an availability provision pursuant to s 67D of the Act.
- (b) Clause 7.2. records that hours of work is allocated by a roster system, with the work to be performed and the start and finish times being flexible, provided they fall within the employee's Agreed Working Times (as per clause 7.17).
- (c) Clause 7.3 provides that rosters are to be prepared with reference to the employee's Individual Guaranteed Hours (see clause 7.1) and their Agreed Working Times (as per clause 7.17).
- (d) Clause 7.4 sets out the roster preparation arrangements, and notes they are made available on Tuesday evening for the following Monday to Sunday;
- (e) Clause 7.5 allows employees to temporarily (in a one off situation) adjust their Agreed Work Hours and refers to the use by the employee of the Rostering Assistance book,
- (f) Clauses 7.6-7.11 deal with shift swaps, confirmed rostered hours, shift cancellation and minimum shift duration.
- (g) Clause 7.12 says that the Guaranteed Hours provisions (clauses 7.12-7.16) only apply to Eligible Employees (see clause 7.13).
- (h) Clause 7.13 defines an Eligible Employee (for the purpose of Guaranteed Hours) as a union member who had completed the initial 4 weeks of employee training.
- (i) Clauses 7.14 and 7.15 require Wendco to roster Eligible Employees not less than their Guaranteed Hours in each confirmed roster.
- (j) Clause 7.16 deals with the calculation of Individual Guaranteed Hours, being no less than 10 hours and no more than 40 hours per week. These hours can only be increased or decreased by mutual agreement, confirmed in writing (clause 7.16(h), or where one of the temporary situations outlined in clauses 7.5 – 7.8 apply.

- (k) Clause 7.16(h) records that Guaranteed Hours can only be changed by mutual agreement, and where that occurs the change will be recorded in writing.
- (l) Clauses 7.17 – 7.20 deal with Agreed Working Times.
- (m) Clause 7.17 provides that when applicants apply for employment they are to indicate their available working times as part of their job application. Wendco then offers employment based on the working times indicated by the applicant on their application form, and the proposed guaranteed hours determined by the Manager in accordance with clause 7.16(e). Acceptance of an offer of employment does not occur until the parties have reached an agreement on working times and proposed guaranteed hours, evidenced by a signed Agreed Working Times and Guaranteed Hours Form, or the employee works a shift for Wendco prior to reaching agreement on working times and guaranteed hours.
- (n) Clause 7.19 requires the employee to request to changes Agreed Working Times in writing, and clause 7.20 requires any mutually agreed change to be recorded in writing.

Clauses 7.21 to 7.23 deal with Additional Hours. Clause 7.21 provides that employees will not be rostered outside of their Agreed Working Times, unless specifically agreed on a one-off basis. Clause 7.22 states that “*accepting additional hours will not result in a change to the guaranteed hours*”.

- (o) Clause 13 deals with work on public holidays.
- (p) Clause 13.1 states:
  - Employees are only required to work on a public holiday if they have volunteered to work and have bene rostered to work on a public holiday. An employee volunteers to work on a public holiday by recording their name on the Volunteer Sheet which will be posted in the crew rom or electronically at least one week prior to the proposed roster.
- (q) Clause 13.2 records that an employee who works on any part of a public holiday will be paid time and a half of the relevant daily pay for the time worked.
- (r) Clause 13.3 records that the entitlement to an alternative holiday is determined in accordance with the HA03. It states:

An employee is entitled to an alternative day holiday if the employee works on any part of a public holiday and the public holiday falls on a day that would otherwise be a working day for the employee. Entitlement to

alternative holidays will be determined in accordance with the Holidays Act 2003. (emphasis added)

- (s) Clause 13.4 sets out that the employee’s entitlement to an unworked paid public holiday reflects the entitlement in s 49 of the HA03. Clause 13.4 states:

If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer will pay the employee the employee’s average daily pay for that day. (emphasis added)

### **Findings on disputed material facts**

*Did the CA set out what would otherwise be a working day?*

[87] The Authority did not accept Wendco’s claim that the CA contained new clauses that should be used to determine whether a day was an otherwise working day. None of the new clauses expressly dealt with what “*would otherwise be a working day*” or how that should be determined.

*Wendco’s assessment of who was entitled to a paid unworked public holiday was incorrect*

[88] Regardless of how likely it was, based on an employee’s usual work pattern, that they would have worked on the same day as the public holiday if it had not been a public holiday, Wendco said the employee would not be entitled to a paid unworked public holiday unless;

- (a) The employee had volunteered to work on the public holiday; and
- (b) They had not been rostered to work their Guaranteed Hours of Work on other days during the public holiday week.

[89] That proposition was not accepted. The CA did not say that. Even if it had, then that would have no effect as it excluded, restricted and reduced the employees’ entitlement to a paid unworked public holiday (referred to in this determination as a “*PHNW*”).

*Wendco’s interpretation of what was ‘an otherwise working day’ was incorrect*

[90] The Authority did not accept Ms Lendich’s position that the meaning of whether “*a day would otherwise be a working day for the employee*” under clauses 13.3 and 13.4 of the CA meant that all of the following criteria had to be met or it was not otherwise a working day:

- (a) The day was within the employee’s Agreed Working Times (clauses 7.2 and 7.17); and

- (b) The employee volunteered to work on the public holiday by recording their name on the Volunteer Sheet (clause 13.1); and
- (c) The employee has not worked the contractually guaranteed hours or had not made a written request to increase their Guaranteed Hours (clause 7.16); and
- (d) The employee was rostered to work (clauses 7.2-7.8 and 13.1).

[91] The Authority agreed the public holiday had to fall within the employee's Agreed Working Hours at the time it occurred. If it did not, then it was clearly not an otherwise working day for the employee. However, in terms of the other criteria:

- (a) The CA did not actually say that was the criteria to be applied;
- (b) It was illogical that in order to be entitled to a paid unworked public holiday an employee first had to volunteer work the public holiday;
- (c) Wendco cannot deprive an employee of an unworked paid public holiday by simply rostering them to work a different day in the public holiday week, if the employee usually worked the same day as the public holiday;
- (d) An employee who was rostered to work a public holiday could not also get a paid unworked public holiday for that same day. The contractual entitlement was either clause 13.3 or clause 13.4 in the CA, because it could not be both.

*Effect of clause 13.1 in the CA*

[92] Clause 13.1 addresses the fact that an employee cannot be required to work on a public holiday, unless they have volunteered to do so. It meant Wendco could not roster a Unite member to work on a public holiday unless they had volunteered to work, and the hours they were rostered fell within their Agreed Working Times.

*Wendco's interpretation of clause 13.1 in the CA was incorrect*

[93] Wendco's submission that clause 13.1 in the CA (requirement to volunteer to work on a public holiday) meant an employee's Agreed Working Times did not include public holidays, did not succeed.

[94] Clause 13.1 of the CA does not say that. Nor did clause 7.17 of the CA, that defined an employee's Agreed Working Times. Nor did any of the other clauses in the CA that dealt with rostering or Individual Guaranteed Hours.

[95] A public holiday could fall on a day that was otherwise a working day for the employee, as the rectification process for alternative holidays had recognised that. Whether or not an employee has volunteered to work on a public holiday was irrelevant to the assessment of whether or not the public holiday would otherwise have been a working day for the employee.,

[96] If the employee normally worked that particular day, and if they would have likely worked that same day had not been a public holiday, then it will otherwise be a working day for the employee. It is therefore the work pattern that is decisive of that question, not whether the employee had volunteered to work on a particular public holiday.

*Clause 13.1 of the CA did not prevent Wendco from providing employees with a PHNW*

[97] Wendco's view that clause 13.1 (employee must volunteer to work on a public holiday) prevented it from providing employees with a PHNW, unless they had volunteered to work and had not been able to be rostered to work their Individual Guaranteed Hours on other days that week, was not accepted.

[98] Clause 13.1 of the CA simply removed the right Wendco had in the Former Agreement to require employees to work on public holidays. It did not limit an employee's right to a PHNW to those employees who had volunteered to work on the public holiday.

[99] Even if it had, then such a limitation would have no effect. The minimum public holiday entitlements in the HA03 for a paid unworked public holiday cannot be limited by requiring an employee to have volunteered to work a public holiday, in order to get a PHNW.

*Was there a shared intention about how an 'otherwise working day' would be assessed?*

[100] The Authority did not accept Ms Lendich's evidence that during the bargaining process the parties mutually agreed that the intended interpretation in clauses 13.3 and 13.4 of the CA of what "would otherwise be a working day" for an employee meant that:

- (a) The day was within the employee's Agreed Working Times; and
- (b) The employee had volunteered to work the public holiday; and
- (c) The employee had not worked their Guaranteed Hours that week or had not made a written request to increase their Guaranteed Hours; and
- (d) The employee was rostered to work.

[101] Unite strongly refuted that interpretation, that it had been discussed during bargaining, or that any such agreement had been reached. Mr Treen said he would never have agreed to reducing Unite's members rights to a PHNW in that way. The Authority resolved this conflict in the evidence in Mr Treen's favour, as his evidence appeared more credible.

[102] There was no independent communications or other evidence apart from Ms Lendich's evidence that supported her interpretation. The interpretation Ms Lendich said had been agreed, was illogical because a Unite member would not be paid for an unworked public holiday unless they had first volunteered to work the public holiday.

[103] Such an interpretation would also have effectively deprived employees from receiving a PHNW on any public holiday other than Christmas Day. Even then, the interpretation Ms Lendich put forward would still have deprived most employees from receiving a PHNW.

[104] The Authority accepted Mr Treen's evidence, that the CA did not expressly address how the parties should determine "*whether a day would otherwise be a working day*" for an employee, was because they were unable to reach agreement about that.

*Is the requirement for an employee to volunteer to work on a public holiday relevant to their PHNW entitlement?*

[105] Wendco said that unless an employee had volunteered to work on a public holiday then it could not otherwise be a working day for them, because they cannot be required to work a public holiday unless they have volunteered to do so.

[106] Wendco's position meant that an employee could not receive a PHNW unless they had volunteered to work on the public holiday. That was incorrect. Whether or not the employee had volunteered to work was irrelevant to an objective assessment of whether a public holiday would otherwise be a working day for the employee.

[107] If an employee volunteered to work on a public holiday, then Wendco could have rostered them to work that public holiday, thereby negating the statutory right to a paid unworked public holiday if it would otherwise have been a working day for them.

[108] Whether or not a union member has volunteered to work on a public holiday is not a valid factor that can be used to determine whether or not a particular public holiday would otherwise be a working day for the employee.

*Did the Individual Guaranteed Hours clause in the CA prevent Wendco from rostering employees a PHNW?*

[109] Clause 7.21 of the CA did not permit an employee to be rostered outside of their Agreed Working Times, unless specifically agreed on a one off basis. Wendco claimed that a union member's Guaranteed Hours could not be met by rostering the employee a PHNW, because clause 7.21 made that "*contractually impossible*". The Authority disagreed.

[110] Wendco had already rostered some employees a PHNW on Christmas Day 2020, so it clearly could be, and was previously, done. Wendco had therefore already used a PHNW as a way of ensuring the employee received their minimum Guaranteed Hours, so it clearly believed it was contractually entitled to do that.

[111] An employee could be rostered other types of HA03 leave (eg sick, bereavement, family violence leave) that meant the employee was paid for the day but did not attend work. Unworked but paid public holidays should be treated in the same way.

[112] There was no contractual or statutory provision that prevented Wendco from rostering union members a PHNW on any public holiday the employee would otherwise have worked, on the understanding they would not be required to attend work, but would instead receive an unworked paid public holiday. Such an approach was not inconsistent with, or contrary to, clause 13.1 in the CA because it did not require the employee to actually work on the public holiday.

[113] Where a public holiday would otherwise be a working day for the employee, but the employee had not volunteered to work it then Wendco must provide the employee with a PHNW, as required by clause 13.4 of the CA. Where that occurs, then the PHNW counts towards the employee's Individual Guaranteed Hours. Contrary to Wendco's view, the Authority finds that there was nothing in the CA that prevented or prohibited that from occurring.

*Was the employee's contractually guaranteed hours relevant to an assessment of the PHNW entitlement?*

[114] Wendco said an employee would only be entitled to a PHNW if they had not been rostered to work their guaranteed hours on other days in the week in which the public holiday occurred. The Authority did not accept that.

[115] That approach effectively allowed Wendco to roster employees in a way that deprived union members of their statutory entitlement to a PHNW, under clause 13.4 of the CA and s 56 of the HA03. That is not permitted. These are minimum rights and entitlements that cannot be 'rostered' away.

[116] Although Wendco strenuously objected to Unite's allegations that it had rostered affected members in a way that disentitled them from a PHNW, it was clear to the Authority that union members who would normally have worked on the day of the public holiday, had been rostered to work on other days during the week in which the public holiday occurred. As Unite pointed out, rostering in such a way reduced Wendco's wages bill.

[117] Ms Lendich emphasised to the Authority that was not deliberate. She pointed out it would be too hard for Wendco to have deliberately done that, so it was coincidental if it occurred. Ms Lendich told the Authority that the rostering is now done by computers, although the details of that were not shared.

[118] Whether or not an employee has worked their Individual Guaranteed Hours in the week in which the public holiday occurred was not a factor that was relevant to the assessment of whether a public holiday would otherwise be a working day for the employee.

*Did the employee have to be rostered to work the public holiday in order to obtain the PHNW entitlement?*

[119] Wendco's claim that a public holiday would only otherwise be a working day for the employee if they had been rostered to work that day, did not succeed. An employee who was rostered to work on a public holiday did not have the contractual or statutory right to a PHNW that same day. An employee who worked the public holiday would get an alternative holiday under clause 13.3 of the CA, but not a PHNW under clause 13.4 of the CA.

[120] Wendco's interpretation therefore deprived affected members of a PHNW on any public holiday apart from Christmas Day (when the restaurants were closed), which was the only day Wendco would potentially roster employees but not require them to work. However, that was also very limited, because the only union members who had not been rostered to work their Guaranteed Hours on another day during the public holiday week would get a PHNW on Christmas Day.

[121] Interpreting clause 13.1 of the CA to mean that before an employee could receive a PHNW they had to volunteer and be rostered to work the public holiday was an invalid restriction on their contractual (and minimum statutory) entitlement to a PHNW. Whether Wendco has elected to roster an employee (who had volunteered) to work a particular public holiday is irrelevant to an assessment of the employee's public holiday entitlement in clause 13.4 of the CA.

*Is Christmas Day always excluded from ever being an 'otherwise working day'?*

[122] Wendco's position that Christmas Day cannot ever be an otherwise working day for any employee, because the restaurants are closed, is not accepted. Christmas Day could otherwise be a working day for employees who usually worked that day of the week.

[123] The evidence established that Wendco has previously treated Christmas Day as an otherwise working day for some employees. Wendco's own evidence was that it paid PHNW to Annie Devi and Ryan Korff for Christmas Day 2020. According to Unite's evidence, which may also have occurred for up to seven more employees.

[124] The only reason no employees worked on Christmas Day 2020 was because the restaurants were closed, precisely because it was a public holiday. But for the Christmas Day public holiday, some employees would have worked that day. Whether it would otherwise be a working day for an employee depended on whether or not they usually worked that same day of the week.

*Wendco has had control over the affected employees' public holiday entitlements*

[125] Wendco has applied the CA in the way that effectively gave it the exclusive power to decide, and therefore control, whether or not a union member would receive a PHNW. Ms Lendich's evidence that Wendco was not in control of the union members' public holiday entitlements because they (not Wendco) could exclusively decide whether or not to volunteer to work on a public holiday, was not accepted.

[126] Apart from Ms Lendich's evidence that if an employee who was rostered to work on a public holiday called in sick they would get a PHNW (not paid sick leave), there was no evidence of any employee receiving a PHNW for any public holiday, apart from Christmas Day. Those who received a PHNW on Christmas Day were limited (between two to seven

depending on which party's evidence was accepted) to employees who had not already been rostered to work their Individual Guaranteed Hours that week.

[127] That in itself was evidence that Wendco had limited the affected employees' entitlement to a PHNW, particularly when the Authority considered it was clear that a number of the public holidays clearly would otherwise have been a working day for many of the affected members.

*Effect does s 6 of the HA03 on the public holiday entitlements in the CA?*

[128] Wendco's interpretation of clause 13.4 of the CA resulted in an outcome that was clearly far less favourable to employees than what the HA03 provided for. It placed so many restrictions on assessing what "would otherwise be a working day" for the employee, that it rendered the minimum PHNW entitlement almost nugatory.

[129] The Authority did not agree with Wendco's interpretation of clause 13.4 of the CA. However, to the extent that interpretation was correct (which was not accepted) then that would be contrary to s6(3), so any such those provisions would have no effect, as per s 6(3)(a) of the HA03.

*Was it clear that none of the public holidays would 'otherwise have been a working day' for any of the affected employees?*

[130] Wendco's position, that it was clear that none of the public holidays would have otherwise been a working day for any of the affected employees, was not accepted. The Authority considered the contrary was true.

[131] For many of the affected employees it was clear that they would have worked that same day of the week, had it not been a public holiday. Unite's claim that these affected employees were therefore entitled to a paid unworked public holiday (PHNW), as per clause 13.4 of the CA was successful.

**How will the parties know if it is clear that a public holiday “*would otherwise be a working day*” for an affected member?**

*What criteria should be used to assess whether a public holiday was clearly a working day?*

[132] The rectification process after the 2017 determination used a formulaic test that made it clear whether a worked public holiday “*would otherwise be a working day for the employee*”, for the purposes of the alternative holiday entitlement in clause 13.3 of the CA.

[133] Although that test only applied to the assessment of whether the employee was entitled to an alternative holiday, that same logic should apply to whether it was clear an unworked public holiday “*would otherwise be a working day for the employee*”. Namely, a regular pattern of work established over a four to 13 week period could make it clear that a public holiday would otherwise be a working day.

[134] The type of entitlement (ie whether an alternative holiday or a PHNW) is not relevant to whether it was clear the public holiday would otherwise be a working day for the employee. What was relevant was the employee’s regular or normal work pattern. It was open to the parties to have agreed on a test to establish whether it was clear an unworked public holiday would otherwise be a working day for the PHNW entitlement, but they did not do so.

[135] That omission left it open to the Authority to adopt an objective test to determining whether it was clear the employee regularly or normally worked the day the public holiday fell on. In some cases reviewing four weeks of an employee’s regular days of work made that clear, for some it needed to be 13 weeks and for others it was clear from reviewing a period of time that fell in between that.

[136] This approach meant the Authority did not need to adopt the exact same work pattern test used in the 2017 rectification process, or agreed on in the Record of Settlement, because it was clear just from looking at the days the employee worked that a particular public holiday would otherwise have been a normal workday, but for the public holiday.

[137] The Authority applied an individualised approach to each employee's work pattern. For some of the affected employees who worked 6/6 or 5/6 or 8/9 or 9/10 or 14/14 of the same day, it was clear to the Authority that they normally worked the same day the public holiday fell on.

*Work pattern*

[138] The parties therefore needed to objectively review the employee's work pattern to see whether it was clear that the employee usually worked the same day as the public holiday, to determine their PHNW entitlement in clause 13.4 of the CA. If the employee normally worked the same day as the public holiday fell, then it clearly would otherwise be a working day for them.

*How regularly did an employee need to work the same day for it to 'otherwise be a working day'?*

[139] The Authority in the 2017 determination said a period of at least three months or, if an employee had not worked for three months, then the employee's full work history needed to be considered to establish a long enough pattern of regular work.

[140] It also recognised that the work pattern may be decisive in terms of establishing whether a public holiday clearly would otherwise be a working day for employees who worked a variable roster.

[141] The Authority declined to give a percentage of the number of the same days an employee had to work in the lead up to the public holiday for it to be clear that the public holiday in question would otherwise be a working day for the employee, because it doubted there was a 'one size fits all' answer to that question.

[142] The Authority did however note that "*for some employees the answer may be clear if they worked more than 50% of the same day of the week in the preceding three to six months*" leading up to the public holiday. It also added the caveat that the 50 percent assessment would not always produce the correct answer, which is why a personalised approach was required.

[143] In the absence of agreement between the parties on a formulaic test that was to be applied to assess the PHNW entitlement in clause 13.4 of the CA, then an objective personalised assessment had to be done for each employee. There needed to be a clear regular

or normal work pattern established, but the period of time it covered varied for each employee, to ensure an individualised approach was adopted.

[144] The Authority has undertaken that exercise for each affected employee and has formed the preliminary view that for many of them it was clear the public holiday(s) would otherwise be a working day for the employee.

**Was it clear that any of the Christmas 2020 and/or New Year 2021 public holidays “*would otherwise be a working day*” for any of the affected members?**

[145] It was clear to the Authority that a number of the Christmas 2020 and New Year 2021 public holidays would otherwise have been a working day for many of the affected members. The Authority has provided the parties with a Minute that sets out its preliminary views on that.

**Where it was not clear, did Wendco correctly assess whether a public holiday “*would otherwise be a working day*” for each affected member?**

[146] Where it was not clear that a public holiday “*would otherwise be working day*” for an affected member, then for each employee, for each public holiday, Wendco had to attempt to agree on that with the employee (or their representative, Unite). Wendco failed to do that. Instead, Wendco unilaterally decided what (if any) public holiday entitlements an affected employee would receive.

[147] Wendco did not correctly assess the affected members’ public holiday entitlements, so it should have an opportunity to do that now, based on the findings in this determination. In seeking to reach agreement with an affected employee about their public holiday entitlement, Wendco and the employee had to consider the factors in s 12(3) of the HA03.

**How should the factors in s 12(3) of the HA03 be applied for each affected member?**

**(a) Section 12(2)(a) of the HA03**

[148] The s 12(2)(a) factor (employee’s employment agreement) required the parties to see if the day the public holiday fell on was within the employee’s Agreed Work Times at the time the public holiday occurred. If not, then it would not otherwise be a working day for that employee.

(b) Section 12(2)(b) of the HA03

[149] The s 12(2)(b) factor (the employee's work patterns) was the subject of the Record of Settlement dated 2 June 2022.

(c) Section 12(2)(c) of the HA03

[150] Any other relevant factors were to be considered, including those in s 12(3)(c)(i)-(iii) of the HA03. The factor in s 12(3)(c)(i) was not relevant because Unite's members had guaranteed hours. The factor in s 12(3)(c)(ii) was already covered by the work patterns the parties had agreed on in the Record of Settlement.

[151] The factor in s 12(3)(c)(iii) (reasonable expectations of employer and employee) related to whether or not;

- (a) The public holiday fell within the employee's Agreed Work Times; or
- (b) There was some reason why the employee would not be continuing to work their normal work pattern (parental leave, long terms absence, leave without pay etc).

(d) Section 12(2)(d) of the HA03

[152] The Authority considered the most important, and decisive, factor in this case would be the s 12(3)(d) factor which required the parties to consider whether "*but for*" the public holiday the employee would have worked on the day on concerned. That factor led back to the need for there to be an individualised assessment of the particular employee's normal work pattern in the lead up to the public holiday.

**What else did the parties need to take into account when assessing whether or not a public holiday would otherwise be a working day for each affected employee, where that is not clear?**

*Other HA03 leave*

[153] When considering the employee's work pattern in the lead up to the public holiday all HA03 leave (such as sick, bereavement and family violence leave, as well as PHNW) needed to be counted as a working day.

*Factors that were not relevant to the assessment*

[154] Factors that would make it clear that a public holiday would not otherwise be a working day (for the purposes of the CA public holiday entitlements) for an employee included:

- (a) It fell outside the employee's Agreed Working Times;
- (b) The employee was not covered by the Unite CA;
- (c) Material changes had occurred to the employee's work pattern immediately before the public holiday, rendering it obsolete; and
- (d) The employee had commenced parental leave, leave without pay, long term sick leave, or some other type of leave that meant they would not have continued to have worked the same day as the public holiday, regardless of the public holiday.

**Has Wendco breached clause 13.3 of the CA?**

[155] Wendco admitted that it failed to pay five affected members an alternative holiday they were entitled to under clause 13.3 of the CA. Wendco has therefore breached clause 13.3 of the CA.

[156] However, the total number of breaches has not yet been determined, as it is unclear whether the 'Mondayisation' issues were limited to five affected employees or involved more than that. That is subject to further investigation.

**Has Wendco breached clause 13.4 of the CA?**

[157] Wendco breached clause 13.4 of the CA, because it failed to pay a number of affected members a PHNW they were contractually entitled to under clause 13.4 of the CA. The total number of breaches is yet to be determined, so will be subject to further investigation.

**What if any outstanding contractual public holiday entitlement is each affected member owed?**

[158] Where the Authority considered it was clear that some of the public holidays would otherwise have been working days for some of the affected employees, that has been recorded in a Minute dated 2 May 2023.

[159] Because there is currently some ambiguity relating to the evidence for some of the affected employees, the parties have been given an opportunity to correct any inaccuracies in the data the Authority used when reaching that conclusion, before that is formally determined.

[160] The Minute also identified other evidential issues that need clarification or further investigation and a process was put in place to facilitate that. The Authority also provided guidance in the Minute to the parties on how they should attempt to agree on whether or not a public holiday would otherwise be a public holiday for each affected employee, where that was not clear.

[161] The Authority's findings regarding the outstanding contractual entitlements each affected employee is owed is therefore still under investigation. The Minute issued to the parties today sets out the next steps in the Authority's investigation.

**What if any costs and disbursements should the successful party be awarded?**

[162] Whether or not costs should be payable, in light of the Authority's Practice Note 2 dated 29 April 2022, will be addressed at the conclusion of these proceedings.

**Rachel Larmer**  
**Member of the Employment Relations Authority**