

IN THE COURT OF APPEAL OF NEW ZEALAND

CA 270/05

BETWEEN

THE NEW ZEALAND FIRE  
SERVICE COMMISSION

Appellant

A N D

NEW ZEALAND PROFESSIONAL  
FIREFIGHTERS UNION

Respondent

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RESPONDENT'S SUBMISSIONS

Dated this 10th day of July 2006

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(for contents see overleaf)

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PRESENTED FOR FILING BY:

OAKLEY MORAN

Solicitors, Wellington.

P.O. Box 241 DX SP20003

Phone: (04) 472.3055

Fax: (04) 472.6657

Persons Acting

Peter Cranney/Anthea Hughes

Submission 9 July Court of Appeal

MAY IT PLEASE THIS HONOURABLE COURT

1. OVERVIEW

- 1.1. The contractual roster has operated since the 1970s.
- 1.2. It clearly identifies working days for the employee, rostered days off for the employee, and annual leave days for the employee. In each 160 day period 90 calendar days are worked; 56 calendar days are days rostered off; and 14 days are annual leave (see appendix A).
- 1.3. On an annual basis, the employee works 205 days<sup>1</sup>; is rostered off for 128 days; and is on annual leave for 32 days<sup>2</sup>.
- 1.4. In the late 1980s and prior to 1991-1992, the parties regarded the annual leave component of the roster as being made up of three weeks' annual holiday, one week's shift leave and four days' extra leave.
- 1.5. In 1991 and 1992, following the passing of the Holidays Amendment Act 1991, there arose a new and general obligation to provide a day in lieu to any employee who worked on a public holiday.
- 1.6. The Appellant ("Commission") requested the Respondent ("NZPFU") to agree to use the existing annual leave entitlements to satisfy the new obligation. The Commission had insufficient funds to grant additional days off work, which would have meant overtime payments for the replacement workers. The use of existing leave days meant that the new section 7A obligation was cost neutral for the Commission. The NZPFU's members, unlike other New Zealand workers, received no additional days in lieu for working public holidays. Instead they

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<sup>1</sup> The figures contained at paragraph 2.4(v) of the Commission's submission are not correct. See paragraph 1.22.1 below.

<sup>2</sup> The average of 32 days for annual leave could mislead. The employees can work three calendar years receiving 28 days per year, and then receive additional leave as late as the fourth calendar year if still employed, to bring the average up

had agreed, under threat of redundancies, to re-label existing leave entitlements.

- 1.7. The NZPFU scrupulously honoured the agreement made, notwithstanding developments in the case law suggesting that days in lieu must be granted on actual working days, and could not be granted on days that were not working days or were already agreed leave days. The first such case was *Ashcroft v Ansett NZ Ltd* [1993] 2 ERNZ 891.
- 1.8. The NZPFU continued to honour the arrangement even in the face of opposition from a sizeable minority of its then membership. In 1995, that minority sued the Commission: *Small v New Zealand Fire Service Commission* AEC 21/96 17 May 1996. The NZPFU was not a party to the ensuing litigation.<sup>3</sup>
- 1.9. In *Small* (Case 464), Travis J dismissed the minority's claim. Travis J declined to follow the *Ashcroft* approach, and thought it unnecessary, on the view he took of the case and for the reasons he gave, to decide whether the *Ashcroft* requirements arose from the 1981 Act (Case 474 line 11). The Court considered that the *Ashcroft* requirements may have arisen not from any obligation imposed by the 1981 Act as amended, but rather from the contract before the Court in that case (Case 474 line 9).
- 1.10. The Court in *Small* identified "the nub of the argument" as whether parties to an employment contract could use prior existing arrangements for leave to satisfy the section 7A obligation (Case 476 last paragraph). Travis J accepted the Commission's submission that the "totality of arrangements" in

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<sup>3</sup> to 32 (see appendix A).  
It is common ground that an earlier judgement of this Court contains an error: *New Zealand Fire Service Commission v NZPFU*, CA268/04 17 March 2004. The Court stated that the Employment Court had accepted that the NZPFU was a party to or privy to the *Small* litigation. In fact, the Employment Court specifically declined to make that finding: see Case 669 paragraph 43.

the 1991 agreement satisfied the requirements of the 1981 Act, and stated that where “a contract provided for benefits in excess of those provided in the Act, although not in precisely the same terms, this will satisfy the requirements of the [1981] Act” (Case 478 paragraph 1).

- 1.11. The NZPFU continued to honour the agreement made and renewed that agreement, as a collective employment agreement in 2001. The 2001 agreement was to expire on 29 June 2003.
- 1.12. The position was different in 2003. The parties were aware that new legislation was pending. The Chief Executive informed the NZPFU that he did not wish to anticipate what obligations would be imposed by proposed 2003 Act. His position was that if there were obligations which had financial implications, he would expect the Government to fund those, and that the parties should not need to find those funds in the moneys already provided by the government to settle the agreement (Case 137, paragraph 108).
- 1.13. The 2003 CEA which replaced the 2001 CEA therefore contained a provision which dealt with both the 1981 Act and the anticipated 2003 Act.<sup>4</sup> In relation to the 1981 Act, the CEA repeated the existing contractual terms, to the effect that the parties were in agreement that the 14 days’ leave in 160 gave each employee annual leave in excess of the three weeks’ minimum provided by section 11 of the 1981 Act; and that the additional days provided compliance with the requirements of section 7A of that Act (CEA clauses 2.7.1(a) and (b), Case 376). In relation to the 2003 Act, the CEA imposed a new obligation on the Chief Executive to demonstrate compliance with the “intent and entitlements” of the as yet unseen legislation. (CEA

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<sup>4</sup> The 2003 agreement was signed on 1 July 2003. The Holidays Act 2003 was signed by the Governor General on 17 December 2003 and came into force for

clause 2.7.1(c), Case 376). The NZPFU protected its position in this manner.

- 1.14. The inclusion of clauses 2.7.1(a) and (b) was consistent with the NZPFU's acceptance of the *Small* decision, as it understood that decision. The new clause 2.7.1(c) indicated that both parties accepted that the Chief Executive would be bound by the requirements of the new Act (both its intent and its entitlements).
- 1.15. The 2003 Act came into force after the CEA was signed. The 2003 Act conferred various entitlements in a code relating to public holidays and alternative holidays. The code included a requirement that an alternative holiday be taken on a day that would otherwise be a working day for the employee. The Act also gave the employee the right to choose which day to use, after seeking to reach agreement with the employer.
- 1.16. The subsequent contention by the Commission that the 2003 Act did not change the law (and therefore that this matter should be resolved by reference to previous case law) is not correct. The purpose of the 2003 Act was in part to codify aspects of the existing law; in part to reform the law; and in part to create a new, standard and self contained code *which could be easily understood without reference to the case law*. In those circumstances the law should be ascertained by the language used in the code itself, rather than by reviewing copious authorities to ascertain what the law was, and then asking whether the statute has changed the law: *Bank of England v Vagliano Brothers* [1891-4] All ER 93, 113 lines D-I (NZPFU's bundle, tab 6 page 60).
- 1.17. The Explanatory Note to the Bill states (inter alia):

“The Holidays Bill implements government policy by providing entitlements that are easy to understand and apply.” Business New Zealand's bundle page 24) (emphasis added)

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material purposes on ! April 2004.

“The Bill ensures that the application of holiday and leave entitlements can be achieved through reference to the provisions of the Bill without needing to examine outside sources.” Business New Zealand’s bundle page 24)(emphasis added).

“... The [1981] Act has attracted criticism from the public, and from employer and employee groups, over recent years for being complicated and difficult to understand and apply. The Act has been supplemented by copious judicial decisions that are not evident to users and has also been the subject of numerous reviews.” (Business New Zealand bundle page 39)(emphasis added).

- 1.18. Those goals of the Bill were met by the straightforward language used in the Act. The relevant words are “a day that would otherwise be a working day for the employee”. (See Holidays Act 2003 section 57(1)(b)).
- 1.19. The phrase “otherwise working day” (referred to repeatedly by both the Commission and Business New Zealand) does not appear anywhere in the statute<sup>5</sup> (see Commission’s submission paragraphs 1.3(i), 1.1, 1.13, 1.4(ii), 1.14((iv)(twice), 1.14 (v); 1.17, 3, 3.4, 3.5 (twice), 3.6, 3.11, 4.1, 4.15(ii), 7.8(i); Business New Zealand’s submission paragraph 1.3, 1.7, 4.1, 4.6, 5.5, 8.14, 8.15. 8.18).
- 1.20. As it happens, the section 57(1)(b) words under discussion are used widely throughout the 2003 Act: sections 13(1), 40(3)(a), 47(a), 48(1) and (2), 56(1)(a), 59(1)(a) and 71(1).
- 1.21. The words have a clear meaning. If it is necessary to refer to similar words in the 1981 Act, the case law favours the NZPFU, not the Commission. Section 7A of the Holidays Act 1981 contained the words “would otherwise be working days for the worker” (for the purpose of identifying whether a particular

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<sup>5</sup> The importance of discussing the actual words used in the statute was emphasised in *Strauchon v New Zealand of the Intellectually Handicapped*[1994] 2 ERNZ 226, 241 in which the Employment Court considered similar words in section 7A of the 1981 Act: “At this point in the plaintiffs’ submissions I address what I see as a serious misunderstanding by counsel as to all the phrase in s7A(1) which requires interpretation and application upon which virtually the whole of her submissions are based. She has confined her attention to the words “otherwise be working days” whereas I rule that the phrase in question must be “that would otherwise be working days””. To that must be added “for the worker””; Holidays

employee would receive a holiday on pay on a public holiday). The Court expressly approved the Defendant's formulation that the words mean a day on which "the employee *but for* the public holiday *would have worked*": *Strauchon v New Zealand Society of the Intellectually Handicapped* [1994] 2 ERNZ 226 at 241 (emphasis in original) (NZPFU's bundle, tab 4 page 43). See also the review of cases at pages 239-241 of *Strauchon*.

1.22. The NZPFU makes the following initial comments about the Commission's submission in this Court:

1.22.1. At paragraph 2.4(v) of its submission, the Commission has provided incorrect information in the form of a claim that the NZPFU's members work an average of 180 days per year. In fact, the employees work an average of 205 days; and are rostered off for an average 128 days; the remaining "average" of 32 days in annual leave. This can be compared with an "ordinary" five day per week Monday to Friday worker who works 235 days per year (that is, 365 less 15 notional days annual leave less 11 public holidays less 52 Saturdays and 52 Sundays). Although firefighters work less than the "standard" 235 days, they work longer continuous hours and at antisocial times. Firefighters work 10 or 14 hour shifts and not the "ordinary" eight hours. Further, half of the shifts are overnight shifts commencing at 6pm and ending at 8am the following day. The shifts also run on Saturdays and Sundays. In calendar day terms, the employees work on average of 9.6 hours per day (a total of 48 hours over five calendar days). In terms of actual hours worked in a year, firefighters work 1968 hours (that is, 9.6 hours an average per calendar day,

over 205 calendar days). An “ordinary” worker works 235 8-hour days, or 1880 hours, or around 88 hours per year less than a firefighter. (The difference of 88 hours is equivalent to about 11 eight hour holidays.)

- 1.22.2. The Commission has not clearly distinguished between the evidence heard in this proceeding and the facts as found in *Small*. The distinction is important because the Court in *Small* heard copious uncontested evidence about the 1992 contractual negotiations from one witness (Mr Summers). This evidence was heard with the consent of both parties in that case (see Case 465). Mr Summers also gave evidence in this proceeding but his evidence about the negotiations was struck out of his brief unheard as was Mr Best’s evidence in response. The Union does not accept the facts about the negotiations as found by the Travis J and also does not accept all of his conclusions about the workings of the roster, the leave system, and the payment system (see Case 63 line 550 – 560; Case 67 lines 752 – 785 and lines 787-796; see also below in this submission). Notwithstanding that the NZPFU has not and does not rely on any contention *Small* was wrongly decided notwithstanding that it has never accepted the Court’s factual conclusions (see Case 109 paragraph 15; Case 120 paragraphs 36-40.8; Case 129 paragraphs 66–96; Case 137 paragraphs 108-121); although the NZPFU has contended throughout that *Small* is no longer good law in light of the 2003 Act.

- 1.23. Business New Zealand’s submissions are dealt with in more detail below. For present purposes it is sufficient to state:

- 1.23.1. The NZPFU does not accept that this case necessarily

has “*far reaching effects*” (Business New Zealand’s submission paragraph 1.1). The roster, the facts and the history are in many ways unique. Certainly, there was no evidence, affidavit or otherwise, which addressed this issue.

1.23.2. Business New Zealand’s submissions regarding the Explanatory Note to the Holidays Bill and the Advisory Group are one-sided. Further, the passage referred to at paragraph 5.3 of its submission forms no part of any report of the Holidays Act Working Group or of any Executive Summary in any such report.

## 2. SUMMARY OF NZPFU’S CASE

- 2.1. The 14 days in 160 are not days that would otherwise be working days for the employee. Accordingly, cannot be used as alternative holidays as that would breach section 57(1)(b) of the 2003 Act.
- 2.2. In any event, there has been no agreement by any employee or by the NZPFU to use the days or any of them as alternative holidays, as required by section 57(1)(a).
- 2.3. The terms of the CEA, the history of the CEA, the contractual roster, the leave system and the payment schema all show that the days are not days that would otherwise be working days for the employee.
- 2.4. The case law that developed under the 1981 Act does not when properly read assist the Commission. In any event, the 2003 Act is a code, and should be applied.
- 2.5. The Employment Court made no error. Its conclusions which interpreted the CEA, including its interpretation of clause 2.7.1 (a) –(c) are amenable to appeal.

## 3. THE STATUTORY RIGHTS AT ISSUE

- 3.1. The rights at issue arise from straightforward statutory language.
- 3.2. The employer is required to provide an alternative holiday in accordance with section 56(2)(a) of the Holidays Act 2003 (the Act).
- 3.3. The alternative holiday “must be a day that would otherwise be a working day for the employee”: section 57(1)(b).
- 3.4. The alternative holiday must “be taken by the employee on a day that is agreed between the employer and the employee”: section 57(1)(b).
- 3.5. The alternative holiday must be a whole “working day off work”: section 57(1)(c) (emphasis added).
- 3.6. The alternative holiday must “be taken on a day that is agreed between the employer and the employee”: section 57(1)(a).
- 3.7. If the employer and the employee cannot agree on when an alternative holiday is to be taken, then the day may be taken on a date to be determined by the employee, taking into account that employer’s view as to when it is convenient for the employee to take the day: section 57(2)(a).
- 3.8. The employer may require the employee to take the alternative holiday on a date determined by it only if (section 58):
  - 3.8.1. Twelve months have passed since the entitlement arose (section 58(a)); and
  - 3.8.2. The employer and the employee have not been able to agree on a date on which the employee will take the day (section 58(b)); and
  - 3.8.3. The employer has given the employee at least 14 days’ notice of the date on which the employer requires the alternative holiday to be taken: (section 58(c)).
- 3.9. If the employer chooses not to exercise the right to require the employee to take the alternative holiday pursuant to section 58,

there is then an entitlement for the employee to request the employer to exchange the employee's entitlement for a payment: section 61.

3.10. The employer is required to keep a record of the "dates of ... any public holiday on which the employee worked" (section 81(2)(i)); the date on which the employee became entitled to an alternative holiday (section 81(2)(k)); the details of the dates of an payments for any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay (section 81(2)(k)); and the details of any payment to which the employee is entitled under section 61(3)).

3.11. If it is not clear whether a day would otherwise be a working day for the employee, both the employer and the employee must take into account the factors listed at section 12(3) with a view to reaching agreement about the matter (the factors are the employment agreement; the employee's work patterns; and any other relevant factors including the employer's rosters or other similar systems; and the reasonable expectations of the employer and the employee that the employee would work on the day concerned.

3.12. Each entitlement provided to an employee by the Act is a minimum entitlement: section 6(1).

3.13. An employment agreement that excludes, restricts or reduces an employee's entitlements under the Act has no effect to the extent that it does so: section 6(3)(a).

#### 4. THE CEA - OPERATION AND HISTORY

4.1. In applying the abovementioned sections, the terms of the CEA itself, and the factual context, are crucial.

##### *The contractual roster*

4.2. An employee joining the fire service is assigned to black watch

roster. This is a five day Monday to Friday roster which is used for training purposes (see CEA clause 2.4.2, Case 367).

- 4.3. The hours of work in a black watch roster position are eight hours per day between 0700 and 1800, to be worked Monday to Friday (clause 2.3.5, Case 365).
- 4.4. The trainee is then “assigned”, by the employer, to the operational roster (clause 2.4.4 Case 367).
- 4.5. The “operational roster” is defined in the agreement (clauses 2.3.1, 2.3.2, and 2.3.2.1, Case 363).
- 4.6. The assignment to the operational roster is an assignment to one of four watches, each defined by a colour – green, red, brown and blue (Case 112 paragraph 8).
- 4.7. One quarter of the operational roster employees are assigned to each of the four watches (Case 112 paragraph 9).
- 4.8. The first day of the roster commences at 0800 on day 1. There are then four shifts, two of 10 hours and two of 14 hours, worked over the next five calendar days. In calendar day terms, an employee works on five out of eight days, as follows (Case 113 paragraph 12):

Day 1	0800 - 1800	10 hours
Day 2	0800 – 1800	10 hours
Day 3	1800- 2400	6 hours
Day 4	0001- 0800 and 1800- 2400	14 hours total
Day 5	0001 – 0800	8 hours
Day 6	rostered day off	
Day 7	rostered day off	
Day 8	rostered day off	

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Day 1 0800 – 1800 etc. ...

- 4.9. The operation of the roster over the 160 calendar days is illustrated by the table at Appendix 1.

- 4.10. Unlike most employees who operate on a seven day week, firefighters operate on an “eight day cycle”. The number of calendar days worked per eight day cycle is five – the same number of days as a weekly worker would normally work in a week. However, firefighters work forty eight hours over the five day period, not forty (Case 113).
- 4.11. Work outside of those usual rostered shifts is overtime and is paid at time and a half for the first three hours, and double time thereafter (clause 2.6.10 – Case 374).<sup>6</sup>

*The leave system*

- 4.12. Leave days, like rostered days off and working days, are strictly defined. Each of the four coloured watches is divided into ten separate “leave groups”, making forty separate leave groups. Each employee therefore has both a colour and a number (Case 115 paragraph 20 and 21).
- 4.13. After working 18 of the “eight day cycles” (described above), the employee commences 14 days’ annual leave. The leave commences after the three rostered days off. The leave then concludes after 14 days. There are then a further two rostered days off which are not leave (Case 115 paragraph 22).
- 4.14. The system then repeats itself endlessly, although an employee may be required by the employer to change from one leave group to another, or from one watch to another. If an employee does not change his or her watch colour or leave group number, it is possible for him or her to know with certainty the days which are working days for him or her, the days which are rostered

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<sup>6</sup> One consequence of clause 2.6.10 (as was submitted in the Employment Court) is that if the Commission is successful, it must pay overtime rates to employees who are granted alternative holidays outside of rostered shifts. This is a consequence of section 9(1)(a) and 9(1)(b)(ii) of the Act, which require that alternative holidays be paid at “the amount the employee would have received had the employee worked on the day concerned”.

days off, the days which are leave days, and the days which are public holidays required to be worked (Case 115 paragraph 23).

*The roster and leave system summarised*

- 4.15. In summary, the CEA clearly defines the working days for the employee concerned, specifically:
  - 4.15.1. Clause 2.3.1 defines the operational roster.
  - 4.15.2. Clause 2.3.1.1 defines the eight week cycle of the operational roster, and states that during the eight week cycle an employee will normally work 28 shifts.
  - 4.15.3. Clause 2.3.1.2 defines the eight day cycle of the operational roster and states that during the eight day cycle a worker will normally work four shifts.
  - 4.15.4. Although there is provision at clause 2.3.1.3 for the Chief Executive to determine the times at which the eight week cycle and eight day cycle will commence, the contract clearly contemplates continuation of the cycles. Any change to the commencement date of the various cycles would only exchange the existing set of working days for another equally clear set.
  - 4.15.5. Clause 2.3.2 refers specifically to the “continuing rotating roster”, which is set out at 2.3.2.1.
  - 4.15.6. Clause 2.3.6.1 tightly defines which days are working days for the employee concerned and which are not, even in a situation of a requirement to change from one watch group to another. Each day is carefully allocated as a working day (night or day shift) or a rostered day off.
  - 4.15.7. All time worked outside of a “usual rostered shift” is paid at overtime rates: clause 2.6.10.

- 4.16. Annual leave – the 14 days in 160 – is rigidly defined pursuant to a rigid cycle.
- 4.17. The 14 days in 160, which had their origins as annual leave, shift leave and service leave, have never been working days for the employee. They have always been one form or another of leave (see below).
- 4.18. Until 2003 the leave system was entirely contractual, notwithstanding that the parties included comment in the employment agreements to the effect that the annual leave entitlements were in excess of the minimums required by section 11 of the 1981 Act. The 1981 Act did not bind the Crown for annual holiday purposes. The employees were bound contractually to work only the days rostered (that is, five out of eight calendar days in the first 144 days of the defined roster). The employer was contractually bound to grant 14 days' leave within each 160, and to do that in accordance with a contractually mandated roster cycle. The payment regime for the 14 days in 160 was also contractual, notwithstanding that the payment methodology reflected the statutory scheme imposed on the private sector and contained in the 1981 Act and subsequently, the 2003 Act (see paragraphs 4.31 and 4.32 below).
- 4.19. The leave scheme is and was an agreed system whereby all leave days fall outside of any day that an employee may be required to work. (The CEA contains a specific exception to this principle at clause 1.4.12.3, which in limited circumstances specifically allows annual leave to be taken on days that would otherwise be working days for the particular employee (Case 348, clause 1.4.12.3, and in particular the words “the *worker's* first duty day”).

*Wages and their relationship to an employee's working days*

- 4.20. Because of the suggestion made both in *Small* and subsequently that the employees are paid a “salary” (and therefore every day is a working day) it is necessary to deal with this issue.
- 4.21. In *Small*, Travis J stated (Case 481 last paragraph):
- “I accept Mr Broadmore’s submission that whether one draws the analogy of a five day week a week worker or not the wages earned during the time a worker is at work cover the period of what may loosely be described as a working week which includes the normal days off for that particular worker”.
- 4.22. That passage may be somewhat difficult to construe. However, if it means that the employees are paid a salary in the normal sense of the word (that is, an annual sum which is then divided into weekly or fortnightly amounts), or that there is some payment for rostered days off, it is not correct.
- 4.23. This issue was dealt with in detail in the Employment Court in this proceeding (but not before Travis J in *Small*). What became apparent is that the parties retain the same rigid division of working days and non-working days in their payment and wages schema as is contained in the rostering and leave schema.
- 4.24. The evidence was that over eight calendar weeks (which equates to seven 8-day cycles or half of a 160 day cycle) all employees are rostered for exactly the same number of ordinary hours, exactly the same number of overtime hours, and exactly the same number of Saturdays and Sundays<sup>7</sup>.
- 4.25. The parties agreed in the late 1970s that it was desirable to identify all the payments and allowances relating to Saturdays, Sundays, ordinary hours worked and overtime hours over the roster period so that an equal weekly wage could be paid each

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<sup>7</sup> The reason for this is that over the eight week period, there are seven 8-day cycles. Only one cycle will commence on a Monday; one on a Tuesday; one on a Wednesday; and so on. The result is that every employee works exactly the same number of hours in the period as every other employee; and exactly the same number of Saturdays and Sundays (and other weekdays) as every other

week.

- 4.26. This arrangement enabled the parties to standardise weekly wage payments while preserving in its entirety an exact correspondence between working days and hours worked on the one hand the wages paid to the employee on the other. This rigid approach has been continued to this day.
- 4.27. By way of example, the total weekly wage currently paid comprises payment for 42 hours. This figure of 42 is arrived at by taking the payments for seven 8-day cycles (that is,  $7 \times 48 = 336$  hours) and then dividing that figure of 336 equally over eight 7-day weeks, resulting in a payment of 42 hours per week.
- 4.28. Although the parties carried out this exercise in the late 1970s, the current CEA still retains the rigid co-relation between the actual working days worked by the employee in the cycle and the wages paid (see CEA Part 4 Table 2 Case 391; see CEA Case 392 which records the actual hourly rates which provide basis of the total weekly wage in the table; and also Case 651-655, being a table kept by the parties outside of the CEA, for the purposes of calculating the Total Weekly Wage).
- 4.29. Contrary to the impression that may be gained from *Small* (and from the Commission's submission in this proceeding) there are no wages paid for days rostered off. The payments and allowances received by an employee are payments for actual working days worked by the employee. Those days are rigidly defined by the CEA itself.
- 4.30. For those reasons, the statements at paragraphs 2.4(iii) of the Commission's submission referring to rostered days off ("the remaining two days are on pay") and 2.4(v) ("the two paid days at the end of the 14 day period") are both incorrect. Those days

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employee.

are not paid. Those days, and other rostered days off, have never been paid. The payments received by the employees relate to the exact number of rigidly defined working days as dictated by the CEA.

*Payment for leave*

- 4.31. The payments for the 14 days leave in 160 are dealt with in a different manner to the payment for days worked.
- 4.32. The 1981 Act did not bind the Crown for annual leave purposes. Notwithstanding that, the contractual scheme agreed between the parties had similarities to the statutory scheme, requiring a comparison between ordinary wages at the time the holiday commenced and average earnings over the previous twelve months, and then payment of the higher sum. The 14 days in 160 were paid in accordance with this scheme, which stood on its own feet as a contractual term. (For provisions which applied to the private sector see Holidays Act 1981 section 16; for similar provisions now binding the private sector and the Crown see Holidays Act 2003 section 21(2)(b)(i) and (ii); for the relevant contractual provisions see 2003 CEA (Case 372 clause 2.6.8); 2001 CEA Case 299 clause 2.6.8; 1992 CEC Case 224 clause 3.6.8; prior Determination Case 633 clauses 6.7.1 and 6.7.2). The principle feature of the approach contained in the 1981 and 2003 Acts, reflected in the employment agreements as a contractual obligation, is that payment for annual leave is based either on *past wages* or *wages at the time the holiday commenced*, rather than any assessment of what the employee would have been paid had he or she worked during the holiday.

*The History of the CEA*

Pre 1991-1992

- 4.33. The existing roster has been in place for more that 30 years. Its

history is recorded in a decision of the Public Sector Tribunal in 1985: *Northern Fire Brigades Industrial Union of Workers and Anor v New Zealand Fire Service Commission* SST 20/84 Williamson J 30 April 1985 (NZPFU's bundle, tab 5 page 45. See also Case 107 paragraphs 2-7).

4.34. The Tribunal considered the makeup of the 14 days in 160. As is recorded in *Small*, the Tribunal considered that the 14 days in 160 (using the "average" of 32 days per annum which was common ground between the parties in that case) meant that (case 469):

"all the employees presently receive the equivalent of three weeks' annual leave, one week shift leave and four days' service leave" (as quoted in *Small* Case 469)

4.35. In this proceeding the NZPFU accepted that from 1986 onwards the parties simply recorded that the employees would have 14 days' annual leave in each 160 (Case 118 paragraph 27.6). This accorded with the comment of Travis J in *Small* : "I conclude that from 1986 onwards the parties intended simply that firefighters would be entitled to 14 consecutive days annual leave in each 160" (Case 476, end of penultimate paragraph).

4.36. It was common ground in this proceeding that prior to 1992, both parties considered that the 14 days in 160 included recognition of "extra leave for working shifts" and that such extra leave, although not expressly identified as such in the agreement was, as Mr Summers put it "considered part of the global holiday entitlement prior to 1992" (Case 154 paragraph 30; Case 127 paragraph 61).

#### The 1991-1992 Agreement

4.37. As stated above, much of the evidence which the Court heard in *Small* about the 1991-1992 negotiations was excluded in this proceeding.

4.38. There was some evidence about the 1991-1992 period from Mr

Best in this proceeding (Case 108 paragraphs 8 -13).

- 4.39. The best evidence about what was actually agreed is contained in (and limited to) clause 3.7.1 (a) and (b) of the then agreement (Case 229).

#### 1992 - 2001

- 4.40. The 1992 settlement caused controversy among NZPFU members. The NZPFU, having stated as a matter of agreement that the additional annual holidays provided compliance with section 7A of the 1981 Act, took no part in the *Small* litigation other than a watching brief (Case 109 paragraph 15; Case 120 paragraph 38).
- 4.41. The NZPFU accepted the *Small* decision, although it does not accept the factual findings in it about the negotiations (Case 121 paragraphs 40.1 to 40.8) or various comments about the roster and wages system. Having agreed to clauses 2.7.1(a) and (b), the NZPFU did not seek to challenge the *Small* decision (Case 129 paragraphs 66-78; Case 132 paragraphs 80-88; Case 134 paragraph 93 – 96; Case 138 paragraphs 110 – 121; Case 142 paragraph 124).

#### The 2001 Agreement

- 4.42. The parties settled the 2001 agreement after a long dispute about other matters, culminating in a judgment in this Court (see Case 109 paragraphs 16 and 17). The issue of public holidays was not discussed. The previous clauses 2.7.1 (a) and (b) were included unchanged.
- 4.43. The parties “proceeded on the basis of the law as determined in *Small*, that is, that the contract complied with the 1981 Act as determined in that case” (Case 110 paragraph 17).

#### The 2003 Agreement

- 4.44. The Chief Executive knew that that the Holidays Act 1981 was

being reviewed but had no knowledge of the final form the legislation would take (Case 48 paragraph 32; see also Case 122 paragraph 45). The NZPFU also had no knowledge but was “particularly sensitive” to the issue of its members’ holiday rights. For that reason, the issue of the pending new Act was an issue in the 2003 negotiations (Case 122 paragraph 43 - 44).

4.45. Although it was open to the Chief Executive to seek to delay the agreement or alternatively to seek to have it expire on the coming into force of the new Act, he instead agreed to the new clause 2.7.1(c) (Case 142 paragraph 125). The context has already been referred to (Case 137 paragraph 108). The Chief Executive apparently hoped for additional funding to enable compliance if that was needed.

4.46. The NZPFU required the Chief Executive to demonstrate compliance with the intent and entitlements of the 2003 Act shortly after it came into force, and they issued proceedings in the Employment Relations Authority.

## 5. THE PRE-2003 CASE LAW

5.1. The Commission’s defence throughout has been based on the case law developed under the 1981 Act (rather than the words of the 2003 Act), so it is appropriate to briefly consider the earlier cases.

### *Small*

5.2. The Court in *Small* was required to determine whether parties to an employment agreement could lawfully use prior existing arrangements for leave to satisfy the section 7A requirement (Case 476 last paragraph):

“This leads to the nub of the .....per annum for firefighters.”

5.3. The Court had already considered earlier in its judgement the submission from Mr Haigh to the effect that it was unlawful to

substitute a non-working day or a annual holiday for the new section 7A requirement (Case 474 paragraph 1):

“Mr Haigh’s fifth and sixth proposition are taken from *Ashcroft v Ansett NZ Ltd* [1993] ERNZ 891... or unpaid leave”

5.4. Travis J considered it unnecessary (“on the view I have taken and for the reasons I will give” Case 474 line 13) to determine whether the *Ashcroft* propositions where requirements of the 1981 Act as amended. He thought it “may well be that the conclusions [in *Ashcroft*] arise from the particular wording of the contracts under consideration in that case”.

5.5. The view taken by the Travis J and the reasons for that view are contained later in the *Small* judgement (Case 477 (third bottom line) – 478 (end of first paragraph)).

“Mr Broadmore submitted that ....have been breached”.

5.6. The Court approached the case on the basis that the “totality of arrangements” in the 1992 agreement satisfied the requirements of the Act on the basis that “the contractual benefits were in excess of those provided for by the Act although not precisely in the same terms”. The Court considered that in those circumstances, section 33 of the 1981 Act was not breached.

*Ashcroft v Ansett NZ Ltd* [1993] ERNZ 891

5.7. *Ashcroft* was determined in 1993, *Small* in 1996.

5.8. As stated above, Travis J did not regard *Ashcroft* as authority for the proposition the 1981 Act required that days in lieu be granted only on non annual leave days or only on working days.

5.9. The better view, contrary to the views expressed by Travis J in *Small*, is that Palmer J in *Ashcroft* did decide that days in lieu could not be granted on leave days or non-working days (see Commission’s bundle of cases tab 6, pages 918 (paragraph 4):

“In my view .... and widely publicised.”

See also paragraphs (3), (4), (10) and (11) at page 926 of the judgment.

- 5.10. The position after *Small* is that *Ashcroft* and *Small* conflicted – a conflict decisively resolved by section 57(1)(b) of the 2003 Act.
- 5.11. Any fair reading of *Small* itself makes clear that the Court approached the matter on the basis that the days in question – the 14 days in 160 - were *not* working days. The passages Travis J quoted from *Telecom* (Case 474) are referred to by him for the purpose of illustrating the difficulty of attempting to contend that a particular day could be seen, at the same time, to be both a working day and holiday.
- 5.12. Although it is difficult to fully ascertain from the *Ashcroft* judgment, it appears that the real divergence between it and *Small* may arise from the different manner in which the respective judges dealt with the issue of section 33 of the 1981 Act.
- 5.13. Travis J proceeded on the basis of a “totality of arrangements” approach, which allowed him to conclude that as “the contractual benefits were in excess of those provided for by the Act although not precisely in the same terms” the 1981 Act was complied with. These comments were made by Travis J in the same paragraph in which he referred to section 33. Palmer J also heard submission on section 33, and expressly rejected a submission from the employer to the effect that it was competent for an employee to agree to give up a day in lieu for some other consideration (see page 916 last paragraph). Palmer J preferred a robust reading of section 33.
- 5.14. As stated, the result is that after *Small* there was a conflict between *Small* and *Ashcroft* as to whether the *Ashcroft* requirements could be said to derive from the requirements of the 1981 Act. *Small* stands for the proposition that if overall

contractual entitlements are in excess of those provided by the 1981 Act although not in precisely the same terms, that would satisfy the requirements of the 1981 Act. *Ashcroft* however required that days in lieu be granted on work days, and also stated they cannot be granted on days which are leave days (although not expressly dealing with the issue of contractual re-labelling, said to have been the “nub of the argument” in *Small*: Case 476 last paragraph).

*New Zealand Harbour Workers Union v Lyttelton Port Company Limited*  
[1995] 2 ERNZ 177

5.15. *Lyttelton Port Company* was decided on 3 November 1995. It was brought to Travis J’s attention by Mr Small’s counsel, but not for any issue relating to whether a day in lieu must be taken on a working day (case 474 last paragraph).<sup>8</sup>

5.16. Although said by the Commission and Business New Zealand to be the origin of the rule that an alternative holiday must be taken on a day that would otherwise be a working day for the employee, *Lyttelton Port Company* did not deal with any such issue. There was no such dispute in *Lyttelton Port Company* because both parties accepted that the day in lieu must be granted on a working day. Such acceptance was essential to the employer’s case. It argued that because it had already paid the employees double time for working, it could grant a day in lieu on a working day and not be liable for any additional wages.

See Commission’s bundle, tab 3:

Page 190

“(c) Whether a paid day is to be taken on a day ..... annual holidays”.

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<sup>8</sup> The issue was whether an employer, having paid double time for to the employee working on the public holidays, would have an obligation to pay wages when the day in lieu was taken. The employer argued that no obligation to pay an additional sum would arise.

“(d) Timing of a day in lieu ....decide the date”.

Page 198 - 199

“(v) Choosing the Day in Lieu... instant case.”

- 5.17. Those passages make clear that the issue in *Lyttelton Port Company* was *who should choose* when the day should be taken (the employer or the employee) not whether the day should be taken only on a day that would otherwise be a working day for the employee.
- 5.18. Notably, the case was directly in contradiction on the choosing issue with what had already been decided in *Ashcroft*. In *Ashcroft*, the Court had determined that the employer should choose; in *Lyttelton Port Company* the Court considered that the right to choose (at least “in the instant case”- page 199 line 11) was the employee’s.
- 5.19. It is true that the Court in *Lyttelton Port Company* uses language such as “a day off work” (page 198 line 16) and “a day off” (page 196 line 38) but the phrase “a day that would otherwise be a working day for the employee” is not found in the judgment, let alone as any part of the case’s ratio. That phrase appears to have its origins in two cases decided after both *Lyttelton Port Company* and *Small*, namely *New Zealand Medical Laboratory Workers Union v Health Waikato Limited* [1996] 2 ERNZ 33 and *Health Waikato Limited v New Zealand Medical Laboratory Workers Union* [1996] 2 ERNZ 44.

#### *The Health Waikato Cases*

- 5.20. The first of the two *Health Waikato* cases held that the alternative holiday “must be on a day that the employee otherwise would have worked” (Commission’s bundle tab 7 page 43 line 15). This dicta is a probable influence on the wording of section 57(1)(b). To the extent that the case holds that such obligation arises from the 1981 Act, it contradicts *Small* (which seemed to proceed on the basis that the 1981 Act may not

impose such an obligation, at least where the totality of arrangements provide more than the 1981 Act requires).

5.21. To similar effect see the second *Health Waikato* case (Commission's bundle tab 4 page 47 line 23).

*Conclusion about the cases*

5.22. An examination of the pre 2003 cases establishes:

5.22.1. *Ashcroft* is authority for the proposition that a day in lieu cannot be granted on leave days or non-working days; and also for the proposition that the employer and not the employee can ultimately choose which day should be taken.

5.22.2. *Lyttelton Port Company* is authority (for material purposes) for the proposition that the employee and not the employer can ultimately choose which day should be taken. It was assumed by both parties and the Court that "a day off" or "a day off work" was required, although that issue was not argued.

5.22.3. *Small* is authority for the proposition that the *Ashcroft* requirements it refers to may have arisen from the contract and not from the 1981 Act; and that if the "totality of arrangements" were in excess of those provided by the 1981 Act, although not precisely in the same terms, the requirements of the 1981 Act would be satisfied and section 33 not breached; and for the proposition that this particular CEA does not breach the 1981 Act.

5.22.4. The *Health Waikato* cases are authority for the proposition that a day in lieu must be taken on a day that the employee otherwise would have worked.

5.23. The case law does not shed much light on the proper

interpretation of the 2003 Act. As a result of *Small* (undisturbed in the Court of Appeal), the New Zealand Fire Service continued to travel forward in its own compartment in reliance on *Small*. *Small* remains useful, however, because to the extent that it deals with the issue, it seems to proceed on the basis that the 14 days in 160 are not working days.

## 6. THE 2003 ACT

### *The 2003 Act discussed*

6.1. Both the alternative holiday provisions and the annual holidays provisions need to be considered.

### Alternative Holidays

6.2. The three sub-parts of section 57(1) need to be read together. The “alternative holiday provided” must:

6.2.1. Be taken on a day that is agreed between the employer and employee (section 57(1)(a)); and

6.2.2. Be a day that would otherwise be a working day for the employee (section 57(1)(b)); and

6.2.3. Be a whole working day off work for the employee (section 57(1)(c)) (emphasis added).

6.3. It is not enough that that day would otherwise be a working day for the employee. It is also necessary that such day has been agreed, and is a whole working day off work.

6.4. In the event that agreement cannot be reached pursuant to section 57(1)(a), the employee is entitled to choose the day, but must take into account the employer’s view as to when it is convenient for the employee to take the day. The employer may require the employee to take the holiday only if certain requirements are met, namely, 12 months have passed (section 58(a)); and the parties have not been able to agree on a date on

which the employee will take the day (section 58(b)); and the employer has given 14 days' notice (section 58(c)).

- 6.5. The section 57 requirements apply in relation to "an alternative holiday provided under section 56": see section 57(1). Section 56 itself contains a phrase similar to that contained in section 57(1)(b), namely "a day that would otherwise be a working day for an employee" (section 56(1)(a)). That test applies for the purposes of identifying an employee's entitlement to an alternative holiday. If the public holiday falls on such a day, and the employee works on any part of that day (in accordance with his or her employment agreement) the employee is entitled to an alternative holiday which meets the requirements of section 57: see section 56(2)(a). The section 56(1)(b) wording is also the basis for any claim for payment in the event that the employee actually takes the holiday. There is no entitlement to payment unless the day is a day that would otherwise be a working day for an employee.
- 6.6. It is clear that the various sections dealing with alternative holidays and the entitlements surrounding those are a code.
- 6.7. Any employment agreement which excludes or restricts or reduces such entitlements has no effect to the extent that it does so: section 6(2). Section 6(1) also makes clear that the "totality of arrangements" approach of *Small* cannot easily prevail. Each entitlement provided "*to an employee*" is a minimum entitlement.
- 6.8. The individual nature of the entitlements is emphasised (and becomes necessary) because of the right of employees to sell accrued alternative holidays for payment after a year (section 61). This also gives rise to corresponding record keeping obligations (section 81(1)(a)-(q)), including new obligations reflecting the explicit focus on individualised public holiday entitlements and alternative holiday entitlements (section

81(2)(k), (l), (n)).

- 6.9. The concept of “a day that would otherwise be a working day for the employee” is fundamental to many other rights under the 2003 Act, namely establishing an employee’s entitlement to a take a public holiday on pay (section 48(2))<sup>9</sup>; establishing whether an employee who is sick or who suffers a bereavement can claim pay for a particular day (section 71(1))<sup>10</sup>; establishing the entitlement of an employee who is “on call” on a public holiday (section 59(1)(a)); establishing whether an employer can require an employee to work on a public holiday (section 47(a)); determining how the four Christmas and New Year days should be paid, and whether or not they should be Mondayised or Tuesdayised for the particular employee; and determining certain post-employment rights for employees (section (40)(3)(a)).
- 6.10. Section 12 then applies for the purpose of “determining” an employee’s entitlements under those various sections.
- 6.11. The section 12(3) factors only apply if it is “not clear” whether a day would otherwise be a working day for the employee (section 12(2)). Section 12(3) is plainly designed to deal with a situation (unlike here) where work is irregular, unpatterned, or arranged in such a manner that the parties are unable to properly distinguish between a day that would otherwise be a working day for the employee and a day that would not otherwise be a working day for the employee.
- 6.12. The factors under section 12(3) “must” be taken into account by “the employee” and the employer with a view to reaching an

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<sup>9</sup> Not at issue here because an employee is contractually obliged to work on every public holiday that falls on a day that would otherwise be a working day for that employee.

<sup>10</sup> The only days of sick leave and bereavement leave that need be paid by an employer to an employee are days that “would otherwise be a working

agreement on the matter. Plainly, any such agreement must not violate the basic requirement of section 57(1)(b) (and the various other sections containing the same words) that the day agreed must actually be a day that would otherwise be a working day for the employee.

6.13. There is an unwritten “but for” test in various of the sections of the 2003 Act which contain the disputed phrase. An employee:

6.13.1. Is entitled to sick or bereavement leave if the day would otherwise be a working day for the employee *but for* the sickness or bereavement (section 71(1)).

6.13.2. Is entitled to an alternative holiday if “on call” on a day that would otherwise be a working day for the employee *but for* it being a public holiday (section 59).

6.13.3. Takes a statute-complying alternative holiday if the day would otherwise be a working day for the employee *but for* the taking of the alternative holiday (section 56(1)(a) and 57(1)(b)).

6.13.4. Can, if there is a contractual requirement to work public holidays, be required to work on a public holiday if *but for* it being a public holiday the day would otherwise be a working day for the employee (section 47).

6.13.5. Is entitled to treat certain post employment days as public holidays if those days would otherwise be working days for the employee *but for* the ending of employment (section 40(3)).

#### Annual Holidays

6.14. The scheme of the 2003 Act in relation to annual holidays reflects the long standing position that what is required is numbers of weeks rather than days; and further, that there is no

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day for the employee”:section 71(1).

requirement that such annual holidays be granted on working days .

- 6.15. Because annual holidays are granted as weeks, there is comprehensive provision for ascertaining “ordinary weekly pay”: section 8 and in particular section 8(1)(a) (“the amount of pay that the employee receives under his or her employment agreement for an ordinary working week”).
- 6.16. In the event of an inability to determine that “amount of pay”, the method of calculation is retrospective, not prospective: (section 8(2); see also section 21(2)(b)(i) and (ii); and definition of “ordinary weekly pay” and “average weekly earnings” in section 5).
- 6.17. The scheme of the 2003 Act (and its predecessor Acts) is that the requirements of annual holidays and pay for those have no actual connection at all to the days that would or could have been working days during the period of the holidays. The holiday is granted in weeks and paid in weeks regardless of whether all or any of the days concerned would or could otherwise have been working days for the employee. The calculation of payment rests solely on past average earnings or earnings as they were “as at the beginning of the annual holiday”: section 21(2)(b)(i) and (ii). The 2003 Act and its predecessors thus contemplate a situation where paid annual leave can be granted on days that are all working days; on days none of which are working days; or on days that comprise in part days that would otherwise be working days for the employee and in part days that would not otherwise be working days for an employee. Thus it is lawful for an employer to allow leave in, say, the first three weeks of December every year, because he or she has no supplies every year at that time; or because the vessel he or she owns is maintained each year at that time; or

because the factory is closed down every year at that time; or because there is a rostering arrangement requiring particular employees to be rostered off on annual holidays at that time, and others rostered on in their place. Sections 29-35 of the 2003 Act specifically deal with one such situation, namely, closedown periods.

- 6.18. There are certain further special provisions which preserve sick leave and bereavement leave rights of employees, when sickness or bereavement occurs after the employee has been allowed the annual holiday, but before he or she takes it. In those circumstances the employer must allow the employee to take any period of sickness or injury or any period related to a bereavement (which the employee could otherwise take as an annual holiday) as sick leave or bereavement leave. Here, the qualifying criterion is not that the day concerned is a “day that would otherwise be a working day for the employee” but that the sickness or bereavement occurs on days “that the employee would otherwise take as annual holiday”: section 38(2)(a) and (b). This reflects the statutory scheme for annual holidays which are holidays regardless of whether the days concerned are days that would otherwise be working days for the employee; or whether they are not; or whether the annual leave includes a combination of both types of day. Under the statutory scheme, such sick leave or bereavement leave must be paid on the basis of “an amount equivalent to the employee’s relevant daily pay” for “each day of leave or bereavement leave that would otherwise be a working day for the employee”: section 71(1). Because none of the 14 days in 160 are days that would otherwise be working days for the employee, such an arrangement could not benefit firefighters but they have a separate contractual arrangement dealing with that issue (Case

348 clause 1.4.12). The clause allows employees to debit as sick leave any sickness that falls within the 14 days in 160. Specific provision is then made for the employee to take alternative annual leave on days that would otherwise be working days for the employee (clause 1.4.12.3)).

- 6.19. Finally, section 40 provides that a public holiday that occurs in annual leave must be treated as a public holiday, and not as annual leave. This provision is consistent with the sections already referred to. If the 14 days in 160 are taken over a period that includes a public holiday, that day is to be treated as one. If it is a day that would otherwise be a working day for the employee (not the case here), the employer would be required to pay what the employee would have received if he/she had worked (section 48(2)(a)) (in this case, overtime rates: see section 9(1)(a) and CEA 2.6.10; Case 374). If the day falls on a day that would not otherwise be a working day for the employee (as here) there is no statutory obligation for payment for the day (section 48(1)(a)(this is addressed in this particular CEA at clause 2.6.2.2.2 Case 370, which provides for an extra day's pay to be paid to the particular employee as part of the total weekly wage payment).

*The 2003 Act applied to the facts and the CEA*

- 6.20. The CEA does not use the word "leave" to mean absence from work on days that would otherwise be working days for the employee. It uses that word to include three types of situation: days that would otherwise be working days for the employee; for days that would not otherwise be working days for the employee; and periods containing both types of days.
- 6.21. The Commission's analysis is therefore flawed even as a matter of contractual analysis.
- 6.22. All of the following types of leave cover both days that would

otherwise be working days for the employee, and days that would not (Case 344-349):

- 6.22.1. Adoption leave and maternity leave (clauses 1.4.1 and 1.4.2 (“up to twelve months”)).
- 6.22.2. Paternity leave (clause 1.4.3 (“up to 14 days’ special leave without pay”)) (this could be comprised of either 14 days which are not otherwise working days for the employee (annual leave days); or 14 days being made up of both working days and rostered days off.
- 6.22.3. Bereavement leave (clause 1.4.5.1 (“reasonable travel time”)).
- 6.22.4. Service leave (clause 1.4.6 (“28 consecutive days”)). This leave would normally include days that would otherwise be working days for the employee and days that would not.
- 6.22.5. Jury service leave (clause 1.4.8.3 (“it is only in respect of the time spent on jury service including travel time”)).
- 6.22.6. Leave without pay (clause 1.4.9 (employer discretion)).
- 6.22.7. Sporting and cultural events (clause 1.4.10 (employer discretion)).
- 6.22.8. Military training (clauses 1.4.11 (as per “Volunteers Employment Protection Act 1973”)).
- 6.22.9. Tuition leave (clause 1.4.13 (“time off without ordinary loss of pay”))
- 6.22.10. Annual leave (taken in some circumstances on days that would otherwise be working days for the employee (clause 1.4.12.3); and in others on days that would not, namely, a rostered leave cycle)
- 6.22.11. Sick leave (clause 2.8.3 (“4 weeks”), and clause 2.8.5.2 (“the number of complete days absent from shift

including rostered days off if these fall between two absences”)).

6.22.12. Work accident leave (clause 2.9.3 (“week”) and then (“payment shall be made at the normal sick leave rate”).

6.23. As will be seen the word “leave” does not as claimed by the Commission (as a matter of “logic” and “definition”) imply that the day concerned would be otherwise be a working day for the employee. In relation to annual leave on the operational roster, that issue is determined exclusively and conclusively by the roster itself. The rostered annual leave never includes a day that would otherwise be a working day for the employee concerned. There was ample basis for the Employment Court’s conclusion on this interpretational issue and no appeal lies to this Court: section 232, Employment Relations Act 2000.

6.24. Depending on circumstances, timing and type of leave concerned, some of the various other examples mentioned could be made up solely of days that would otherwise be working days for the employee; solely of days that would not otherwise be working days for the employee; or a combination of both (some, such as maternity leave, could include working days, non working days *and* leave days). Under the scheme of the CEA an employee may takes 4 weeks’ sick leave which includes days that would have been his or her 14 days in 160. That does not transform any of them into days that would otherwise be working days for the employee.

6.25. The flaw in the Commission’s claim that the label of leave coverts that nature of days can be illustrated by referring the 14 days in 160, and to a hypothetical employee owed 14 alternative holidays and who takes them during the leave period. On the Commission’s theory, there are 14 straight, continuous and consecutive days *that are all converted to days that would*

*otherwise have been working days for the employee.*

- 6.26. Similarly a pregnant firefighter may seek and be granted 160 days leave, commencing at the beginning of a 160 roster cycle. On the Commission's theory, all of the 160 consecutive days become "days that would otherwise be working days for the employee". That is an absurdity. The true position is that the only days that could fall into that category are the days that the employee would have worked had she not taken the leave, namely 90 of the 160 days: see Appendix A. The matter can also be illustrated by presuming that instead of granting the maternity leave at the commencement of the roster, the leave is granted at the beginning of the first "rostered days off" or at the beginning of the first annual leave period 14 days in 160. In both of those cases, the days concerned cannot suddenly be converted to days that would otherwise be working days for the employee.
- 6.27. The parties in this proceeding have not (as apparently claimed by Mr Cleary in his submission – paragraph 81.3) "previously agreed that days in lieu could be taken from working days before the roster was set". Instead, the parties took the days in lieu from existing leave entitlements not working days. They did that because the employer could not afford to pay overtime payments to replacement employees. Neither can it be said that the days used were "once" working days prior to being leave. They were not. They were always one form or another of leave.
- 6.28. If the 1981 Act had been repealed and not replaced at all, the employees would still have had an inalienable contractual entitlement to not work, but be paid, in accordance with the agreement, on the 14 days in 160.
- 6.29. For those reasons, and for reasons already alluded to, the

matter is already clear within the meaning of section 12(2) of the 2003 Act, meaning that no resort need be had to the section 12(3) factors.

6.30. However, all of the section 12(3) factors favour the NZPFU, not the Commission. The first and second of the three section 12(3) criteria, namely the employee's employment agreement (section 12(3)(a)), and the employee's work patterns (section 12(3)(b)) plainly support the NZPFU's position. Indeed the work patterns are themselves terms of employment.

6.31. The third criterion, namely the employer's rosters or similar systems (section 12(3)(c)(ii)), also overwhelmingly favours the NZPFU's position. The employer's rosters and similar systems are themselves contractual terms.

6.32. The fourth criterion is "the reasonable expectations of the employer and the employee that the employee would work on the day concerned" section 12(3)(c)(iii). There is no such expectation. Indeed, the 14 days in 160 are so rigidly policed that almost no employee ever works (see Mr Summers' evidence Case 87 lines 180-187; see also Case 88 line 247 – 267; Case 130 paragraph 75; Case 139 paragraph 116 and Case 141 paragraph 123). If an employee does work during the 14 days in 160, there is an expensive overtime payment.

6.33. The Commission's criticism of the Employment Court is that the Court neglected to consider "any other relevant factors" as required by the opening words of section 12(3)(c). The relevant factors said to have been overlooked are:

6.33.1. *The historical use of the 14 days in 160 as leave* (Commission's submission 3.5 -311). This "omission" is said by the Commission to be important, because leave days are "by definition" otherwise working days. This has already been responded to above. The

Employment Court dealt with this factor adequately and correctly (Case 20 paragraph [50]).

6.33.2. *The agreement reached in 1992 to expressly identify up to 11 of these 32 days extended leave in every 365 as lieu days.* The above formulation (Commission's submission 3.12) was not what was agreed in 1992 or subsequently. What was and is agreed needs to be ascertained by referring to the actual words in the agreements. The pre 2003 agreements contained terms which state that the 14 days in 160 gave employees annual holidays in excess of the three weeks' minimum provided by section 11 of the Holidays Act 1981 and that the additional holidays provided compliance with section 7A of the 1981 Act. That hardly equates to the words used by the Commission. Importantly, the parties knew that the 2003 CEA would span two Holidays Acts and dealt with that situation by addressing both. In any event, the Employment Court did not overlook this factor. It dealt with it adequately and correctly (Case 12 paragraph [13]; paragraph [65] ("we accept Mr Cranney's argument that that the wording of clause 2.7.1(c) contemplated that when the 2003 Act came into force the service would be required to demonstrate compliance with the intent and entitlements of the new legislation"). That is an interpretational issue from which there is no appeal.

6.33.3. *Every day in the Fire Service is a working day:* (Commission's submission paragraph 3.16). The complaint is that the Employment Court should have taken this factor into account but did not. The Employment Court however directly and correctly

addressed the Commission's submission (Case 24 paragraph [50]). The Commission's case in the Employment Court (and in this Court - see submission paragraph 3.16 last sentence) was that the 14 days in 160 were not a continuation of the roster and had been isolated as leave. The Commission erroneously concluded that that meant the days become days which are otherwise working days for the employee. That conclusion is based on a misreading of the 2003 Act, the roster, the CEA as a whole, the leave arrangements, the history of this matter, the original origin of the days, and clause 2.7.1. As to the contractual interpretation issues (including the Employment Court's interpretation of clause 2.7.1, there is no appeal; Employment Relations Act 2000 section 234).

*No agreement to use the 14 in 160 as alternative holidays*

- 6.34. Even if the Commission is right and the 14 days in 160 are days that would otherwise be working days for the employee, there has been no agreement to take those days or any of them as alternative holidays.
- 6.35. The Employment Court was right to conclude that the employees have not agreed to use the 14 days in 160 as alternative holidays (Case 24 paragraph 51). There is no appeal from that interpretational issue.
- 6.36. The clauses said by the Commission to amount to compliance with the section 57(1)(a) requirement are clauses 2.7.1(a) and (b). Yet those clauses merely state that there were days in the 14 days in 160 in addition to the three weeks' minimum required by section 11 of the 1981 Act; and that the additional annual holidays so identified provided compliance with section 7A of the 1981 Act. That falls far short of a section 56(1)(a) agreement.

- 6.37. In any event the clauses were immediately followed by clause 2.7.1 (c). The parties expressly left open the issue of compliance with the 2003 Act. The Chief Executive was required to demonstrate compliance with the intent and entitlements of the new Act.
- 6.38. The words “intent” and the plural “entitlements” signify that the parties expected full compliance and with all of the provisions of the 2003 Act, least with reference to alternative holidays (the subject matter of clause 2.7.1). The full intent and entitlements include provisions conferring the right on an employee to determine which working day would be taken as an alternative holiday (after first attempting to reach agreement with the employer); provisions which nullify the effect any contractual term which excludes, restricts or reduces an employee’s entitlements under the Act; and the section 12 provisions which provide a mandatory mechanism to assist the parties to resolve the issue using a compulsory formulation. Those were the matters to which the Commission bound itself contractually and in advance by agreeing to clause 2.7.1(c).
- 6.39. The employee’s right is to seek an agreement about an *individual* day to be taken (that would otherwise be a working day for him or her) and then if no agreement (but only after taking into account the the employer’s view as to when it is convenient) to choose the day him or herself.

## 7. THE “COMPOUNDING” ARGUMENT

- 7.1. The compounding argument is an assertion by the Commission contained at paragraph 8.4 of its submission to the effect that a firefighter (employee 1) chooses to take an alternative holiday on a public holiday (namely the Christmas Day/Boxing Day shift). The consequence is said to be that the replacement employee (employee 2 called in on overtime, perhaps from one

of the 14 days in 160) would then become entitled to two alternative holidays, because he or she had worked on two separate public holidays. Employee 2 then claims those holidays in a similar way to employee 1 and before long, there is a massive compounding liability.

7.2. The flaw in the argument arises from the Commission's own distorted view as to what comprises a day that would otherwise be a working day for an employee. Under its distorted view, employee 2 is entitled to an alternative holiday, because "every day is a working day". The correct view is that employee 2 is not entitled to an alternative holiday. The entitlement only arises if the day that employee 2 works is a day that would otherwise be a working day for him or her (section 56(1)(a) and (b)). An employee who works overtime on a day that is not a day that would otherwise be a working day for him or her, has no entitlement to an alternative holiday: see section 48(1)(b) (but there is an entitlement to a penalty payment).

## 8. CLOSING DOWN THE SERVICE

8.1. The "closing down the service" argument contained at paragraphs 8.1 and 8.2 of the Commission's submission. The complaint is that all the employees could request an alternative holiday on the same day and close down the service. Of course, such an event could never lawfully occur. There is an obligation on each employee to take into account the employer's view as to when it is convenient to take that day (section 57(2)(a)). It is surely a matter of judicial notice that even in industries with a strong militant workforce, there has been no such concern as is now raised in the entire 16 years since the original section 7A was passed into law. The Commission's fear amounts to the anticipation of a hypothetical and unlawful strike, in breach of the provision of the Employment Relations Act

2000. Such an occurrence is possible but most unlikely and could occur by way of concerted action on an ordinary day as well as alternative holiday.

9. BUSINESS NEW ZEALAND'S SUBMISSION

9.1. As will be apparent from the above submissions, the case turns largely on its own facts and history and upon the particular terms of the CEA.

9.2. For those reasons it is not necessary to engage in artificial comparisons between the 2003 Act and the case law relating to the 1981 Act. Such case law that does exist (*Small, Strauchon*) supports the NZPFU's position, not the Commission's.

9.3. The Advisory Group plainly identified its position at the very outset of the process, and in one of its only unanimous statements, in these terms:(NZPFU's bundle tab 7 page 76):

"3 Difficulties With The Current Legislation

The difficulties with the Act are as a result of four factors:

..... prohibitive rules which cannot be altered by agreement."

9.4. That is hardly a call for mere codification of the previous law.

9.5. Contrary to the impression gained from Business New Zealand's submission, a core purpose of the new Act was to create a code so as to replace the case law upon which the previous rights rested (see above paragraph 1.17).

9.6. In addition to the passages already referred to from the Explanatory Note, there are other relevant signposts which plainly indicate much broader purposes of the 2003 Act:

9.6.1. "maintain a balance between work and life outside the workplace ... necessitate the repeal of the Holidays Act 1981" (Explanatory Note, Business New Zealand's bundle page 24 line 2 – 9; and also Holidays Act 2003 section 3).

9.6.2. Apply equally to the State Sector and private sector

(Explanatory Note, Business New Zealand's bundle page 24 last three lines).

- 9.6.3. To “codify the present case law with regard to treatment of annual holidays *when an employee's employment is terminated*” (Explanatory Note, Business New Zealand's bundle page 26 lines 3-4).
- 9.6.4. To recognise that the Holidays Act 1981 did not reflect *current working patterns* or social and economic developments since its enactment” (see Explanatory Note, Business New Zealand's bundle page 39; see entire passage under the heading of “Statement Of Problem And Need For Action”). (Note that the phrase used is “current working patterns” not “current working practices” as apparently referred to in Business New Zealand's submission paragraph 6.1)
- 9.6.5. To meet certain stated “policy objectives” (see Explanatory Note, Business New Zealand's bundle page 40 – 42; included in the objectives is the objective of binding the Crown itself).
- 9.7. The Select Committee paid particular attention to the issue of the new process to be applied for the purposes of determining “what would otherwise be a working day” (Business New Zealand's bundle page 53 “We recommend .... public holiday”).
- 9.8. As a careful perusal of the Working Group document reveals, the “codification” of *Lyttelton Port Company* relates to matters other than the issue of “a day that would otherwise be a working day for the employee”. Indeed, the paragraphs in the Working Group's report said by Business New Zealand to address *Lyttelton Port Company* (paragraphs 4.10 to 4.17) do not deal with that issue.

## 10. CONCLUSION AND COSTS

- 10.1. The NZPFU behaved honourably throughout. At the Commission's request in 1992, it agreed to use annual leave days as alternative holidays. It thereby enabled the Commission to meet the section 7A requirement without additional cost. That was the very reason why non-working days, rather than working days, were used.
- 10.2. The NZPFU did not alter its position in the light of Ashcroft, and did not seek to challenge the *Small* decision, which held the arrangement to be lawful.
- 10.3. In 2003, that changed. The Commission assumed an obligation to comply with the intent and entitlements of the 2003 Act (which in any event cannot be contracted out of).
- 10.4. The appeal identifies no error of law and should be dismissed with costs in the Respondent's favour.

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Peter Cranney  
Solicitor for Respondent  
10 July 2006