

PC:BJM

2 July, 2007

Derek Best  
National Secretary  
NZ Professional Firefighters Union  
P.O. Box 38.213  
PETONE

1st floor, Leaders Building  
15 Brandon Street  
PO Box 241, DX SP2003  
Wellington 6140  
New Zealand

tel: 04 472 3055  
fax: 04 472 6657  
email@oakleymoran.co.nz

Dear Derek

**PUBLIC HOLIDAYS – PROPOSED SETTLEMENT  
FOR MEMBERS ONLY – NOT FOR WIDER DISTRIBUTION  
CONFIDENTIAL AND LEGALLY PRIVILEGED**

1. You have asked for our opinion of the proposal put forward by the Chief Executive of the New Zealand Fire Service for settlement of the New Zealand Professional Firefighter's Union's case against him, due to be heard in the Supreme Court on 16 and 17 August 2007.
2. The proposal has four main components:
  - 2.1 From 1 April 2007, the Chief Executive will act consistently with the NZPFU's interpretation of the Holidays Act 2003. Specifically, if an employee works on a public holiday or part of a public holiday, the employee will become entitled to an alternative holiday on a day that would otherwise be a working day. The Chief Executive has accepted that the alternative holiday will be taken on a day that is one of the four days rostered on during the four-on, four-off roster.
  - 2.2 For the period 1 April 2003 to 1 April 2007, the Chief Executive will credit each employee with approximately 50%-60% of the alternative holidays that would otherwise have been available under the NZPFU's interpretation of the Holidays Act 2003 – that is, 12 days for each member. These days are "saleable" to the employer, having a cash value to each NZPFU member of between \$340 to \$350 per day (based on senior firefighter rates), that is, some \$4,200 in total per member.
  - 2.3 Wage increases of 4% from 1 January 2007 and 4% from 1 January 2008.
  - 2.4 An additional alternative holiday for each public holiday that falls within annual leave.
3. In considering the Chief Executive's offer, we have had regard to the history of alternative holidays (or days in lieu) and also to an assessment of litigation risk in the Supreme Court.
4. As you know, there was no right in New Zealand to alternative holidays or days in lieu prior to certain amendments to the Holidays Act 1981, the amendments having come into force

on 15 May 1991, the same day as the infamous Employment Contracts Act 1991.

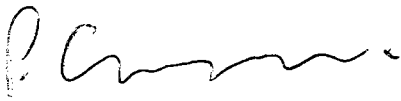
5. Although the amendment gave rise to a new right, nobody appreciated that at the time, and it was not until a year later that the Employment Court determined that alternative holidays were available. Even then, there was considerable confusion for some years as to the nature and extent of rights relating to alternative holidays.
6. In the meantime, the NZPFU had already agreed that the formula of 14 days annual leave in 160 days included recognition of alternative holidays or days in lieu. As is apparent from a reading of *Small v New Zealand Fire Service Commission*, that NZPFU's agreement was extracted under duress. In 1991 the NZPFU, like other Unions, was attempting to preserve its collective arrangements in the face of an extraordinarily hostile employment environment.
7. Notwithstanding that, it is a matter of history that the NZPFU honoured the agreements reached in 1991.
8. In 2002, the NZPFU's showed foresight in referring expressly to the upcoming 2003 holidays legislation when negotiating the 2003-2006 collective employment agreement, notwithstanding that the legislation was not yet finalised.
9. Since 2003, the Union has been battling the Chief Executive about the issue in the Courts. It is fair to say that the course of that litigation has been somewhat predictable. The Employment Relations Authority removed the matter to the Employment Court (over the Chief Executive's objection) and also declined to strike the matter out. The Employment Court also declined to strike the matter out, confirmed by the Court of Appeal. The Employment Court then unanimously found in favour of the NZPFU. The Court of Appeal overturned the Employment Court. The Supreme Court then gave leave to appeal, and the matter is set down for hearing on 16 and 17 August 2007 before that Court.
10. The NZPFU has good prospects of success in the Supreme Court. As many members will already be aware, the majority in the Court of Appeal made basic errors in their construction and application of the collective agreement. In our opinion the Court of Appeal also exceeded its jurisdiction in overturning the Employment Court's decision. Unfortunately for the NZPFU, this is not the first time this has occurred. We estimate the chance of success on appeal before the Supreme Court is something in the order of 65% to 75%.
11. The Chief Executive's offer needs to be assessed against that background.
12. One way of assessing such an offer is to consider the chance of success and compare that to the offer made. The Chief Executive has offered around 55% of the days lost in the period 2003 to 2006, not all of the days lost.
13. However, in our view, what tips the balance decisively in favour of acceptance is the future scenario. The offer includes acceptance of the NZPFU's position for all public holidays after 1 April 2007. Each member will receive a full day in lieu for each such holiday or part holiday worked – in some cases, receiving two such days in relation to a single shift worked (1800 – 0600). The NZPFU has also achieved its desired definition of "day" for public holiday purposes (midnight to midnight), meaning that the number of alternative holidays available to employees is significantly increased. The offer also includes alternative holidays for public holidays that fall at any time within the 14 days annual leave in every 160 days – meaning, for example, that an employee who has 14 days leave over say Christmas

will normally pick up four full additional days.

14. The end result is an historic reversal of the situation that has prevailed since 1991.
15. While there is some advantage in "being proved right" by proceeding to the Supreme Court, in our view the risk of an undesirable judgment – which we assess at 25% – 35% - cannot justify proceeding, in the face of the offer made.
16. In our view, the result is a significant victory for the NZPFU, and one which will benefit members for some time. The offer should be accepted.

Yours faithfully

**OAKLEY MORAN**

A handwritten signature in black ink, appearing to read 'Peter Cranney', written in a cursive style.

**Peter Cranney**