IN THE EMPLOYMENT COURT
WELLINGTON

WC 13/07
WRC 38/06

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	THE NEW ZEALAND FIRE SERVICE COMMISSION Plaintiff
AND	THE NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION Defendant

Hearing: 26 February 2007
(Heard at Wellington)

Court: Judge C M Shaw
Judge A A Couch
Judge M E Perkins

Appearances: G C Davenport, Counsel for the Plaintiff
Peter Cranney, Counsel and Camilla Belich, Advocate for the Defendant

Judgment: 31 May 2007

JUDGMENT OF THE FULL COURT

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[1] The parties have made what is effectively a joint application for declarations about the way the New Zealand Fire Service (the Fire Service) pays most of its employees for working on public holidays.

[2] The employees directly affected by these proceedings are those covered by the collective agreement between the parties. Those employees are represented in these proceedings by their union, the New Zealand Professional Firefighters Union (the NZPFU). The outcome will also indirectly affect firefighters who are not members

of the union but whose individual employment agreements are in similar terms to the collective agreement. Overall, this includes virtually all professional firefighters in New Zealand.

[3] The proceedings were formulated on the assumption that the current collective employment agreement was subject to the transitional provisions contained in ss51 and 53 of the Holidays Act 2003 (the Holidays Act) and that, as a result, the collective agreement need not comply with the specific provisions of the Holidays Act relating to the method of payment for work done on public holidays until 1 April 2007. That assumption was incorrect. The transitional provisions of the Holidays Act apply only to an "*existing collective agreement*". That term is defined in s5 as being a collective agreement entered into before 1 April 2004. The current collective agreement came into force on 1 July 2006 and, we infer, was entered into well after 1 April 2004.

[4] As a result, the specific declarations sought in the statement of claim are inappropriate and we have treated the proceedings as an application for a general declaration whether the provisions of the collective agreement relating to payment for work done on a public holiday comply with the Holidays Act.

[5] There are three provisions of the Holidays Act relating to payment for work done on public holidays:

a) Section 50 which requires employers to pay employees at least time and a half for working on a public holiday.

b) Section 52 which requires all employment agreements entered into after 1 April 2004 to include a provision that confirms the right of employees to be paid in accordance with s50.

c) Section 55 which provides that an employer must pay an employee for a public holiday in the pay that relates to the pay period in which the holiday occurs.

[6] The collective agreement provides payment for work done on public holidays through a component of what is called the "*Total Weekly Wage*". The effect is that, rather than being paid additional wages for each occasion on which work is done on a public holiday, employees receive a regular amount added to each fortnightly payment throughout the year. The essential issue in this case is whether this method of payment is consistent with the provisions of the Holidays Act summarised above.

Declaratory Judgments Act 1908

[7] For the plaintiff, Mr Davenport submitted that the Court had jurisdiction to make the declarations sought under the Declaratory Judgments Act 1908. He submitted that s162 of the Employment Relations Act 2000 vests such jurisdiction in the Employment Relations Authority and that this was transferred to the Court by s190. We do not accept this submission.

[8] Section 162 of the Employment Relations Act 2000 empowers the Authority and the Court to make any order that the High Court may make under any enactment or rule of law relating to contracts. The predecessor to s162 was a virtually identical provision: s104(1)(h) of the Employment Contracts Act 1991. Whether that section conferred jurisdiction on this Court under the Declaratory Judgments Act 1908 was considered by the Court of Appeal and the Employment Court[1].

[9] In *Sears v Attorney-General,* the Court of Appeal held[2] that section 104(1)(h) was:

> *... directed and limited to the orders available in proceedings founded on or relating to an employment contract. It is an ancillary remedial provision. It does not create a separate cause of action. It does not import s 3 of the Declaratory Judgments Act. There is nothing in s 104(1)(h) or elsewhere in the legislation and no justification in principle to support an argument that an application for a declaration in the employment contracts area to the specialist employment Court gives rise to a right of appeal to the Privy Council overriding the emphatic and unqualified provisions of s 135(5). The plain intention of Parliament in enacting that subsection was to make this Court the final Court of appeal in respect of such employment matters.*

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[1] *Sears v Attorney-General* [1995] 2 ERNZ 121 (CA); *Dillon v Chep Handling Systems Ltd* [1995] 2 ERNZ 282; *Manufacturing and Construction Workers Union Inc v Honda New Zealand Ltd* [1996] 1 ERNZ 354 at 371.

[2] At p125

[10] We find that the effect of s162 of the Employment Relations Act 2000 is the same as that of its predecessor. Accordingly, we regard the dictum set out above as equally applicable to s162.

[11] In *Honda* Goddard CJ found that the procedure under the Declaratory Judgments Act 1908 should be distinguished from the entirely separate action for a declaration as part of an action for damages and other relief, which is frequently invoked to test the validity of actions under contracts both in common law and in equitable courts. The Chief Judge affirmed the almost boundless scope of declaratory relief available in relation to contracts, including employment contracts, which has the advantage of being an ideal means of resolving a dispute amicably with less danger of generating the animosity of coercive litigation.

[12] The position is even clearer now in the context of the Employment Relations Act 2000 where proceedings are founded on the far wider concept of employment relationship problems and both the Authority and the Court have the express jurisdiction to resolve such matters.

[13] For reasons discussed in *Sears* the distinction is more than a matter of mere formality or procedure but that does not preclude the Court from granting declarations in these proceedings. We find that what has been transferred to the Court by the Authority is an employment relationship problem requiring resolution within the powers and jurisdiction provided in the Employment Relations Act 2000. The Court is empowered to make the declarations sought but not pursuant to the Declaratory Judgments Act 1908, which reserves jurisdiction under that Act exclusively to the High Court.

The facts

[14] The parties provided the Court with an agreed statement of facts. The following summary is based on or adapted from that statement.

[15] The Fire Service is the employer of firefighters, 1,670 of whom are represented by the NZPFU.

[16] The current collective employment agreement between the parties is the New Zealand Fire Service and New Zealand Professional Firefighters' Union Collective Agreement for Uniformed and Communications Centre Employees 2006 (the collective agreement).

[17] Firefighters work according to a 24-hour, 7-day a week roster set out in the collective agreement, which includes performing work on public holidays. The roster is based on an 8-day cycle, comprising 4 shifts spanning the first 5 calendar days.

[18] Part 2 of the collective agreement addresses payment for work on public holidays through the firefighters' total weekly wage. The relevant provisions are:

> *2.6.1 The following expressions contained in this part of this Agreement are defined as follows:*
>
> *2.6.1.1 Double Time means the worker's hourly rate multiplied by 2.*
>
> *2.6.1.2 Hourly Rate means the rate of pay shown in Table 3 of Part 4 of this Agreement as applicable to the rank and qualification of the worker concerned.*
>
> *2.6.1.2.1 Those workers in receipt of a personal allowance in accordance with Clause 1.3.16 of this Agreement shall have one fortieth (1/40) of that allowance added to the hourly rate shown in Table 3 of Part 4 prior to any hourly rate calculation.*
>
> *2.6.1.3 Time and a half means the worker's hourly rate multiplied by 1.5.*
>
> *2.6.1.4 Total Weekly Wage means the weekly wages specified in Table 2 of Part 4 of this Agreement as applicable.*
>
> ***TOTAL WEEKLY WAGE***
>
> *2.6.2 The total weekly wage to be paid to Firefighters and Officers shall be shown in Table 2 in Part 4 of this Agreement*
>
> *2.6.2.1 The Total Weekly Wage includes recognition for the following:*
>
> - *availability;*
> - *2 hours in excess of 40 hours per week;*
> - *driving – grades 1 or 2 as appropriate;*
> - *routine work outside routine hours (standard payment of two hours for Officers);*
> - *shift allowance;*
> - *statutory holiday duty hours;*
> - *statutory holiday travel;*
> - *weekend work travel;*
> - *weekend duty hours.*
>
> *2.6.2.2 The recognition of statutory holiday duty hours includes:*

2.6.2.2.1 An average payment that equates to T2 on top of normal pay rates for employees who work on statutory holidays.

2.6.2.2.2 An average payment giving an extra day's pay to employees who are rostered off duty on a statutory holiday.

2.6.2.3 The parties to this Agreement agree that the payment in 2.6.2.2.2 to employees rostered off duty is for the purposes of complying with the provisions of the Holidays Act 1981, Section 7a. It ensures a paid day off is given for the statutory holiday concerned.

2.6.2.4 The parties further agree that this compliance has occurred prior to, and since, the passing of the Holidays Amendment Act 1991. ...

[19] The rest of clause 2.6.2.4 includes statements of support for the present arrangements and agreement of the parties to file the present proceedings. It also includes a statement of the effect of ss51 and 53 of the Holidays Act after 1 April 2007, which we find is not correct.

The total weekly wage

[20] Historically, firefighters' conditions of employment contained in awards and collective agreements expressly provided for penal rates of pay to be paid for work performed on public holidays. This resulted in fluctuations in weekly pay which were inconvenient to the parties.

[21] In February 1990 a new agreement came into force, which used for the first time the phrase "*Total Weekly Wage*". This has been used by the parties ever since. It includes the firefighters' weekly wage. In addition, it averages the penal payments for work performed on public holidays. These are spread throughout the year by inclusion in the total weekly wage rather than being paid at the time such work is done.

[22] The parties agree that, under this total weekly wage system, firefighters currently receive, as part of their regular fortnightly pay, payment for an extra 3.915 hours comprising three components:

(i) Penal payment for working on public holidays;

(ii) Travel time on public holidays;

(iii) A day's pay when a public holiday falls on a rostered day off.

[23] The parties say that the annual total of these components exceeds the minimum requirements of s50 of the Holidays Act in the sense that it is more than a firefighter would receive if he or she worked all 11 public holidays in a year and was paid at time and a half. We were given examples which assisted us to confirm that this appears to be correct.

[24] The Fire Service, the NZPFU, and the firefighters describe the total weekly wage approach as an "*enhanced*" entitlement compared to the statutory minimum provided for in s50. They do so for the following reasons:

(i) The sum received is in excess of time and a half.

(ii) It provides a consistent and predictable income during the year, enabling firefighters to plan for financial commitments.

(iii) It is much simpler for the Fire Service to administer than paying penal rates for time actually worked on public holidays.

(iv) The alternative to the total weekly wage is a system which has been used in the past and is regarded as unsatisfactory by both the Fire Service and the firefighters.

(v) If the total weekly wage is "unbundled" and penal rates of pay instituted for work done on public holidays, this would result in a reduction in the fortnightly pay for many firefighters. This in turn is likely to act as a significant hurdle to the settlement of a new collective agreement.

The Holidays Act 2003

[25] The starting point for considering the issues in this case is the Holidays Act 2003 and its 2004 amendments. As this is a case of statutory interpretation, we approach it in terms of s5 of the Interpretation Act 1999 by ascertaining its meaning according to its text and in light of its purpose.

[26] The Holidays Act as a whole has a number of specified purposes. It is divided into parts. The provisions relating to public holidays are in Part 2 which is divided

in turn into subparts, each with its own purpose section. In the context of the Holidays Act as a whole, the following sections are relevant:

> *3* ***Purpose***
>
> *The purpose of this Act is to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to—*
>
> *(a) annual holidays to provide the opportunity for rest and recreation:*
>
> *(b) public holidays for the observance of days of national, religious, or cultural significance:*
>
> *(c) sick leave to assist employees who are unable to attend work because they are sick or injured, or because someone who depends on the employee for care is sick or injured:*
>
> *(d) bereavement leave to assist employees who are unable to attend work because they have suffered a bereavement.*
>
> *4* ***Overview***
>
> ...
>
> *(2) In this Act,—*
>
> ...
>
> *(b) Part 2—*
>
> *(i) confers minimum entitlements to annual holidays, public holidays, sick leave, and bereavement leave:*
>
> *(ii) contains provisions dealing with how holiday pay and leave pay is calculated in various circumstances and when it must be paid:*
>
> ...
>
> *6* ***Relationship between Act and employment agreements***
>
> *(1) Each entitlement provided to an employee by this Act is a minimum entitlement.*
>
> *(2) This Act does not prevent an employer from providing an employee with enhanced or additional entitlements (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.*
>
> *(3) However, an employment agreement that excludes, restricts, or reduces an employee's entitlements under this Act—*
>
> *(a) has no effect to the extent that it does so; but*
>
> *(b) is not an illegal contract under the Illegal Contracts Act 1970.*
>
> ...
>
> *9* ***Meaning of relevant daily pay***
>
> *(1) In this Act, unless the context otherwise requires, **relevant daily pay**, for the purposes of calculating payment for a public holiday, alternative holiday, sick leave, or bereavement leave,—*
>
> *(a) means the amount of pay that the employee would have received had the employee worked on the day concerned; and*

(b) includes—

(i) productivity or incentive-based payments (including commission) if those payments would have otherwise been received on the day concerned:

(ii) payments for overtime if those payments would have otherwise been received on the day concerned:

(iii) the cash value of any board or lodgings provided by the employer to the employee.

(2) To avoid doubt, if subsection (1)(a) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half).

...

[27] Section 46 entitles employees to public holidays and payment for them in accordance with subpart 3 of Part 2. Section 48 materially provides that there is compliance with s46 if the employee works on any part of a public holiday and is paid in accordance with s50:

50 Employer must pay employee at least time and a half for working on public holiday

(1) If an employee works (in accordance with his or her employment agreement) on any part of a public holiday, the employer must pay the employee the greater of—

(a) the portion of the employee's relevant daily pay (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or

(b) the portion of the employee's relevant daily pay that relates to the time actually worked on the day.

*(2) In subsection (1)(a), **penal rates**—*

(a) means an identifiable additional amount that is payable to compensate the employee for working on a particular day of the week or a public holiday; but

(b) does not include, for example, any additional payment for a sixth or seventh day of work.

(3) This section is subject to section 51.

51 Transitional provision for employers who already pay for work on public holidays in employee's regular pay

(1) This section applies to—

(a) an existing collective agreement until the later of—

(i) 1 April 2007; or

(ii) the date on which a collective agreement that replaces the existing collective agreement comes into force:

(b) an existing individual employment agreement, until 1 April 2007.

(2) An employer may pay an employee for work on a public holiday as part of the employee's regular pay if the requirements of subsection (3) are met.

(3) *The requirements are that—*

(a) *an amount for working on public holidays has been previously genuinely negotiated into the employee's regular pay; and*

(b) *the amount can be demonstrated to meet the objectives of section 50; and*

(c) *the employer can provide evidence to support the requirements in paragraphs (a) and (b).*

52 ***New employment agreements must include provision that complies with section 50***

(1) *This section applies to an employment agreement that is entered into after 1 April 2004.*

(2) *The employment agreement must include a provision that confirms the right of the employee to be paid in accordance with section 50 for working on a public holiday.*

(3) *To avoid doubt, the employment agreement may not state that the relevant daily pay of the employee already includes an amount that is calculated to comply with section 50.*

53 ***Existing employment agreements must include provision that complies with section 50***

(1) *This section applies to an existing employment agreement.*

(2) *The employment agreement must, from the date referred to in subsection (3), be amended to include a provision that confirms the right of the employee to be paid in accordance with section 50 for working on a public holiday.*

(3) *The date is,—*

(a) *for an existing collective agreement to which section 51 applies, the later of—*

(i) *1 April 2007; or*

(ii) *the date on which a collective agreement that replaces the existing collective agreement comes into force:*

...

(4) *To avoid doubt, an existing employment agreement may not state that the relevant daily pay of the employee already includes an amount that is calculated to comply with section 50.*

...

55 ***When payment for public holiday must be made***

An employer must pay an employee for a public holiday in the pay that relates to the pay period in which the holiday occurs.

[28] In summary, the relevant rights and obligations of an employer under the Holidays Act in relation to payment for work on a public holiday are:

1. The required payment is based on the employee's relevant daily pay, being the amount of pay the employee would have received for working on the day (s9), less any penal rates (s50(1)(a)).

2. The employer must pay the employee the relevant daily pay plus half that amount again (s50(1)(a)).

3. Employment agreements must confirm the right of an employee to be paid in accordance with s50 (ss52(2) and 53(2)) but must not state that the relevant daily pay already includes an amount calculated to comply with s50 (ss52(3) and 53(3)).

4. Payment for a public holiday must be made in the pay that relates to the pay period in which the holiday occurs (s55).

5. Employees' entitlements under the Act are minimum entitlements (s6(1)).

6. An employer may provide its employees with agreed enhanced or additional entitlements (s6(2)).

[29] Turning to the firefighters collective agreement we now address each of the issues in this case.

Issue 1

Does the amount of payment in the collective agreement comply with s50?

[30] Mr Davenport submitted that the payment made under the collective agreement exceeds the statutory requirement for time and a half by a considerable margin and is therefore an enhanced entitlement as contemplated by s6. He cited the decision of the full Court in *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and CityLine (New Zealand) Ltd*[3].

[3] Unreported, Travis, Shaw, Perkins JJ, 27 November 2006, AC 61A/06

[31] He relied on the basis for calculation of the total weekly pay supported by the agreement of the union that the component of the total weekly wage attributable to payment for work done on public holidays is sufficient to meet the maximum possible employer obligations in any year.

[32] We find that this issue is purely factual. Clause 2.6.2.2.1 of the collective agreement provides that the total weekly wage includes:

> *2.6.2.2.1 An average payment that equates to T2 on top of normal pay rates for employees who work on statutory holidays.*

[33] In this context, "*T2*" refers to double time or twice the employee's hourly rate of pay. As the requirement of s50 is for time and a half, the total weekly wage therefore exceeds that requirement and may properly be regarded as an enhanced entitlement within the meaning of s6(2).

[34] The only aspect of this issue which gives us cause for concern is that clause 2.6.2.2.1 refers to an "*average*" payment. The requirement of s50 is that, on every occasion on which an employee works on a public holiday, payment must be made at a rate not less than time and a half. In this case, we accept the calculations of the parties that the total amount of additional payment to each firefighter made in respect of work done on public holidays is 132 hours per year. That is more than sufficient to meet the requirements of s50 even if the firefighter worked on all 11 public holidays in any one year. Having said that, we are of the view that clause 2.6.2 could be better worded to make the position absolutely clear. That is a matter the parties may wish to address in their negotiations for a new agreement.

Issue 2

Does the collective agreement comply with s52?

[35] Section 52 of the Holidays Act is open to two alternative interpretations. One is that it requires every employment agreement to contain a provision that specifically refers to the requirements of s50 and expressly confirms the employee's right to be paid for work on a public holiday in accordance with those requirements.

[36] The alternative is that s52 will be satisfied if the employment agreement contains payment provisions which themselves comply with s50.

[37] The difficulty with the first construction is that it would limit the payment regime to that specifically provided for in s50, that is payment at time and a half. Given that the Holidays Act provides generally in s6 for enhanced or additional entitlements, it would be inconsistent to interpret ss52 and 53 in a way which precluded such enhancement or addition. We note also s54 which provides how questions about whether ss50 to 53 have been complied with are to be determined. If the first construction were applied, few if any questions could arise about whether ss52 and 53 had been complied with and s54 would be deprived of much of its purpose.

[38] For these reasons, we prefer the second construction. Given the conclusion that we have already reached that the total weekly wage provided for in the collective agreement exceeds the requirements of s50, we find that the collective agreement meets the requirements of s52(2).

[39] As the collective agreement does not purport to define "*relevant daily pay*", no issue arises in respect of s52(3).

Issue 3

Does the time for payment relate to the pay period in which the holiday occurs?

[40] This is the most problematic of the three areas of compliance with the Holidays Act in the present case. It is centred on the requirements of s55. The wording of this section is unequivocal and appears to allow no flexibility as to when such payments ought to be made.

[41] Public holidays are spread across the year. Under the collective agreement the extra 132 hours of pay per year for working on public holidays equates to 2.5 hours extra pay per week. This is paid to firefighters each fortnight from the time they start work, whether or not they may have worked on any public holidays.

[42] There are two potential difficulties with this scheme of payment. The first is that a new employee may work one or more public holidays before he or she has been paid sufficient additional pay to reach the threshold of time and a half when payment is made for the pay period in which the holiday or holidays occur. An extreme example would be an employee who commences work in mid December and then works the four public holidays of Christmas Day, Boxing Day, New Year's Day, and 2 January. As firefighters work either 10- or 14-hour shifts, that work would potentially require an additional 20 to 30 hours' pay. Even if those holidays occurred in two fortnightly pay periods, such a firefighter would only have accumulated 10 hours' additional pay. The balance would therefore be paid in arrears over the following several fortnights.

[43] Mr Davenport acknowledged this difficulty. He submitted, however, that this would be an extraordinary situation and that most firefighters will very quickly receive more through the total weekly wage system than they would receive if they had to wait until the public holidays occurred before receiving payment.

[44] Mr Cranney referred us to Part 2 clause 4 of the collective agreement which provides that workers joining the brigade and firefighters under training are to be assigned to a position on the "Black Watch", one of 6 watches with different rosters. He then said that firefighters on the Black Watch do not work a public holiday for the first 3 months. The effect of this is that by the time they work their first public holiday they will already have received the required additional payment for that work as part of their total weekly wage. While we accept that this may be so as a matter of practice, we were unable to find any provision of the collective agreement to this effect. This is significant because any declaration we may give about whether the collective agreement complies with the Holidays Act must be based on what is permissible under the terms of the collective agreement rather than what the custom or practice may be.

[45] The second difficulty with the total weekly wage in the context of s55 is that it largely relies on the additional payment required by s50 for working on a public holiday being made in advance of the pay period in which the public holiday occurs. This is at odds with the plain meaning of the words of s55.

[46] Both Mr Cranney and Mr Davenport submitted that payment in advance for public holidays is a form of enhancement and therefore permitted by s6. In this case they say that the enhancement is that regular payments in advance give financial certainty and regularity of income, an important advantage to firefighters. It is the case for both parties that, just as the parties to the collective agreement can agree to additional payments for working on public holidays in excess of what is required by s50, so it is open to them to agree on an enhanced mechanism for making those additional payments provided the entitlement of the employees under the Holidays Act is not undermined.

[47] To support that proposition Mr Davenport relied on the decision of the full Court in *NZ Tramways* in which it discussed the additions and enhancements to minimum entitlements which are permitted by s6. He suggested that, where parties have agreed an enhanced payment, s6 also allows the parties to agree on how that enhancement is to be delivered. However, we note that the full Court found[4] that entitlements referred to in the 2003 Holidays Act can only mean the four minimum entitlements referred to in ss3 and 4(2)(b). The case did not concern methods of payment for those holiday entitlements.

[48] Mr Davenport also submitted that the general scheme of the Holidays Act provides in a number of instances for parties to agree about arrangements on various matters. Although s55 says that payments must be paid at a particular time, he argued that the manner in which the word "*must*" is used in other parts of the Holidays Act and the provisions of s6(2) enabling the parties to agree on enhancements and additions supported a construction of s55 in which the word "*must*" is not necessarily mandatory and should not exclude the operation of s6.

[49] Mr Davenport referred to the Preliminary Report of the Holidays Act Advisory Group which was a key precursor of the Holidays Act 2003. This report suggested that s55 was based on the ratio in *Ashcroft v Ansett New Zealand Ltd*[5] in which the Employment Court found that a holiday in lieu of working on a public holiday was to be paid at the time the holiday was taken. The advisory group recommended that

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[4] At para [32]
[5] [1993] 2 ERNZ 891 at p926

a provision be included in the 2003 legislation to say "*An employer must make a payment in respect of a public holiday in the pay that relates to the period in which the public holiday occurs*" and repeated this recommendation in its second report. The resulting clause was not discussed in the parliamentary readings of the Holidays Bill nor by the Select Committee. Mr Davenport suggested that, given its link to *Ashcroft,* s55 is aimed at ensuring that the public holiday itself is paid for in a timely fashion.

[50] In our view, the link between *Ashcroft* and s55 reveals no more than that Parliament adopted the existing common law position that a holiday in lieu of working a public holiday is paid for at the time the holiday is taken. The link does not support the proposition that the payment can be made in advance.

[51] Another decision relating to the timing of payment for holidays in the context of the Holidays Act 1981 was *Drake Personnel (New Zealand) Ltd v Taylor*[6]. The Court of Appeal held that there is no reason in principle why an obligation to pay money at some time in the future cannot be discharged by earlier payment, particularly where this is done by agreement.

[52] In that case, the Court of Appeal was assessing whether the payment of annual holiday pay by periodic payments in advance was consistent with s21(2) of the 1981 Holidays Act. This provided that when the employment of a worker by an employer is terminated prior to the accrual of annual holidays, the employer "*shall forthwith pay to the worker ... an amount equal to 6 percent of his gross earnings during that period.*"

[53] The Court held[7] that, although the s21 payment did not become due and payable until the employment was terminated, the obligation was created as soon as the qualifying period of employment started to run and gave rise to a liability to pay at a future date. The word "*forthwith*" was directed at preventing late payment rather than precluding early payment. Thus s21 did not prevent the employer from making

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[6] [1996] 1 ERNZ 324
[7] At p 329-330

periodic payments on account of holiday pay which would become due on termination.

[54] This raises the question whether the obligation created by s55 is equally amenable to the common law principle which the Court of Appeal relied on in *Drake*. We find that the words of s55 of the 2003 Holidays Act are significantly different from those of s21 of the 1981 Holidays Act and that the decision in *Drake Personnel* can be distinguished. In reaching this conclusion, we are reinforced by what Chambers J said in *Air New Zealand Ltd v New Zealand Airline Pilots' Association Industrial Union of Workers Inc*[8]:

> *[60] There can be no doubt that the Holidays Act 2003 is bold social legislation quite different from the Holidays Act 1981, which it replaced. I agree wholeheartedly with both the Employment Court and the majority in this court in their view that the 2003 Act is so different from the earlier legislation that there is nothing to be gained by trawling through cases decided under the 1981 Act.*

[55] It is significant that s55 of the 2003 Holidays Act is not made subject to other provisions of the statute. Section 21 of the 1981 Holidays Act was expressly subject to the provisions of s23 of that Act which permitted alternative arrangements by agreement provided they were "*not less favourable to the worker*", however s55 of the 2003 Holidays Act has no such conditions or exceptions. It stands alone.

[56] While the concept of "pay as you go" holiday pay was endorsed to an extent in the *Drake Personnel* case, this has now been strictly limited in the 2003 Holidays Act. Sections 27 and 28 provide that, apart from casual employment or short fixed term employment, payment for annual holidays must be paid in advance immediately before the holiday is taken and not included in periodic regular pay. One permissible exception is that, by agreement, annual holiday pay may be paid during the period in which the annual holiday is taken. The construction we give to s55 is consistent with these provisions.

[57] We also find that s51 of the Holidays Act gives a strong indication of the construction to be placed on s55. Section 51 is a transitional provision validating the provisions of existing collective agreements which provided that payment for work

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[8] (2006) 4 NZELR 122

done on public holidays was to be made as part of employees' regular pay. If s55 was construed to permit such arrangements, there would have been no purpose in enacting s51 to preserve such arrangements in the interim. Applying the principle that Parliament must be presumed to have enacted each provision of a statute for a purpose, this reinforces the conclusion that s55 should be given the plain meaning of the words used in it and no more.

[58] The meaning of the words in s55 is clear and unambiguous. Payment for the holiday worked must be made in the particular pay period in which the holiday occurs. It follows that payment, in full or in part, cannot be made in any other pay period.

[59] We find that since the enactment of the Holidays Act in 2003 it has not been open to the parties to agree on a regime of payment for work done on public holidays inconsistent with the plain meaning of s55. Any agreements which predated the Holidays Act expired on 1 April 2007, since when s55 has governed the timing of payment of public holiday pay. To the extent that the collective agreement provides that payment for work on any particular public holiday is to be made in part or in full other than in the pay that relates to the pay period in which the holiday occurs, the collective agreement is inconsistent with the Holidays Act 2003 and, pursuant to s6(3), it has no effect.

Conclusion

[60] In summary, we find that the provisions of the collective agreement relating to payment for work done on public holidays are consistent with the Holidays Act 2003 with respect to the amount of payment to which firefighters are entitled but not with respect to the timing of that payment. We find that the collective agreement complies with ss50 and 52 but that it does not comply with s55.

Comment

[61] We are conscious that our conclusion will require the parties in this case and others in similar circumstances to change long-standing arrangements which they regard as mutually beneficial. In our view, however, the legislation as enacted

cannot properly be interpreted otherwise. Specifically, the wording of s55 is such that the obligation is not susceptible of enhancement pursuant to s6 or to the principle applied in the *Drake* case.

Costs

[62] As this proceeding was effectively initiated jointly by the parties for their mutual benefit, an order for costs would not be appropriate and none was sought. The parties are to bear their own costs.

C M Shaw
JUDGE
for the full Court

Judgment signed at 3.30 on 31 May 2007