IN THE COURT OF APPEAL OF NEW ZEALAND

CA270/05

BETWEEN	NEW ZEALAND FIRE SERVICE COMMISSION Appellant
AND	NEW ZEALAND PROFESSIONAL FIREFIGHTERS UNION Respondent

Hearing: 24 July 2006

Court: William Young P, Chambers and O'Regan JJ

Counsel: W M Wilson QC and G D Davenport for Appellant
P Cranney and A J Hughes for Respondent
T D Cleary and R M H Searle for Business New Zealand Inc (Intervenor)

Judgment: 21 December 2006 at 4 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B A declaration is made that the current employment arrangements between the appellant and the respondent comply with the Holidays Act 2003.

C The respondent must pay to the appellant costs of $6,000, plus usual disbursements. We certify for second counsel.

REASONS

William Young P and Chambers J [1]
O'Regan J (dissenting) [28]

WILLIAM YOUNG P AND CHAMBERS J

(Given by Chambers J)

Firefighters' roster and its provision for holidays

[1] The New Zealand Fire Service Commission conducts a 24 hours a day/365 days a year operation. To accommodate this, the collective employment agreement for firefighters provides for firefighters to work on a rostered basis. All firefighters (other than trainees) are assigned to one of four "watches". Each watch works on a 160 day roster. Each 160 day period comprises 18 cycles of eight days, followed by 14 days' leave, followed by two days which are "rostered days off which are not leave". Each eight day work cycle involves working the day shift on days 1 and 2 and the night shift on days 3 and 4. The night shift on day 4 spills over into the morning of day 5. Days 6 to 8 are then rostered days off.

[2] The 16 days off at the end of each 160 day period ("a period") are comprised of a mixture of annual leave and public holidays in lieu. It will be apparent from our description of the roster that firefighters are required, from time to time, to work on public holidays. When they do work on public holidays, they are paid double time. They are also entitled to a day off in lieu. The leave provision at the end of a period is long enough to accommodate not only annual leave entitlements but also lieu days for public holidays. Indeed, it is common ground that most firefighters end up getting extra leave because more lieu days are built in than would ever in fact be needed. No firefighter ever has to work on every public holiday in any given year.

[3] The commission and the firefighters' union, the New Zealand Professional Firefighters Union, by a provision in their collective employment agreement, expressly agreed the agreement complied with the holidays legislation in force prior to the coming into force of the Holidays Act 2003, namely the Holidays Act 1981. But an issue has arisen as to whether the agreement continues to comply with the new legislation. The union argues that it does not and its view was upheld by the Employment Court. The commission now, with leave, appeals from that decision.

Issue on the appeal

[4] Because of the view we take, there is only one issue we need to consider on this appeal. It is: is the commission complying with ss 56 and 57 of the Holidays Act 2003?

[5] The relevant provision of the parties' collective agreement reads as follows:

> 2.7.1 Except as provided in Subclause 2.7.1.1 each worker shall be granted annual leave periods, without deduction of pay, at the rate of 14 consecutive days (inclusive of Sundays) within each 160 consecutive days' employment.
>
> (a) The parties to this Agreement agree that the formula of 14 days' leave within each 160 days' employment gives each employee annual holidays in excess of the three weeks minimum provided in Section 11 of the Holidays Act 1981.
>
> (b) The parties further agree that the additional annual holidays in 2.7.1(a) above, provide compliance with the Holidays Act 1981, Section 7A for work performed on statutory holidays prior to, and since, the passing of the Holidays Amendment Act 1991.
>
> (c) The parties recognise that, at the time that this Agreement came into force, the Government had introduced new legislation governing holidays. When these provisions come into force, the Fire Service will be required to demonstrate compliance with the intent and entitlements of the new legislation.

[6] No party raised any doubt about our jurisdiction to hear this appeal. While we have some concern in that regard, we have decided to assume that the parties are right in the view that this court has jurisdiction to resolve their dispute.

Is the commission complying with ss 56 and 57 of the Holidays Act 2003?

[7] Under s 46(1) of the Holidays Act, an employee is entitled to public holidays, and payment for those holidays, in accordance with Subpart 3. That entitlement does not mean that an employee cannot work on a public holiday. An employee can lawfully work on a public holiday provided he or she does so in accordance with his or her employment agreement, he or she is paid in accordance with s 50, and he or she gets an alternative holiday under s 56: see s 48(2)(b). There is no dispute in this case that the collective employment agreement does require firefighters to work from

time to time on public holidays in accordance with the roster and that the commission pays firefighters who do work on public holidays in accordance with s 50. The dispute hinges on the third element: does the present scheme provide an alternative holiday in accordance with the statutory scheme (ss 56-61)?

[8] If an employee works on a public holiday and that public holiday would otherwise be a working day for that employee, the employer must provide the employee with another day's holiday: ss 56(1) and (2). The requirements of that other day's holiday (or "alternative holiday", as it is termed in the Act) are set out in s 57. It is subs (1) which is relevant to this appeal:

> An alternative holiday provided under section 56 must –
>
> (a) be taken by the employee on a day that is agreed between the employer and employee; and
>
> (b) be a day that would otherwise be a working day for the employee; and
>
> (c) be a whole working day off work for the employee, regardless of the amount of time the employee actually worked on the public holiday.

[9] It is important to note that, while those attributes of an alternative holiday may be prescribed in a collective employment agreement, they do not necessarily need to be found there, provided that the employer does provide an alternative holiday which has those attributes. The focus therefore is not exclusively on clause 2.7.1; in order to answer the question whether the commission is complying with ss 56 and 57, one needs to look at how the relationship works in practice. Section 57 provides for considerable flexibility; for instance, as to the timing of the alternative holiday: subss (2) and (3).

[10] In the decision under appeal (*New Zealand Firefighters Union Inc v The Chief Executive of the New Zealand Fire Service* [2005] 1 ERNZ 645), the Employment Court concentrated primarily on s 57(1)(b). The court considered that the agreement did not comply with that provision as the lieu days (the alternative holidays) were not days "that would otherwise be [working days] for the employee" concerned. In his opinion, O'Regan J reaches the same view the Employment Court did.

[11] The Employment Court reasoned that the 16 day slot (as we shall call the two cycles at the end of the 160 day period) is comprised of "non-working days" because "there is no reasonable expectation of either the service or the firefighters that a firefighter would be required to work on the days so isolated": at [51]. It is at the heart of this case whether the days in the 16 day slot, or some of them, are days which would otherwise be working days for the employee.

[12] Whether a day would otherwise be a working day is an intensely practical question. In the first instance, employers and employees have to try to agree on the answer: s 12(2). And the factors they are bound to take into account are very open-ended and flexible: s 12(3). If they cannot agree, then a Labour Inspector can determine the matter for them: s 13. His or her decision is binding (s 79), except to that extent that, in any proceedings before the Employment Relations Authority, the authority "makes its own determination on the matter". Whether that route to determination is mandatory is not clear at first blush; if it is, it does not appear to have been followed in this case. But since we heard no submissions on that, we shall assume we have jurisdiction to determine this question.

[13] We begin our discussion with some general comments. It is fundamental that a holiday for an employee represents time off work. Different holidays have different purposes: see s 3. In the case of annual leave, it is time off work "to provide the opportunity for rest and recreation". The Act currently provides for a minimum entitlement of three weeks' paid annual holidays. How those holidays are taken is a matter for agreement between the employer and employee, although the employer cannot unreasonably withhold consent to an employee's request to take annual holidays: s 18.

[14] Despite the fact the entitlement is expressed in weeks, it is clear the employee can take the leave in shorter periods. The number of working days off will turn on "what genuinely constitutes a working week for the employee": s 17(1). A Monday to Friday worker will get 15 working days off, while a six day a week employee will end up getting 18 working days off. In order to work out what would otherwise have been a working day for the employee, one looks at the standard working week or period for that employee. For instance, a Monday to Friday worker on the minimum

entitlement who takes annual leave from Wednesday one week through Sunday the following week will have taken eight days' leave from his or her 15 day bank of annual leave. The two Saturdays and Sundays falling during his annual leave will not effectively count as days of annual leave, as they would not otherwise be working days for that worker. If a public holiday fell on the Monday during that leave period, then the period of annual leave taken would drop to seven days from the 15 day bank: s 40(1).

[15] It makes no difference under the Act whether the period or periods of annual leave are pre-determined in the employment contract or are determined in an ad hoc way during the year. An employee whose employment contract provides that he or she must take some leave in the first two weeks of May is in the same position as an employee who, in January one year, agrees with his or her employer that he or she will take annual leave in those two weeks of May. If each is a Monday to Friday worker, each will have taken off what otherwise would have been ten working days.

[16] A like regime governs public holidays, as we shall show.

[17] Having set out those general comments, we now turn to the specifics of this case. The way the firefighters' roster is designed, a firefighter works days 1 to 5 and then has days 6 to 8 off. That cycle repeats itself, within periods and from period to period. It is the equivalent of an employee who works Monday to Friday, week in, week out, year by year.

[18] In the case of the Monday to Friday worker, it is clear that Mondays to Fridays are working days and Saturdays and Sundays are non-working days. Accordingly, any alternative holiday for the purposes of s 57 would have to be taken on a Monday, Tuesday, Wednesday, Thursday, or Friday. They are that employee's "working days", year in and year out. Any holiday (annual leave or public holiday) falling on such a day will be a holiday falling on what would otherwise be a working day. If such an employee works on a public holiday, the alternative day could be any Monday to Friday in the year (except another public holiday).

[19] The case of firefighters falls within the same rubric, save that, instead of the time from the start of one working cycle to the next being seven days, the period is eight days. The timing of annual leave and alternative days has been agreed in advance, but for the reasons already given, that places the firefighter in no different position from the employee who negotiates those holidays on an ad hoc basis.

[20] So what do we know by way of background about firefighters and their employment contract? We know first that, but for the leave provision, the firefighter would be working on days 1 to 5 and 9 to 13 of the 16 day slot. They would in the normal course, but for leave entitlements, be working days.

[21] What we also know is that the commission has always intended to give and has given a lieu day to firefighters who have to work on a public holiday. This agreement was drafted before the Holidays Act 2003 came into force. At least from the time the Holidays Amendment Act 1991 came into force, employees who worked on a public holiday have been entitled to a lieu day: *Labour Inspector v Telecom* [1993] 1 ERNZ 492 (CA). It is common ground this collective agreement complied with that, by providing for lieu days in the 16 day slot. Under the 1991 Act, it was not necessary to specify any particular day within the 16 day slot as a lieu day (as opposed to part of annual leave), but there can be no doubt that it was within this slot that the lieu days were, by agreement, to be found. We also know adequate lieu days have been provided in that period; indeed, the period is generous in that respect as it potentially provides more days' leave than a particular firefighter might be entitled to by way of annual leave and lieu days.

[22] With that background, we turn now to construe clause 2.7.1 of the collective agreement. It is clear from clause 2.7.1(b) that the 16 day slot was intended to cover lieu days (if required) in circumstances where, in the previous 144 days, the firefighter had been required to work on one or more public holidays. Since 1991 and *Telecom*, any lieu day had to be taken on what otherwise would have been a working day: otherwise, it would not have met the statutory requirements of a lieu day, as interpreted in *Telecom*. A Monday to Friday worker could not have been told to work on the Queen's Birthday and then to take the following Saturday off in lieu. So a firefighter's lieu day under the 1991 Act had to be on what would otherwise

have been a working day – and that means it would have had to be one of the eight "working days" in the 16 day slot (days 1 to 5 and 9 to 13). Which one of those days it was did not matter under the 1991 Act. But the parties' agreement under clause 2.7.1(b) that the agreement complied with the 1991 Act necessarily carried an implication that the lieu days were such of days 1 to 5 and 9 to 13 as were required for that purpose. The other "working days" (i.e., those not so required) and the "non-working days" within the 16 day slot then counted towards the minimum three weeks' annual leave.

[23] The Employment Court found and the union argues that none of the days in the 16 day slot would have been a working day for the purposes of s 57. But, if that is right, none of the days would have been a working day under the 1991 Act either. This agreement would *not* have complied with the 1991 Act so far as lieu days for public holidays are concerned, a state of affairs contrary to the union's agreement in clause 2.7.1(b) and to the Employment Court's finding in *Small v New Zealand Fire Service Commission* EmpC AEC21/96 17 May 1996. The error in the Employment Court's opinion in the present case, in our respectful view, is its failure to appreciate that the concept of the lieu (alternative) day having to be a day that would otherwise have been a working day for the employee is not new. It is explicit now, but it was inherent under the 1991 Act as well. It goes back to the fundamental nature of holidays, as we discussed at [13].

[24] In our view, this agreement does comply with s 57(1)(b), in that the alternative days are days that would otherwise have been working days for the firefighter concerned.

[25] But that is not the end of the matter, as the union argues that, even if the agreement does comply with s 57(1)(b), it does not comply with s 57(1)(a) in that the *specific* alternative day cannot be identified from the available days (days 1 to 5 and 9 to 13). This was an argument the union raised in the Employment Court (see [4]), but it was not answered, as it was not necessary to do so, given the court's view of s 57(1)(b).

[26] Our answer to this point is as follows. We agree that clause 2.7.1 does not expressly state which of the "working days" in the 16 day slot is the specific alternative day for any public holiday which has been worked in the previous 144 days. But that does not matter. All that matters is that the employer has provided in the 16 day slot sufficient alternative days to compensate for any public holidays worked. So far as the commission is concerned, it does not care less which of those "working days" is allocated as the alternative day. Nor have firefighters cared until this dispute arose. If it matters to any particular firefighter as to which of the working days in the 16 day slot is the alternative day, then we have no doubt whatever that the commission would readily agree to whichever day the particular firefighter wished to nominate. It is, after all, a completely immaterial matter from the commission's point of view. What the parties have agreed is the time slot within which any alternative day must be taken. In the circumstances of this case, that represents compliance with s 57(1)(a). Effectively, what the commission has agreed is that the firefighter may take his or her alternative holiday on any "working day" of the 16 day slot, as suits the firefighter. If it is important to the firefighter to pinpoint the exact day, then he or she can utilise rights conferred by s 57(2) or (3).

Result

[27] In our view, the appeal should be allowed and a declaration should be made that the current employment arrangements between the commission and the union comply with the Holidays Act.

O'REGAN J

[28] I have come to a different conclusion from that of my colleagues.

Background

[29] The background is set out at [1] – [3] of the judgment of Chambers J and I will not repeat it. However, there is one aspect of the operation of the collective

employment agreement that should be highlighted. That is the unrelenting pattern of working days and non-working days. A firefighter assigned to a particular watch knows today whether or not he or she will be working on a particular day next year or any later year during the term of the agreement. This arises because of the rigid nature of the roster: four days on, four days off for 18 cycles, then 14 days off (leave), then two days off (rostered days off that are not leave). (Because the fourth day of the four days on continues past midnight into the fifth day, I will refer to the cycle as being five days on, three days off from now on). So the firefighter can immediately identify which days will and will not be working days for him or her by referring to the roster. This is an unusual aspect of this case, but one which is an important factor in applying the relevant legislative provisions to the facts.

Issues

[30] The essential issue is whether the entitlement of a firefighter who works on a public holiday to an alternative day's leave is met by the allocation of one of the 14 days of rostered leave provided for in each 160 day roster period for that purpose. The Employment Court found it was not. In order to resolve the essential issue, the Court must address two particular issues of interpretation of the Holidays Act 2003 (the 2003 Act), which have been encapsulated in the question for which this Court gave the Commission leave to appeal against the decision of the Employment Court (CA194/05 18 November 2005). That question is: Whether the collective agreement complies with s 57 of the [2003 Act], and in particular meets:

(a) The requirement in s 57(1)(a) that an alternative holiday be taken on a day that is agreed between the employer and the employee'; and

(b) The requirement in s 57(1)(b) that the alternative holiday 'be a day that would otherwise be a working day for the employee'.

[31] The Commission contends that the parties are bound by a decision of the Employment Court to the effect that the provision of the collective agreement providing for alternative days complied with the relevant provisions of the predecessor to the 2003 Act, the Holidays Act 1981 (the 1981 Act). It initially

contended that an issue estoppel arose but focused its argument in this Court on the similarities between the 1981 Act and the 2003 Act, contending that compliance with the former logically meant compliance with the latter.

[32] In argument, the parties dealt with the two issues in reverse order, and I will do the same.

Section 57(1)(b): Does the collective agreement provide for an alternative holiday that would otherwise be a working day?

[33] The scheme of the 2003 Act in relation to the present case is that, 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 on a time and a half basis (s 50) and the employee becomes entitled to an alternative holiday: s 56(1). The requirements for an alternative holiday under s 56 are set out in s 57, which provides:

> **57 Requirements of alternative holiday**
>
> (1) An alternative holiday provided under section 56 must—
>
> (c) be taken by the employee on a day that is agreed between the employer and employee; and
>
> (d) be a day that would otherwise be a working day for the employee; and
>
> (e) be a whole working day off work for the employee, regardless of the amount of time the employee actually worked on the public holiday.
>
> (2) If an employer and employee cannot agree under subsection (1)(a) on when an alternative holiday is to be taken, then the day may be taken—
>
> (a) on a date determined by the employee, taking into account the employer's view as to when it is convenient for the employee to take the day; and
>
> (b) within 12 months of the employee's entitlement to the alternative holiday having arisen.
>
> (3) An employee must give an employer at least 14 days' notice of his or her intention to take the alternative holiday.

[34] Subsequent sections deal with the circumstances in which an employer can require an employee to take an alternative day on a day determined by the employer (s 58), the circumstances in which an employee may exchange his or her entitlement to an alternative holiday for payment (s 61) and the basis on which an employee must be paid on an alternative holiday (s 60).

[35] The provision in the collective agreement which deals with holidays is cl 2.7.1, which is reproduced at [5] of the judgment of Chambers J.

[36] Clause 2.7.1(b) refers to s 7A of the 1981 Act which was the public holidays provision of that Act. It provided that employment contracts had to provide for 11 public holidays, and that, unless otherwise agreed, those 11 public holidays were the days specified in s 7A(2). The differences between that provision and the relevant provisions of the 2003 Act are discussed in detail in the decision of this Court in *Air New Zealand Limited v The New Zealand Airline Pilots' Association Industrial Union of Workers Inc* CA113/05 13 November 2006, and it is not necessary to repeat that analysis here.

[37] The introductory wording of cl 2.7.1 refers to "annual leave periods", but the later reference to s 7A of the 1981 Act indicates that the period of 14 days out of each 160 days is intended to deal with both the annual holiday entitlement and alternative days for public holidays worked. On average, firefighters are entitled to 32 days leave per annum under this provision (not counting the two "rostered days off" at the end of each 160 day cycle: if those days are brought into the calculation the average would be 36.5 days). The entitlement to annual holidays under s 11 of the 1981 Act and s 16 of the 2003 Act is 21 days, so the 32 day entitlement provides for 11 extra days which corresponds with the number of public holidays in each year. The effect of this is that firefighters are provided with 11 days of leave to compensate them for working on public holidays even though in any given year each firefighter is likely to work on only some public holidays.

[38] Clause 2.7.1 is in essentially the same terms as the clauses in previous collective agreements between the Commission and the Union since 1991, when s 7A was inserted into the 1981 Act. The difference between the current cl 2.7.1 and

the earlier provisions reflects the parties' anticipation of the 2003 Act at the time the collective agreement was concluded. This led to the inclusion of cl 2.7.1(c), under which the Commission binds itself to establish that the regime in cl 2.7.1 meets the requirements of the 2003 Act. An earlier version of clause 2.7.1 has been the subject of litigation to which I refer below.

[39] The 2003 Act itself gives guidance on the method of determining what would otherwise be a working day in s 12. Section 12(2) says that, if it is not clear whether a day would otherwise be a working day for the employee, the employer and the employee must take into account the factors listed in s 12(3) with a view to reaching agreement on the matter. The factors listed in s 12(3) are:

> (a) The employee's employment agreement;
>
> (b) The employee's work patterns;
>
> (c) Any other relevant factors, including:
>
> > (i) whether the employee works for the employer only when work is available;
> >
> > (ii) the employer's rosters or other similar systems;
> >
> > (iii) the reasonable expectations of the employer and the employee that the employee would work on the day concerned.

[40] The Commission argues that each of the 14 days of leave at the end of each 160 day cycle should be classified as a day that would otherwise be a working day for a firefighter.

[41] The Commission's arguments, and my evaluation of them, follow.

[42] The Commission says the 14 days are "otherwise working days" because they are not days rostered off, but are days which are "carved out of the roster as leave

days". It was argued that, to be annual leave days, those days must, by definition and logic, be otherwise working days.

[43] In my view this argument does not engage with the statutory wording: what is required by s 57(1)(b) is that the alternative day be a day that would otherwise be a working day *for the employee*. That cannot sensibly be interpreted otherwise than as meaning that the employee would be at work but for the fact that he or she is taking the alternative holiday provided as required by s 56. In the present case, the effect of the rostering system is that the employee would, during the 14 days, be on holiday.

[44] The Commission said that the history of the collective agreement and its predecessors supported its position. It said that after the enactment of the Holidays Amendment Act 1991, the Commission and the Union agreed that a firefighter's entitlement to annual holidays would be reduced so that days in lieu of public holidays would be provided as part of the 14 day period of leave in each 160 day rotation. The Commission argued that these days were therefore "otherwise working days" because they could not have been classified as days of annual holiday unless they would otherwise have been days of work for the firefighter. It was argued that this history had been ignored by the Employment Court.

[45] Again this fails to engage with the statutory requirement. Even if the Commission's account of the history is accepted, that does not lead to a conclusion that the 14 days are days on which an employee would otherwise be working. To the contrary, it confirms that the 14 days have always been provided under the collective agreement as days on which a firefighter would not be working, because he or she would be on one form of leave or another. The roster now provides for those 14 days to be days on which a firefighter is not required to be at work, and that was the case even before the 1991 Amendment Act came into force. In any event, annual holiday entitlements accrue in weeks rather than days: s 16(1) of the 2003 Act. During any given week of annual holidays, there may well be days on which the employee would not have been working if he or she had not been on holiday.

[46] The Commission also argued that, as the Fire Service is a 365 day per year operation, every day is a working day for the Commission. No doubt that is true.

But the statutory requirement focuses on what would be a working day for the employee, not for the employer.

[47] The majority feel able to construe s 57(1)(b) as if the words "but for the leave provision in the employment agreement between the employer and the employee" appear after the words which actually do appear in that paragraph. I can see no reason to add to the words used by Parliament: if that qualification had been intended, the drafter would no doubt have said so. And if one disregards the leave provision in this case, there is a void. So to make the majority's approach work, an assumption must be made that firefighters would work five days on, three days off during the 14 days at the end of the eighteenth cycle, and the two days of "rostered days off which are not leave" that follow those 14 days. Even the Commission did not contend for that position: it said all of the 16 days were "otherwise working days", not days 1-5 and 9-13 as the majority say.

[48] In my view, the Employment Court was correct to find that an alternative day must be a day on which a firefighter would be working if he or she were not taking the alternative day's holiday. I think this is clear enough to make it unnecessary to have to resort to the factors set out in s 12(3). But even if those factors are considered, they clearly support that conclusion because the collective agreement, the terms of the roster and the way in which firefighters actually work under that roster all confirm that the 14 days are not days on which a firefighter is working, and are not therefore available to be allocated as alternative holidays under s 56.

Section 57(1)(a): Does the collective agreement provide for alternative holidays on days agreed between the employer and employee?

[49] The Commission's essential contention is that cl 2.7.1 constitutes an agreement between the employer and the employee as to when alternative holidays will be provided, and therefore meets the requirement of s 57(1)(a). The Employment Court accepted that a provision in a collective agreement providing for the days on which alternative holidays will be taken could comply with s 57(1)(a). However, it said that cl 2.7.1 did not achieve that in the present case.

[50] As I would have found that the 14 days are not days that would otherwise be working days for firefighters, it is not strictly necessary for me to determine this question. But, for completeness, I will set out my views.

[51] The present issue requires the Court to interpret s 57(1)(a), which expressly requires that an alternative holiday be taken by an employee on a day that is agreed between the employer and the employee. This focuses on an individual day and on actual agreement. Section 57(2) provides for the default position where agreement cannot be reached, in which case the day on which the alternative holiday is to be taken can be determined by the employee. The wording of these provisions focuses on a particular day or a particular date, rather than on an identified day in a pool of days provided for the purpose.

[52] If my position on the requirement that an alternative holiday be a day on which the employee would otherwise be working is adopted, there is limited scope for any form of pooling arrangement. The wording of s 57 requires agreement on a particular working day as the alternative holiday. That is not to say that there cannot be a collective agreement about a regime for the taking of alternative days, to avoid the need for individual negotiations with each employee in respect of each public holiday worked. For example, it would be open to the Commission and the Union to recast the collective agreement so that it recorded the agreement of employees to take an alternative day in respect of any public holiday worked during a particular 160 day rotation on the first working day of the next rotation, or some other specified day.

[53] The majority conclude that pooling is permitted, even though, on their analysis, the 16 days in the pool are comprised of some "otherwise working days" (days 1-5 and 9-13) and some days that would not otherwise be working days. While that seems a sensible regime to me, it is not what Parliament required when it enacted the 2003 Act. I cannot see how it complies with either s 57(1)(b) (because it contemplates that the alternative day will not be a day on which the employee would otherwise be working, even on the majority's analysis), or s 57(1)(a) (because the actual day on which the alternative holiday is to be taken has not been agreed by the employer and the employee).

The significance of the 1981 Act in the present case

[54] The Commission argued that the Union was seeking a ruling from the Court which was inconsistent with a decision of the Employment Court in relation to the 1981 Act: *Small v New Zealand Fire Service Commission* EmpC AEC 21/96 17 May 1996. Application for leave to appeal against that decision to this Court was dismissed: *Small v New Zealand Fire Service Commission* [1997] ERNZ 248. In that case the Employment Court found that cl 3.7.1 of the 1992 collective agreement between the Commission and the Union, which is essentially the same as the current cl 2.7.1 (with the omission of paragraph (c)), complied with the relevant provisions of the 1981 Act. In substance the argument made before us by the Commission was that, if a provision identical to cl 2.7.1 complied with the 1981 Act, and the 2003 Act has not changed the law applying under the 1981 Act in any material respect, cl 2.7.1 must comply with the 2003 Act.

[55] This aspect of the case has some similarities to the position taken by the employer in *Air New Zealand*. Effectively it asks the Court to interpret the 2003 Act by taking as a starting point the position said to apply under the 1981 Act, having closely analysed the cases decided under the 1981 Act and comparing that position to the relevant provisions of the 2003 Act to determine whether there are substantive differences between the two. It is argued that, if no substantive differences can be identified, then the position applying under the 1981 Act must also apply under the 2003 Act.

[56] The Commission criticised the Employment Court for reaching a conclusion that cl 2.7.1 failed to meet the requirements of the 2003 Act, when it had concluded in *Small* that the earlier version of the clause met the requirements of the 1981 Act. The Commission's argument was that this was not open to the Employment Court unless it could identify material changes in the law as a result of the enactment of the 2003 Act.

[57] As is clear from what I have said in this judgment, I do not accept that method of statutory interpretation is appropriate. Rather, I begin with the words of the statute and, in the event of any lack of clarity, resort to matters such as the legislative

history and the pre-existing law. Not only is this orthodox statutory interpretation, but it also reflects the intention of Parliament that holiday entitlements should be decided by reference to the statute, obviating the need for extensive reference to pre-existing case law. That intention was expressed in clear terms in the Explanatory Note to the Bill which became the 2003 Act.

Issue estoppel

[58] Although the Commission did not press its issue estoppel argument before us, I record that, in the light of my conclusion about the correct interpretation of the 2003 Act, which differs from the Employment Court's conclusion on the correct interpretation of the 1981 Act in *Small*, I believe that argument would fail. The fact that the Union was not a party in *Small* may well have defeated the issue estoppel point anyway, but it is not necessary to decide that.

Criticism of the Union

[59] The Commission suggested that the result of the Employment Court's ruling was that firefighters were now having their cake and eating it too, because they had the benefit of, on average, 32 days leave per annum, but would now, in addition, be entitled to alternative days for public holidays that are actually worked. In fact, it was argued that that problem could be compounded further by a firefighter who works on, say, Good Friday, choosing to take the alternative day on, say, Christmas Day, thereby necessitating the provision of an alternative day to his or her replacement on Christmas Day. That could be exacerbated if the firefighter chose as his or her alternative day the night shift on Christmas Day because the replacement would work on two different public holidays (Christmas Day and Boxing Day) necessitating the provision of two alternative holidays to the replacement. The Commission also suggested the possibility of disruption to its 365 day operation by a large number of firefighters choosing to take an alternative holiday on the same day. It seems unlikely that the legislature would have intended such perverse outcomes. The Union's counsel, Mr Cranney, assured the Court that the requirement of s 57(2)(a) that an employee take into account an employer's view as to when it is

convenient for the employee to take an alternative holiday means that none of these scenarios could arise in practice. I agree.

[60] In any event, the Court cannot interpret a statute other than by reference to the normal principles of interpretation. If that leads to an inconvenient or unfair contractual outcome, the parties will need to work out an appropriate response to that when the contract is renegotiated. That is what the parties did after the law was changed in 1991 and this Court determined that days in lieu should be provided to employees who worked on public holidays.

Result

[61] I would dismiss the appeal. I would answer the questions recorded at [30] above in the negative.

Solicitors:
McBride Davenport James, Wellington, for Appellant
Oakley Moran, Wellington, for Respondent
Susan-Jane Davies, Solicitor for Business New Zealand Inc, Wellington, for Intervenor