IN THE COURT OF APPEAL OF NEW ZEALAND

CA194/05

	BETWEEN	NEW ZEALAND FIRE SERVICE COMMISSION Applicant
	AND	NEW ZEALAND PROFESSIONAL FIREFIGHTERS' UNION INC Respondent

Hearing: 14 November 2005

Court: Hammond, William Young and Panckhurst JJ

Counsel: W M Wilson QC and G C Davenport for Applicant
P Cranney and A J Hughes for Respondent

Judgment: 18 November 2005

JUDGMENT OF THE COURT

The application for leave to appeal is granted on these questions:

Whether the collective employment agreement complies with s 57 of the Holidays Act 2003, and in particular meets:

(i) the requirement in s 51(1)(a) that an alternative holiday be taken 'on a day that is agreed between the employer and employee', and

(ii) the requirement in s 51(1)(b) that the alternative holiday 'be a day that would otherwise be a working day for the employee'.

REASONS

(Given by Hammond J)

Introduction

[1] We have before us an application, pursuant to s 214 of the Employment Relations Act 2000, for leave to appeal to this Court against the whole of the decision of the Employment Court in this proceeding. The particular decision of the Employment Court is dated 22 August 2005 (WC18/05). The application is opposed by the respondent.

[2] Under s 214(3) this Court is empowered to grant leave, if in its opinion, "the question of law in the appeal is one that by reason of its general public importance or for any other reason, ought to be submitted to [this Court] for decision".

[3] This is the second occasion on which this proceeding has been before this Court. In CA268/04 17 March 2005 the Court, in a judgment delivered by O'Regan J for a panel comprising McGrath, Hammond and O'Regan JJ dismissed an application for leave to appeal by the Commission against a decision of the Employment Court declining to strike out the claim made by the union.

[4] The underlying proceeding raises the general issue of whether the New Zealand Fire Service Commission is in breach of its obligation under the Holidays Act 2003 to provide an alternative holiday to employees who work on public holidays.

[5] The Commission claims to meet its obligations by providing 32 days holidays in each year under two components: 21 days of annual leave plus 11 additional days to cover the 11 statutory holidays. Mr Wilson described this as "a generous assumption" in that he suggested it is highly unlikely that a member of the union would have to work all 11 days with a formula of four days on, and four off work.

[6] Cases involving issues of this character have been troublesome in employment law in New Zealand. Indeed the Employment Court began its judgment

of 22 August 2005 by saying, "This is yet another case where a 24-hour, 7-day a week emergency service has had difficulties in ensuring that its rostering arrangements comply with the Holidays Act …". The Employment Court recorded that in its view this proceeding was in the nature of "a test case".

[7] In the result, the Employment Court found that the Holidays Act 2003 "is significantly and materially different from the 1981 Act particularly in relation to the entitlement to alternative days for working on public holidays". And, "the current collective agreement does not comply with the 2003 Act because it does not provide for alternative holidays to be taken on dates which would otherwise be working days. We are satisfied however that apart from that requirement the Act permits parties to agree collectively on when alternative holidays may be taken."

[8] The Commission asserts that the Employment Court erred, in law, in five respects in reaching the conclusions it did:

(1) By holding that the differences between the Holidays Act 1981 and the Holidays Act 2003 were "relevant to the present case" and "material" without explaining why this was so;

(2) By concluding that there were relevant and material differences between the Holidays Act 1981, as interpreted by the courts, and the Holidays Act 2003;

(3) By concluding that the days provided to firefighters as alternative holidays for working on public holidays were not "otherwise working days";

(4) By failing to explain how the identical roster had been accepted by the Employment Court in *Small* as lawfully and appropriately providing days in lieu for working on public holidays under the Holidays Act 1981, but was now said not to provide alternative holidays for working on public holidays under the Holidays Act 2003, when the

difference between days in lieu and alternative holidays is one of terminology only;

(5) By holding at para [61] that it was not open to the parties to agree when a day begins and ends, for the purposes of assessing when work is performed on a public holiday, notwithstanding that the wording of s 44(2) of the Holidays Act 2003 and the Court's own prior decision in *Heinz Wattie's Ltd v National Distribution Union Inc & Ors* (WC 2/05, 11/2/05) permitted them to do so.

[9] Mr Wilson sought to advance these five alleged errors to this Court. Strictly speaking, under s 214 of the Act these five points should have been reduced to questions for determination by this Court. Mr Wilson accepted this point. In his oral submissions he said that the five alleged errors of law could be reduced to three questions.

[10] We accept that at least two questions warrant leave. These are captured by a two part formulation:

> Whether the collective employment agreement complies with s 57 of the Holidays Act 2003, and in particular meets:
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> (i) the requirement in s 51(1)(a) that an alternative holiday be taken 'on a day that is agreed between the employer and employee', and
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> (ii) the requirement in s 51(1)(b) that the alternative holiday 'be a day that would otherwise be a working day for the employee'.

[11] In the course of argument Mr Cranney accepted that the fifth alleged error of law - which could be formulated into a third question - was not in issue, the question of principle having been decided in *Heinz Wattie* and being the subject-matter of a concession by counsel before the Employment Court (see [56] of the judgment). In a real sense and as a legal question the issue is therefore otiose and would complicate a proceeding in which clarification of the real issues between the parties has been difficult enough as it is throughout this proceeding.

[12] In the result, we are disposed to grant leave on the first four alleged errors of law, which we have reformulated under the two heads we have noted; but not the

fifth error (or third question). We are satisfied that the requirements of s 214 are met, viz., that matters of general public importance are raised on the appeal which ought to be submitted to this Court for decision. Indeed this Court had presaged as much in its judgment of 17 March 2005. Leave is granted accordingly.

Solicitors:
Broadmore Barnett, Wellington for Applicant
Oakley Moran, Wellington for Respondent