IN THE COURT OF APPEAL OF NEW ZEALAND

CA313/2014
[2016] NZCA 19

BETWEEN	NEW ZEALAND ALUMINIUM SMELTERS LIMITED Appellant
AND	ANDREW WELLER AND 63 OTHERS Respondents

Hearing:	22 October 2015
Court:	Wild, Winkelmann and Kós JJ
Counsel:	P R Jagose and R M Dixon for Appellant R E Harrison QC and G P Lloyd for Respondents
Judgment:	22 February 2016 at 10.00 am

JUDGMENT OF THE COURT

A The issue posed at [1] is answered in the negative. The Employment Court did not err in law in its construction of section 7A of the Holidays Act 1981.

B The appeal is dismissed.

C The appellant must pay costs to the respondents for a standard appeal on a Band A basis, together with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Kós J)

[1] Leave to appeal was granted for a single question:[1]

> Did the Employment Court err in law in its interpretation of s 7A of the Holidays Act 1981?

Set in context, the sole issue before us is:

> Did the Employment Court err in law in its interpretation of s 7A of the Holidays Act 1981 in concluding that employees accrue a day's leave for a statutory holiday that falls on a non-working day for that employee?

[2] Section 7A provides:[2]

> **7A Public Holidays**
>
> (1) Every employment contract shall provide, in relation to every worker bound by it, for the grant to the worker in each year of not less than 11 whole holidays which shall, where they fall on days that would otherwise be working days for the worker, be holidays, on pay, in addition to annual holidays.
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> (2) Unless the employment contract otherwise provides or a worker and the worker's employer otherwise agree, the holidays provided for pursuant to subsection (1) of this section shall include—
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> (a) Christmas Day:
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> (b) Boxing Day:
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> (c) New Year's Day:
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> (d) The second day of January (or some other day in its place):
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> (e) Good Friday:
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> (f) Easter Monday:
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> (g) ANZAC Day:
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> (h) Labour Day:
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> (i) The birthday of the reigning Sovereign:
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> (j) Waitangi Day:
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> (k) The day of the anniversary of the province (or some other day in its place).

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1 *New Zealand Aluminium Smelters Ltd v Weller* [2014] NZCA 438.

2 This provision was repealed by s 91(1) of the Holidays Act 2003, but remains relevant to accrued rights of the respondents.

[3] It is common ground that s 7A(1) does *not* have the effect of requiring *payment* where the prescribed public holiday falls on a *non*-working day for that employee.

[4] The real issue between the parties concerns *accrual of leave in lieu* of a "statutory holiday". That issue arises because New Zealand Aluminium Smelters Ltd (NZAS) and its employees entered into employment contracts that provide that shift staff "shall accrue a days [sic] leave in lieu of a statutory holiday as it occurs".

[5] It is common ground that if an employee *works* on one of the public holidays prescribed in s 7A, he or she will accrue a day's leave in lieu. That is, he or she may take another day off work on pay.

[6] But do they also accrue a day's leave for a public holiday that falls on a *non*-working day? Or as counsel for NZAS Mr Jagose put it, a day's leave "in lieu" of a day they had off in any case?

[7] The Employment Court Judge, Judge Couch, concluded that they do. He construed the contractual provision at [4] as requiring employees be granted a day's leave in lieu of each of the 11 holidays required by s 7A(1), to be taken on a day agreed by the parties. That conclusion draws more upon the Judge's interpretation of the contracts than upon his interpretation of s 7A.

[8] The latter point is important. This being an appeal under the Employment Relations Act 2000, s 214(1) does not permit an appeal to this Court against a decision "on the construction of an … employment agreement". This constraint recognises the specialist nature of the Employment Court and the need to avoid protracted appellate wrangling in employment disputes where the issues are confined to arrangements made by particular parties only.[3]

Background

[9] We will sketch, briefly, the contractual and procedural backgrounds and then address the legislative background to the extent it assists.

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[3] *Secretary for Education v Yates* [2004] 2 ERNZ 313 (CA) at [18] and [21].

Contractual background

[10] Shift workers have been employed by NZAS on individual employment contracts since 1991. Shift work is essential as aluminium smelting requires continuous plant operation. The smelter never shuts.

[11] Leave was addressed in the contracts thus:

> ANNUAL LEAVE
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> The basic annual leave provision for monthly paid staff on daywork is at the rate of four weeks per annum which becomes due each year on the anniversary of your date of appointment. This leave must be taken in the twelve months after it becomes due unless deferred by special approval of management.
>
> Statutory holidays are additional to annual leave for staff on daywork.
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> Alternatively, the annual leave provision for monthly paid staff on a shift roster that involves working statutory holidays, is at the rate of either 20 paid days leave per annum for a 20 shift per four weeks roster, or 21 paid days leave per annum for a 21 shift per four week roster. *Additionally, shift staff as above shall accrue a days leave in lieu of a statutory holiday as it occurs*.
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> [Emphasis added].

[12] From 1992, and with employee support, NZAS changed its shifts so that the working day was longer, but employees were rostered off for longer periods. So the smelter changed from eight to 12 hour shifts.

Procedural background

[13] A dispute then arose. NZAS calculated holidays in hours. It would credit employees with eight hours for each day in lieu. When a holiday was taken, the employee's leave balance would be debited by the number of hours he or she would otherwise have worked. This meant that an employee would have to use up the equivalent of one and a half days of leave if he or she wished to take a holiday on a day on which a 12 hour shift would otherwise have been worked.

[14] The respondents brought a claim in the Employment Relations Authority. They said that under their employment contracts each day in lieu was a whole holiday regardless of the number of hours which might otherwise have been worked.

[15] The Authority found in favour of the employees.[4] The contract required a day's leave to accrue with the passing of each public holiday and a day had become 12 hours as a result of the changing work patterns.[5] The Authority did not consider the impact of the Holidays Act 1981 on its conclusion. There was no discussion of whether leave would accrue only for "statutory holidays" on which the employee would otherwise have worked.

[16] But the statement of problem before the Authority had sought a declaration that the contracts provided the employees with an entitlement to "11 twelve (12) hour lieu days per year irrespective of the number of public holidays actually worked."

[17] On appeal the Employment Court addressed that pleading. In effect it granted the declaration sought. Five paragraphs of Judge Couch's judgment drew particular attention in argument:[6]

> [41] Mr Jagose then submitted that the expression "in lieu" in the disputed clause referred only to "statutory holidays" as he had characterised them. Thus, employees only accrued leave if the day in question fell on a day which would otherwise be a working day for the employee. Otherwise, they had a day free from work, a "holiday", on the day itself.
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> …
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> [43] Section 7A(1) required every employment contract to provide for "the grant to the worker in each year of not less than 11 whole holidays". Even on Mr Jagose's analysis, those were "statutory holidays". They were holidays which the statute required to be granted. The qualified obligation of payment is separate from the unqualified obligation to grant the holidays. Thus, the 11 days were holidays required by the statute to be granted regardless of whether they fell on what may have otherwise been a working day for the employee and therefore regardless of whether the employee had a statutory right to be paid for the day. Section 7A(2) lists what might be called the default days on which those holidays are to be observed. It does so, however, with the proviso that parties to employment contracts may agree to observe the 11 whole holidays required by subs (1) on alternative days.
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> [44] What the parties in this case agreed in Version 1 of the individual employment contract was that, "in lieu" of each of the 11 holidays required under s 7A(1) and nominally occurring on the days listed in s 7A(2),

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4 *Weller v New Zealand Aluminium Smelters Ltd* [2013] NZERA Christchurch 75.
5 At [14].
6 *New Zealand Aluminium Smelters Ltd v Weller* [2014] NZEmpC 74.

> employees would be granted a day's leave. That day's leave could be taken on a day agreed by the parties, thereby satisfying the proviso to s 7A(2).
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> …
>
> [67] I conclude that there is no reason to depart from the plain meaning of the words used in the sentence "Additionally, shift staff as above shall accrue a days leave in lieu of a statutory holiday as it occurs." The only aspect of that sentence not so far discussed is the meaning of the final words "as it occurs". This defines when each day's leave in lieu of statutory holidays shall accrue. As it is clear that the purpose of this sentence as a whole was to discharge the obligations under s 7A of the Holidays Act 1981, the logical inference is that it is a reference to the days described in s 7A(2).
>
> [68] Returning to the meaning of the sentence as a whole, a day's leave means freedom from any obligation to work for a whole day with no loss of salary. Such leave is to be accrued and accounted for in days. On each of the days specified in s 7A(2) of the Holidays Act 1981, one day's leave is to be added to the employee's account. When the employee uses that leave to take a holiday, one day's leave is to be deducted from the employee's account for each day of absence, regardless of the number of hours the employee might otherwise have worked.

Legislative background

[18] We here describe the legislative background to s 7A. We also set out the relevant case law as it arose in the course of the legislative reforms process.

[19] Section 7A has its origins in industrial legislation in 1921. In that year the Factories Act 1921 was enacted. Section 35 required manufacturers to "allow" certain employees[7] a "whole holiday" on six days (Christmas Day, New Year's Day, Good Friday, Easter Monday, Labour Day, and the Sovereign's Birthday) and a "half-holiday" every Saturday afternoon. And where Christmas or New Year's Day fell on a Sunday, the holiday would instead be allowed the next succeeding Monday. Section 38(1) required all these to be paid holidays.

[20] These provisions were considered by a Full Court of four Judges of the Supreme Court in *A and T Burt Ltd v Blair*.[8] There a coppersmith claimed the effect of s 35 was that he was entitled to payment for Christmas and Boxing Days 1937 (a Saturday and Sunday) and New Year's Day 1938 (a Saturday), none of which were actually working days for him. A Magistrate upheld this claim. A Full Court of the

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7 Women and boys under the age of 18 years only. In 1936 that was expanded to every employee: Factories Amendment Act 1936, s 13(1)(a).

8 *A and T Burt Ltd v Blair* [1938] NZLR 968 (SC).

Supreme Court allowed the employer's appeal unanimously. The Court construed the obligation to "allow" as meaning to "give or grant". It held this obligation was triggered only where the required holiday fell on a working day. As Myers CJ put it:[9]

> The necessary assumption is that the holiday that he is to allow for falls on a working-day, since if it falls on a *dies non* … that day already belongs to the worker and there is nothing for the occupier of the factory to allow or give.

And Northcroft J said that s 35:[10]

> … requires that the employer shall allow his employees to absent themselves from the place of their work and to abstain from work on the days specified. That is what is involved in the obligation to "allow to every person employed … the following holidays…." If on the day specified the servant is not required to be at the place of work or to do any work for his master, the enactment is inoperative. Clearly the master can neither "allow" nor withhold a holiday from his servant on days upon which the latter is not obliged to work.

[21] Likewise the obligation to pay in s 38 was triggered only by the same coincidence: the holiday falling on a working day. As Myers CJ put it:[11]

> All that the relevant provisions mean, in my opinion, is that certain holidays are to be allowed or granted, but that no deduction from wages is to be made on account of the holiday. In other words, the worker is to be paid for the time lost by the holiday and is to suffer no monetary loss. There is certainly nothing in the statute, in my opinion, which shows an intention that the worker is not only to be allowed the holiday but is also to be given wages as for that holiday when it falls on a non-working day and he has therefore suffered no monetary loss.

[22] A similar provision was carried through into the Industrial Conciliation and Arbitration Act 1954.[12] Section 150A of that Act provided that every award by the Court of Arbitration was "to provide for the grant to every worker bound by the award of not less than ten whole holidays, on pay, in addition to annual holidays." Ten specific dates were then listed in s 150A(2). They were the same as those in s 7A(2), apart from Waitangi Day which did not then exist.[13]

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9 At 974.
10 At 977.
11 At 975. See also 977 per Callan J and 977–978 per Northcroft J.
12 By the Industrial Conciliation and Arbitration Amendment Act 1965, s 2.
13 Waitangi Day was introduced by the Waitangi Day Act 1976.

[23] That was carried through to s 95 of the Industrial Relations Act 1973, with the Industrial Commission replacing the Court of Arbitration, and registered collective agreements being added to awards.

[24] The precise forerunner to s 7A was the amended version of s 95 introduced by the Industrial Relations Amendment Act 1979.[14] That provided:

> **95 Holidays**
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> (1) Subject to subsection (3) of this section, in making an award or in registering a collective agreement the Court shall provide for the grant to every worker bound by the award or agreement of not less than 11 whole holidays which shall, where they fall on days that would otherwise be working days for the worker, be holidays, on pay, in addition to annual holidays.
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> (2) Subject to subsection (3) of this section, the holidays to be provided pursuant to subsection (1) of this section shall include Christmas Day, Boxing Day, New Year's Day, the second day of January (or some other day in its place), Good Friday, Easter Monday, Anzac Day, Labour Day, the birthday of the reigning Sovereign, Waitangi Day, and the day of the anniversary of the province (or some other day in its place).
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> …

[25] This amendment came at a time of significant industrial unrest.[15] For instance, the Industrial Relations Council was non-functioning because the Federation of Labour would not attend it.[16] Yet this amendment drew support from both sides of the House.[17]

[26] The explanatory note to the Bill recorded:

> This clause (which is retrospective to 8 March 1974, the date of commencement of the principal Act) makes it clear that none of the additional holidays is required to be provided as a whole holiday, on pay, for any worker, unless that day falls upon a day which would otherwise be a working day for the worker.

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14 At s 2. The "Court" was the Industrial Court constituted by the Industrial Relations Act 1971.

15 See, for example, Noel S Woods *Troubled Heritage: The Main Stream of Developments in Private Sector Industrial Relations in New Zealand 1894–1978* (Industrial Relations Centre, Victoria University of Wellington, 1979) at 26.

16 (4 December 1979) 427 NZPD 4442.

17 (6 December 1979) 427 NZPD 4575.

[27] In introducing the amendment the Minister of Labour, the Hon Jim Bolger, said:[18]

> The proposed new section makes it clear that a worker who is entitled under an award to a statutory holiday is to receive pay for that holiday only when it falls on what would otherwise be for him a normal working day.

He went on to say:[19]

> Clause 2 confirms, rather than legitimises, the position about holidays. It was drawn to our attention that the provision for 11 statutory holidays did not make allowance for the fact that Waitangi Day and Anzac Day are not Mondayised, and that therefore every sixth or seventh year they fall on a weekend. One interpretation of the law could imply there should be additional day's holiday when either of those days falls on a Saturday or a Sunday. It has never been the practice for that to be so, and the amendment confirms that understanding. It was brought to our attention by legal advice.

[28] The amendment was said to be clarificatory. In the second reading of the debate the Minister said:[20]

> … the interpretation has always been that a worker qualifies for a paid statutory holiday if it occurs on a day of the week on which he or she normally works. This principle has recently been questioned, and to avoid any confusion, the Act has now been amended to make the original intention perfectly clear.

[29] That wording then became essentially s 173 of the Labour Relations Act 1987. The key difference for present purposes was that whereas previously it was for the Court of Arbitration, Industrial Commission or Industrial Court to "provide for the grant" to workers of these whole holidays, in the Labour Relations Act 1987 the operative words became "every registered award or agreement shall provide for the grant …".

[30] The next iteration became s 7A, introduced in 1991, which is set out at [2].[21]

[31] Section 7A has been considered by this Court on a number of occasions. Three decisions are particularly relevant. The first is *Telecom Networks and*

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18 (4 December 1979) 427 NZPD 4440–4441.
19 (4 December 1979) 427 NZPD 4442.
20 (6 December 1979) 427 NZPD 4574.
21 Introduced by s 5 of the Holidays Amendment Act 1991.

Operations Ltd v Vevers.[22] Telecom's collective employment agreement provided for 11 paid statutory holidays, but could require employees to work those days if rostered. In that event either alternative holidays would be granted or triple payment would be made. Was this compliant with the Act? The Court of Appeal held it was not. In doing so it expressly followed the decision in *A and T Burt*.

[32] A Court of five sat. McKay J (writing for a majority comprising Cooke P, Richardson and Hardie Boys JJ and himself) held:

(a) The word "holiday" in s 7A(1) was used in its everyday sense of a day when the employee is not required to work (contrasting it with "working day" in the same subsection).[23]

(b) The collective agreement gave the employee no option whether or not to work when rostered on a statutory holiday: "The contract does not provide for the grant to the worker of not less than 11 whole holidays in each year, whether in the sense of days when he does not work, or in the more limited sense of days when he may choose not to work". Contracting out was prohibited by the Act, and the agreement violated s 7A(1).[24]

Tipping J agreed with the result, but for different reasons. He would have recognised a greater entitlement to bargain to exchange a holiday entitlement for an agreed consideration.[25]

[33] Secondly, in *Barrycourt Motel & Tourist Flats Ltd v Mitchell*[26] this Court confirmed the conclusions reached in *Telecom* and held s 7A(1):

(a) requires the employment agreement to:[27]

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22 *Telecom Networks and Operations Ltd v Vevers* [1993] 3 NZLR 425 (CA).
23 At 427.
24 At 430.
25 At 433.
26 *Barrycourt Motel & Tourist Flats Ltd v Mitchell* [1996] 2 NZLR 672 (CA).
27 At 678.

> … provide the worker with at least 11 whole holidays which, if they fall on days which would otherwise be working days for that worker, are to be holidays on pay in addition to annual holidays. This provision is mandatory, and s 33 expressly prohibits contracting out …

(b) uses "holidays" "in the sense of days when the employee does not work".[28]

(c) However it:[29]

> … does not ensure that the worker receives 11 whole holidays on days he would otherwise have to work. It expressly says that "where they fall on days that would otherwise be working days for the worker" they are to be holidays, on pay, additional to annual holidays. Where they fall on days which would not otherwise be working days, the employee will not work, but will not receive any additional payment.

[34] Thirdly there is this Court's decision in *Ports of Auckland Ltd v New Zealand Waterfront Workers Union Inc.*[30] There Richardson P noted:[31]

> The scheme of the section itself also provides some guidance to the meaning of the words … [I]t provides globally in respect of not less than 11 "holidays on pay". That theme carries though to the next group of words referring to holidays "where they fall on days that would otherwise be working days for the worker".

He continued:[32]

> The whole purpose of s 7A … is to ensure the availability to workers of paid holidays where public holidays fall on working days … It may fairly be assumed that the purpose of s 7A … is to enable workers observing statutory holidays falling on what would otherwise be working days to have the pay they would have earned on an ordinary working day.

Analysis

[35] The two sub-issues we must address are:

(a) What does s 7A require?

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28 At682.
29 At 164.
30 *Ports of Auckland Ltd v New Zealand Waterfront Workers Union Inc* [1996] 3 NZLR 268 (CA).
31 At 271.
32 At 272.

(b) Did the Judge err in his interpretation of s 7A?

What does s 7A require?

[36] It is convenient first to summarise what s 7A requires, and then record what it does not provide for.

[37] Section 7A requires:

(a) employment contracts to provide not less than 11 holidays (in addition to annual holidays) when the employee is not required to work;[33] or

(b) those 11 holidays, unless otherwise agreed, shall include those listed in s 7A(2). It follows that employer and employee may agree to provide and take some or all of those 11 holidays on different dates if they wish to; and

(c) where the holiday taken falls on a working day for the employee, it is to be on pay and the principles set out in the *Ports of Auckland* decision will apply: the payment must be not less than the amount payable for an ordinary working day.[34]

[38] Section 7A does not however:

(a) ensure the employee receives these 11 holidays on days he or she would otherwise have to work. If instead they fall on a day the employee is not otherwise working, they (1) are still "holidays" for the purposes of s 7A and (2) do not — at least by s 7A — attract an entitlement to payment;[35]

(b) make any provision for accrual of leave in lieu of any of the 11 holidays provided for in s 7A.

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33 Above at [32](b).
34 Above at [34].
35 Above at [33](c).

[39] We now expand on the latter point. The statutory scheme of the section is confined to the provision of an entitlement not to work on the 11 days named (which apply by default if nothing else is agreed) and the right to payment therefor if one falls (that is, the employee takes up the entitlement not to work) on a day which otherwise would be a working day. Other matters, such as transfer of the statutory entitlement to other days or accrual of leave in lieu are matters governed (if at all) by the contractual bargain. They do not fall within the scope of the statutory provision in s 7A.

Did the Judge err in his interpretation of s 7A?

[40] We have set out at [17] the essential reasoning of the Judge. It may be observed that:

(a) nothing said by the Judge in construing s 7A departs from the analysis set out in the preceding section of this judgment: see [37] above;

(b) the right to accrual of a day's leave "in lieu" is properly allocated to the contract entered by the parties — rather than to the statutory provision — as we have noted at [7]–[8] and [38]–[39] above;

(c) the Judge concluded at [68] of his judgment (set out at [17] above) that the key sentence in the employment agreement requires a day's leave to be added to the employee's account for each day specified in s 7A(2);

(d) that conclusion does not depend on the construction of the statute, but rather of the agreement, and therefore is not a matter admitting appeal under s 214(1).[36]

Result

[41] The issue posed at [1] is answered in the negative. The Employment Court did not err in law in its construction of s 7A of the Holidays Act 1981.

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[36] See [8] above.

[42] The appeal is dismissed.

[43] The appellant must pay costs to the respondents for a standard appeal on a Band A basis, together with usual disbursements. We certify for second counsel.

Solicitors:
Chapman Tripp, Wellington for Appellant
G P Lloyd, Wellington for Respondents