IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 218
ARC 2/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND AIRLINE PILOTS' ASSOCIATION INC First Plaintiff
AND	MARK PAUL RITCHIE Second Plaintiff
AND	MT COOK AIRLINES LIMITED Defendant

Hearing: 19 and 20 May 2011 and submissions dated 27 and 30 May 2011 and 12 and 21 November 2012
(Heard at Auckland)

Appearances: Simon Dench, counsel for the plaintiffs
Kevin Thompson, counsel for the defendant

Judgment: 17 December 2012

JUDGMENT OF JUDGE A D FORD

Introduction

[1] After the hearing of this case in May 2011, the parties agreed that judgment should be deferred pending delivery of the Court of Appeal decision in *Postal Workers Union of Aotearoa Incorporated and Street v New Zealand Post Limited*.[1] It was considered that the decision in that case could have relevance in that it was concerned with the correct method of calculating "relevant daily pay" for the purposes of the Holidays Act 2003 (the Act) and that is also the principal issue in the present case, albeit, against a different factual scenario. The judgment of the Court

[1] [2012] NZCA 481.

of Appeal in the *Postal Workers* case was delivered on 30 October 2012 and the parties in the present case were then given the opportunity to file supplementary submissions in response.

[2] The case comes before this Court by way of a de novo challenge by the plaintiff to a determination[2] of the Employment Relations Authority (the Authority) dated 18 December 2009. By way of a minute dated 11 November 2010, Judge Travis recorded that by agreement between the parties, Mr Mark Ritchie would be joined in the proceeding as second plaintiff and that the hearing would be limited to the issue of liability at this stage with quantum to be determined later if the plaintiffs succeeded.

[3] Before the Authority, the first plaintiff argued that the defendant, Mount Cook Airline Limited (Mount Cook or the defendant), had breached the Act by incorrectly calculating the relevant daily pay payable to its pilots who performed work on public holidays. The significance of ascertaining the correct method of calculating relevant daily pay arises in the context of the obligation of an employer under s 50 of the Act to pay an employee at least time and a half of his or her relevant daily pay for working on a public holiday. Under s 56(2)(a) of the Act an employer must also provide the employee with an alternative holiday.

[4] Mount Cook had been using a divisor of, effectively, 1/365th of the pilots' annual salary in identifying the value of the relevant daily pay. Before the Authority the first plaintiff contended that the correct divisor was 206 or, in the alternative, 235, representing what it claimed was the number of days the pilots were actually required to work in order to earn their salary. In its determination the Authority concluded that the approach taken by Mount Cook in calculating the relevant daily pay, by looking at a day's pay as being 1/365th of the pilots' annual salary, was permitted under the Act and it did not lead to any breach of the legislation.

The statutory provisions

[5] The Act, which came into force on 1 April 2004, repealed the Holidays Act 1981 and introduced the concept of "relevant daily pay" for the purposes of

[2] AA 462/09.

calculating payments for public holidays, alternative holidays, sick leave and bereavement leave. Under the previous legislation the term "ordinary pay" had been used for calculating such payments.

[6] The expression "relevant daily pay" is defined in s 9 of the Act. The section was amended and a new s 9A was added by s 5 of the Holidays Amendment Act 2010 but this case is concerned with the provision in the form in which it stood prior to the recent amendment. The section then provided:

> **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; but
>
> (c) excludes any payment of any employer contribution to a superannuation scheme for the benefit of 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).
>
> (3) If it is not possible to determine an employee's relevant daily pay under subsection (1), the pay must be calculated in accordance with the following formula:
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> $$\frac{a}{b}$$
>
> where–
>
> a is the employee's gross earnings for–
>
> (i) the 4 calendar weeks before the end of the pay period immediately before the calculation is made; or
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> (ii) if, the employee's normal pay period is longer than 4 weeks, that pay period immediately before the calculation is made
>
> b is the number of whole or part days during which the employee earned those earnings in the 4 calendar weeks, or longer period (as the case may be) including any day on which the employee

was on a paid holiday or paid leave; but excluding any other day on which the employee did not actually work.

(4) However, an employment agreement may specify a special rate of relevant daily pay for the purpose of calculating payment for a public holiday, alternative holiday, sick leave, or bereavement leave if the rate is equal to, or greater than, what would otherwise be calculated under subsection (1) or subsection (3).

The facts

[7] The Court was told that the dispute giving rise to this litigation affects approximately 100 pilots employed by Mount Cook. The first plaintiff, New Zealand Air Line Pilots' Association Incorporated (NZALPA), is an industrial union and professional association for pilots and air traffic controllers in New Zealand. Its members include the pilots who are employed by Mount Cook. The second plaintiff is an airline captain and a member of NZALPA. He has been employed by Mount Cook as a pilot since November 2002.

[8] There was no real dispute between the parties as to most of the relevant facts. All pilots employed by Mount Cook are parties to a collective employment agreement. At the time of the hearing there had been three such collective agreements since the Act came into force. Mount Cook operates its business 365 days a year. Pilots are rostered to work under fortnightly rosters which operate throughout the year. Pilots cannot be rostered to work, without agreement, on more than nine days in any 14-day period. They do not work an eight-hour day and the number of hours they are actually required to work on any given day will vary. The rosters are published seven days in advance. In advance of any particular 14-day roster period (other than pre-booked annual leave or planned sick leave, for example) there is no certainty as to the number of days that a pilot will work or the actual days on which a pilot will work. Over the course of a year, the number of days that one pilot will work compared to another (assuming leave taken is the same) will vary, but salary is the same for pilots on the same pay scale. While there is a maximum limit on the number of days on which work can contractually be rostered for a pilot, there is no minimum limit.

[9] The remuneration arrangements require an annual salary to be paid to pilots each year and this amount is paid by regular fortnightly payments. The evidence

was that since June 1997, pilots have been paid for each of the 14 days in a fortnightly pay period. The background to this pay structure was outlined by Mr Paul Crooke, the long-serving HR Manager for Mount Cook. By reference to relevant correspondence, Mr Crooke explained, in evidence which I accept, that the problem came about because the company payroll system paid employees on the basis of an 80-hour fortnight payroll system whereas the pilots' contract was constructed as a seven-day-a-week operation. After seeking advice from Datacom Employer Services Ltd, which manages Mount Cook's payroll, the payroll system was changed in June 1997 to the current arrangements whereby payments are made to pilots for each day of the year.

[10] Mr Crooke told the Court:

> 33. Therefore, it was the contract structure which required the change to the payroll, because the payroll was out of step with the contract. It was the payroll system which had to be changed to allow pilots to be paid correctly for the purposes of their employment contract entitlements. Since that time, there have been a number of renewals of the collective contract, and more latterly the collective agreement.

[11] Pilots are paid on the basis of a notional figure of 112.30 hours per fortnight. Mr Crooke explained that the figure of 112.30 hours per 14-day roster/pay period is arrived at by multiplying 14 days by a notional eight hours per day which equals 112 hours. Mr Cooke then said:

> 44.2 Salary is paid to pilots over 26 fortnightly roster/pay periods.
>
> 44.3 However, because 26 times 14 is 364 days, there is an anomaly because annual salary is calculated over 365 days.
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> 44.4 To address this and to spread the value of the 365th day over each fortnightly roster/pay period, that single day of 8 hours is divided by the 26 fortnightly periods which produces an additional 0.30 [hours] in each period.

[12] The three collective employment agreements which have operated since the Act came into force cover the following periods respectively:

1. 2003 - 2005
2. 2006 - 2008
3. 2009 - 2011

With one exception, there have been no material differences between these collectives and the relevant clause numbers have remained the same. The exception relates to the leave provisions. Under cl 9 of the first two agreements, pilots were granted 44 days leave inclusive of public holidays. In the latest collective, leave has been broken down into 28 days annual holidays, six days rostering compensation leave and 11 days for public holidays making a total of 45 days leave.

[13] Other provisions in the collective agreement which counsel identified as material were:

1. Cl 2.26 defines "week" as a period of seven days commencing 0000 hours on Monday.

2. Cl 3 gives Mount Cook the right to require pilots to work any time (subject to other provisions of the agreement, and safety/fatigue restrictions and the Civil Aviation Act). Cl 3 also provides for allocation of duties with fortnightly rosters.

3. Cl 4.1 provides that pilots on internal services (the only services) are entitled to five days off in each fortnightly roster leaving nine days available for duty in each roster.

   NZALPA places considerable reliance in this case on cl 4.3 to 4.7 which in essence provide that, where pilots are required to work on a rostered day off, or are recalled from annual leave, they are entitled to alternative days off or an additional payment of 1/206th of their annual salary.

4. Cl 4.8.1 provides that two day's leave is to be deducted from each pilot which shall be credited to the NZALPA Mt Cook Pilots' Council Leave Bank. The leave so credited is to be allocated to pilots on the Council as reimbursement for time spent on union affairs.

5. Cl 5.6.1 provides for additional payment when a pilot operates temporarily an aircraft falling within a higher equipment category than that in which he normally operates. The payment is linked to 1/206th of the salary appropriate for the higher category for each day flown.

6. The collective agreement did not specify any special rate of relevant daily pay in terms of s 9(4) of the Act meaning that the calculation of the relevant daily pay fails to be determined under the provisions of s 9. As noted above, the clause in the first two collectives provided for 44 days annual leave inclusive of public holidays. In the latest collective agreement the clause provides for a total of 45 days leave.

   Cl 9.10 provides for three days bereavement leave in respect of each specified bereavement.

7. Cl 14.1 provides for up to three months' sick leave on full pay, depending on various factors.

Principles of statutory construction

[14] The principles to be followed and applied in any consideration of the relevant provisions of s 9 of the Act are those recognised by the full Court in cases such as *Tertiary Education Union v Chief Executive, Western Institute of Technology*[3] and *Vice-Chancellor of Massey University v Wrigley*.[4] The starting point is s 5 of the Interpretation Act 1999 which provides:

> **5 Ascertaining meaning of legislation**
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> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[3] [2011] NZEmpC 33.
[4] [2011] NZEmpC 37.

[15] In applying that provision, regard is to be had to what the Supreme Court (Tipping J) said in *Commerce Commission v Fonterra Co-operative Group Ltd*:[5]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.
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> ...
>
> [24] Where, as here, the meaning is not clear on the face of the legislation, the court will regard context and purpose as essential guides to meaning.

[16] In the *Massey University* case the full Court, in reference to the Supreme Court decision in *Air Nelson Ltd v NZAEPMU*[6] said:[7]

> ... We are mindful of what the Supreme Court said in *Air Nelson*, that the interpretation of words in a statute is not about finding meaning in an abstract sense but about "recognising the nature and scope" of the particular words "in particular cases. That is, the issue was not one of construction but one of application."[8]

The case for the plaintiff

[17] Counsel for the plaintiffs, Mr Dench, accepted that Mount Cook has a '365-day' operation and that the pilots are rostered for duty throughout the year on fortnightly rosters. He also accepted that the company's internal computer system treats each pilot as though he or she works 112.3 hours per fortnight but, as counsel expressed it:

> This is a fiction. Nowhere in any of the CEA's is an 8-hour day (or an 8.03 - hour day), or a 112.3 hour fortnight mentioned. The reality is that pilots do not work 8.03 hours on any day (except by chance). Duty hours vary between pilots, and individual pilots' hours vary from day to day.

Mr Dench described the figure of 112.3 as "a convenient tool that the defendant uses to calculate pay."

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[5] [2007] 3 NZLR 767(SC).
[6] [2010] NZSC 53.
[7] At [122].
[8] At [19].

[18] Expanding on this submission Mr Dench went on to say:

> The point is that the system is an internal administrative tool that the defendant has chosen to use. It was introduced in June 1997, well before relevant daily pay existed as a concept. The fact that an internal system is set up so that pay is calculated on the assumption that pilots are paid for working 8.03 hours per day, 7 days a week, for 364 days a year, says nothing about the parties' rights *inter se*. There is no suggestion that the pilots agreed to the introduction of this system and presumably they were happy as long as they were paid properly. The defendant was, and remains, free to adopt any internal system it likes as long as the arithmetic works, and its system is probably an effective practical tool when used correctly.

[19] Mr Dench submitted that there is a contractual limit that equates to 206 days work per year beyond which pilots were entitled to additional pay and he claimed that this entitlement to additional pay "is highly significant when determining what a pilot's normal salary is paid for." Mr Dench explained that the 206 figure was derived as follows:

> ... Under all but the most recent CEA, of the 365 days in a year, pilots were entitled to 44 days leave, leaving a balance of 321 days. Of these 321 days, pilots were entitled to a minimum of 5 days off in each fortnightly roster, leaving a possible 9 days on duty. This meant that pilots could be required to work 9/14^{ths} of 321 days in a year, or 206.3 days each year. This rounds to 206 whole days. The latest CEA provides for 45 days. The equivalent calculation results in a figure of 205.7 days in each year, which also rounds to the nearest whole number of 206.

[20] Mr Dench drew attention to the use of the 206-day figure in the following provisions in the collective agreement:

> 37. ... When a pilot works on a rostered day off, the pilot has the option of having another day off in a future roster or payment of an additional 1/206th of his or her salary; cl 4.5.2. Thus the pilot either retains the 206 day limit with an alternative day off, or is paid an additional 1/206th of his or her salary for working a 207th day.
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> ...
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> 39. Exactly the same concept is used when pilots are required, on a temporary basis, to fly a higher equipment category than usual; see cl 5.6.1. On those days, the pilot is paid the appropriate salary for the higher equipment. This is payable "on a daily basis at 1/206th of the appropriate salary step of the higher salary for each day flown.

[21] Mr Dench referred to the evidence given by Mr Nicholson and Mr Davies on behalf of the plaintiffs. Both were members of the NZALPA negotiating team involved in negotiating the collective agreements between Mount Cook and its

commercial pilots who were members of NZALPA. They gave evidence that the 1/206 figure was put forward in the course of negotiations for the collective by the Mount Cook negotiators as being a day's pay. That proposition was denied by the defendant's witness, Mr Crooke, who said that the 1/206 divisor "... was never a day's pay. That amount was a methodology used to pay an allowance."

[22] Mr Dench submitted:

> (e) 1/206 is not just any figure, but a precise calculation of the theoretical number of days a pilot can be required to work without encroaching on his or her entitlement to days off and leave. Even if the calculation were slightly wrong, it would still be an attempted approximation of the value of a day's work. It is submitted that this is no accident...

[23] Mr Dench also sought support for the plaintiff's approach in s 9(3) of the Act which, as he put it, "looks at days that are actually worked (on average), and excludes those days that are not." He went on to submit: "It is unlikely that the draftsperson intended to produce conceptually different outcomes depending on which subsection of s. 9 just happened to apply in one case as opposed to another. It is submitted that s. 9(3) provides a guide as to how s. 9(1) should be interpreted and applied."

[24] Towards the end of his submissions, Mr Dench provided several hypothetical examples which he submitted illustrated the anomalies with the defendant's approach. In the first illustration he took the case of a part-time employee who worked two days a week for an annual salary of $36,500. He said that if asked, she would say that she earned $350 a day. If that worker was required to work on Easter Monday she would expect her normal $350 for the day plus half again which would give a total of $525. If, however, she was treated as being paid for every day of the year her relevant daily pay would be $100 and the amount she would receive for working Easter Monday would be $150. As counsel expressed it, "Her premium for working Easter Monday would be $50 and amount to 14% of her ordinary pay, rather than the 50% anticipated under the Act."

[25] Mr Dench had earlier submitted an alternative proposition:

> ... if annual leave needs to be factored in, a divisor of 235 days or 250 days should be used:

(a) As to 235, if pilots took no leave, they would be required to be available to work 235 days in the year; or 9/14^{ths} of 365 days. A fortnight's leave represents 9 days in which pilots can be required to work and 5 off days.

(b) As to 250, this works on the basis that pilots are paid for 206 days of work and 44 days leave, which is added back to get 250.

The case for the defendant

[26] Counsel for the defendant, Mr Thompson, contended that the plaintiff did not argue before the Authority, "and does not now argue, that a calculation under section 9(1) is not possible - but that the divisor used by Mount Cook is wrong." He expressed the answer to what he referred to as the "factual question" posed by this case in these terms:

> For a day that the pilot is rostered to work, including a public holiday, the amount of pay that the pilot would have received had the pilot worked on the day concerned is the same amount that the pilot would have received had the pilot not been rostered to work on the day concerned, and not worked. That is, the pilot would have received, in either circumstances, an amount equivalent to his salary divided by 364.

[27] Mr Thompson described the divergent views of the parties in relation to the statutory provision in question in these terms:

> 21. The wording in section 9(1) invites an inquiry which has a wholly factual orientation, and which is applicable to a particular employer and a particular employee in light of a particular employment relationship/agreement. It does not involve the sort of wide reaching one solution fits all approach which NZALPA argues should be adopted - without regard to the actual employment arrangements in place, or the totality of those arrangements. This different approach of the individual versus the global analysis, perhaps highlights the parties' divergent views.

[28] Mr Thompson submitted that if NZALPA was consistent in its argument then, given the increase in total leave days under the latest collective agreement from 44 to 45, the divisor it proposes should be 1/205th rather than 1/206th. Either way, counsel submitted:

> 24. NZALPA's argument which relies on either 206 (or possibly 205) or 235 as the divisor, introduces a calculation which is entirely fictional and does not represent a formula to derive the amount the pilot would have received, and is, in fact, not what the pilot does receive. Pilots do not receive pay on that basis - and it could not possibly work. If,

> for example, a pilot only works 198 days of the year, and is to receive 1/206th for each of those days, which of the remaining 167 days in the year which the pilot does not work, should have the remaining 8 x 1/206 attributed to them? ...

[29] Mr Thompson took issue with the plaintiffs' suggestion that s 9(3) of the Act could be looked at for guidance on the issue:

> 32. NZALPA refers to what was section 9(3), as indicating the purpose was not met by Mount Cooks' approach. That also is wrong. Section 9(3) was a default provision, if it was impossible to calculate RDP under section 9(1).
>
> 33. The inquiry does not reach section 9(3) ... because it is possible to determine a pilot's RDP under section 9(1). It was only when a circumstance of impossibility was encountered, that section 9(3) comes into play...

[30] In response to Mr Dench's reference to the existing 1/206th figure in the collective agreement as a payment to pilots required to work during annual leave or on a rostered day off (see [20] above) Mr Thompson submitted that the payments were negotiated as "additional" payments over and above the salary payment the pilot also receives calculated on the 1/364th approach.

[31] In reference to the hypothetical examples suggested by Mr Dench, Mr Thompson submitted that they overlooked the fact that the outcome of an inquiry as to what an employee would receive for a day "can be different from one day to another, either by reason of the contractual construct or express agreement between the parties." He also made the point that, "many employers and employees agree to a stable income model - so where an employee's hours (including penal hours) or days changed significantly from week to week as a result of a shift pattern, the income is stabilised by paying a consistent amount each fortnight, regardless of the actual number of days or hours worked."

[32] Mr Thompson referred to the decision of this Court in *Roche v Urgent Medical Services Home Care Ltd*,[9] where Judge Colgan in reference to an award representing holidays not taken by Dr Roche, who was on an annual salary said: "This is not difficult to calculate. Dr Roche was on an annual salary. The formula is to divide this by 365 to obtain a notional daily rate of pay."

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[9] [1999] 2 ERNZ 788 at 804.

[33] Mr Thompson submitted that what really underlines the plaintiff's claim is "an apparent desire to change the long-standing contractual basis for pilot remuneration and other entitlements, as applied by the payroll system in place." Counsel stated:

> 83. The remedy for NZALPA, if it would wish pilots at Mount Cook to receive a different amount, is to bargain for a different contract structure - an opportunity which has now presented itself three times to NZALPA. NZALPA could very easily have sought to adopt the model in place at either Eagle Airways, or Air Nelson, and that different construct would result in a different amount to be received by a pilot - and a different method of delivery of, for example, leave entitlements.

Discussion

[34] The reference by Mr Thompson to Eagle Airways and Air Nelson arose out of evidence submitted by the plaintiffs to the effect that under the respective collective agreements relating to those two airlines the divisor for ascertaining relevant daily pay is fixed at 1/260. In cross-examination Mr Crooke made the point that pilots in both those companies always work 10 days in a fortnight whereas the Mount Cook pilots can work nine days or something less than nine days and so, as the witness put it, "there is unpredictability in the Mount Cook operation."

[35] Mr Thompson countered the evidence relating to Eagle Airways and Air Nelson by producing the relevant parts of the collective agreement for Air New Zealand which uses the same divisor as Mount Cook for calculating the relevant daily pay under the Act. Mr Dench sought to distinguish the position regarding Air New Zealand pilots and Mount Cook pilots on the grounds that Air New Zealand pilots fly overseas "involving different time zones" and domestically whereas the Mount Cook pilots operate domestically only.

[36] I must say that I did not find the evidence relating to the position regarding these other airlines particular relevant or helpful apart from the fact that they illustrate how important it is for each case to be considered on its own facts. How the relevant daily pay is to be assessed under s 9(1) in any given case will vary and depend very much on the particular factual circumstances. In this regard, the observations made by the full Court of the Employment Court in *Idea Services Ltd v*

Dickson[10] appear to have relevance in that they involved a similar type of inquiry under s 6 of the Minimum Wage Act 1983. The full Court stated:

> [63] In reaching our decision on the first issue, we adopt the view taken by William Young P and Chambers J in *NZ Fire Service Commission v NZ Professional Firefighters Union*.[11] Construing the Holidays Act, they held that the question of whether a day would be otherwise a working day is an intensely practical one. We think the same may be said of s 6 of the Minimum Wage Act which also reflects practical considerations. Each case will therefore turn on a factual inquiry as to what is required by an employer of an employee and whether that constitutes *"work"* for the purposes of s 6.

[37] In the *Postal Workers* decision the Court of Appeal stated:

> [24] ... The purpose of the new Act was to promote balance between work and other aspects of the lives of employees. That was to be achieved by providing employees with minimum entitlements to annual holidays, public holidays, sick leave and bereavement leave.
>
> [25] The employer was obliged to pay not less than the relevant daily pay for an employee if he or she did not work on a public holiday that would otherwise have been a working day. Similar obligations arose in respect of "alternative holidays" and for sick leave and bereavement leave.
>
> [26] Section 9 defined the expression "relevant daily pay" for the purpose of the identified statutory obligations as meaning the amount of pay that the employee would have received had he or she worked on the day concerned. That pay plainly included the pay for ordinary hours of work but was extended to include other forms of remuneration such as productivity or incentive-based payments (including commission); payments for overtime; and the cash value of board and lodgings provided by the employer. We note that this is an inclusive definition so that other forms of remuneration are not excluded if they would have been received had the employee worked on the day at issue. The only specific exclusion is for employer contributions to the employee's superannuation scheme.
>
> [27] The plain intention of the Act was to provide to employees who had not worked on a public holiday or while taking bereavement or sick leave, a statutory entitlement to a minimum daily sum based on the pay the employee would otherwise have received if he or she had worked on the day or days concerned.
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> ...
>
> [29] The calculation of relevant daily pay is necessarily a notional exercise. It is to be undertaken retrospectively on the basis of what would have been earned if the employee had worked on the relevant holiday or leave day...
>
> ...

[10] [2009] ERNZ 116.
[11] [2007] 2 NZLR 356 (CA) at 359.

> [32] Section 9 must be interpreted in such a way as to make the legislation work in a practical manner...

[38] The *Postal Workers* case was primarily concerned with the interaction between ss 9(1) and 9(3) of the Act and, in particular, the calculation of relevant daily pay in respect of posties where, given the unpredictable circumstances associated with the job, it is not possible to establish whether a postie would have had to work overtime on the relevant day in order to complete his or her postal round. The Court of Appeal held that because there was this element of uncertainty as to how much a postie would have received on a particular day, the calculation of relevant daily pay could not be determined under s 9(1) and therefore the averaging formula under s 9(3) must be used to determine the employee's relevant daily pay.

[39] Mr Dench submitted that it was implicit in the Court of Appeal decision that, "s. 9(3)'s function is to approximate (as best one can) the amount due under s. 9(1) where s. 9(1) cannot be used." Mr Thompson submitted that whether or not the averaging formula in s 9(3) should apply is not the issue in the present case. He stated:

> 7. ... As outlined in primary submissions, NZALPA's argument is that Section 9(1) does apply, and that is also Mount Cook's position. The obvious factual differences, and why the NZ Post decision is of limited specific assistance, is because there is no such uncertainty as to what a pilot receives for a day which requires an RDP payment to be made.
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> ...
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> 13. As the NZ Post decision makes clear on more than one occasion, the Holidays Act requires application by way of a practical method and in a practical manner.

[40] One of the points made by the Authority in its determination in the present case was that Mr Dench had apparently made reference to the suggestion that pilots are "*paid for working every day of the year.*" In response, the Authority stated:

> [35] I am unable to find that Mt Cook has ever stated that its approach is to pay pilots for working every day of the year. Neither has Mt Cook in my view relied on *"a fiction"* that pilots work every day. If there is such a fiction it is not one that Mt Cook has invoked to calculate RDP. The airline's approach has been to pay the same amount for each day of the year. That is not the same as paying them for working 365 days, or the same as paying them as if they were working 365 days. It is relevant that under s 9(1) RDP

> is defined in terms of pay that would have been *"received"* not pay that would have been earned or worked for.

[41] A similar submission to that referred to by the Authority was made by Mr Dench before me. With respect, I agree with the Authority's response. Section 9(1) poses an intensely practical question, namely, what is the amount of pay that a Mount Cook pilot would have received had he or she worked on the day concerned? The answer, on the facts as I find them, is that the pilot would have received an amount equivalent to his or her salary divided by 364. That is the practice that Mount Cook introduced in June 1997 in order to meet the challenges of its contractual arrangements with its pilots. It was the practice that operated when the Act came into force.

[42] The calculation of the relevant daily pay has application not only in respect of public holidays but also alternative holidays, sick leave and bereavement leave. Both counsel made submissions in respect of these other issues which I need not go into. Suffice it to say that if the plaintiffs' position was upheld it would require significant changes to Mount Cook's payroll system in order to deal with the various leave scenarios but that, in my view, is not a consequence intended by the legislature under s 9(1) of the Act. If the interpretation of s 9(1) contended for by the plaintiffs had been intended, it would have been a relatively easy matter for the legislature to have so provided but it did not do so. On the contrary it provided an intensely practical method of calculating relevant daily pay and that is by reference to the amount of pay the employee would actually have received if he or she had worked on the day concerned.

Conclusion

[43] For the reasons stated, the plaintiffs fail in their challenge to the Authority's determination and the relief sought is refused. By way of an affirmative defence, the defendant seeks a declaration of an overpayment in respect of each of its pilots by the equivalent of $1/365^{th}$ of his/her salary in each year "if appropriate". I do not consider it appropriate to make any such order.

[44] If costs are sought and cannot be agreed upon, they can be the subject of submissions.

A D Ford
Judge

Judgment signed at 1.45 pm on 17 December 2012