

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2019] NZEmpC 173
EMPC 413/2018**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN ALLIED INVESTMENTS LIMITED
 Plaintiff

AND COLIN DESMOND FLOWERS
 Defendant

Hearing: 12 September 2019 and further memoranda on 1 and 6 November
 2019
 (Heard at Dunedin)

Appearances: B Nevell, counsel for plaintiff
 P Cranney, counsel for defendant

Judgment: 25 November 2019

JUDGMENT OF JUDGE K G SMITH

[1] Allied Investments Ltd employed Desmond Flowers as a security officer. Mr Flowers worked on rostered night shifts and was required, on occasions, to either start or finish his shift on a public holiday.

[2] Allied Investments maintained that, by agreement, those public holidays Mr Flowers worked on had been transferred to other days, as allowed by the Holidays Act 2003 (the Act). Mr Flowers disagreed and maintained his entitlements under the Act had not been provided.

[3] The Employment Relations Authority concluded the purported transfer of the public holiday was ineffective, because the agreement relied on by Allied Investments did not comply with either ss 44A or 44B of the Act.¹

[4] Allied Investments challenged that determination. It sought a decision that the agreement complied with s 44A so that it had not failed to provide Mr Flowers with his statutory entitlements.

[5] The parties relied on a statement of agreed facts supplemented by evidence from Christopher McDowall, the General Manager of Operations for Allied Investments, and Mr Flowers.

Employment agreement and the transfer provision

[6] On 26 September 2016 Allied Investments employed Mr Flowers as a full-time security officer in Southland. Mr Flowers' employment agreement required him to work between 32 and 60 hours per week "...at such times as to be mutually agreed between the Employee and Employer".

[7] Clause 14 of the employment agreement generally deals with public holidays and begins with a statement that they are to be taken in accordance with the Holidays Amendment Act 2010.

[8] Clause 14.2 of the agreement provides that, if an employee is required to work on a public holiday, he or she is to be paid time and a half for the hours worked and, where that holiday is a day the employee would normally work, be provided with an alternative holiday. The clause recognises that the alternative holiday must be a day that would otherwise be a working day for the employee and be a whole working day regardless of the amount of time the employee had worked on the public holiday.

[9] An agreement to transfer a public holiday is contained in clause 14.3 of the employment agreement that reads:

¹ *Flowers v Allied Investments Ltd t/a Allied Security* [2018] NZERA Christchurch 169.

Transfer of a Public Holiday Clause

The Employer and Employee agree to transfer the public holiday to accommodate the Employers operational hours. The transfer of a public holiday will occur either when the shift starts on the public holiday and transfers into the non-public holiday or when the shift starts on a non-public holiday and moves into a public holiday.

Example

Public Holiday on a Monday: Work shift Monday 7am to 7pm and Monday 7pm to Tuesday 7am may be treated as the 24hrs of Public Holiday period. Further information on this can be found at: www.legislation.govt.nz/act/public/2008.

(emphasis original)

[10] Allied Investments' case was that clause 14.3 must be read together with its public holiday transfer policy the relevant parts of which read:

Public Holiday Transfer

As per the Holidays Amendment Act 2008 and the transfer clause in your employment contract Public holidays will be treated as applying from the start of your shift on a public holiday until the end of a shift whether during or after a public holiday.

Example

If your shift starts at 10pm on a Sunday and ends at 6am on a Monday and the Monday is a public holiday then the public holiday will not apply. If your shift starts on a Monday at 10pm and the Monday is a public holiday and it finishes at 6am on the Tuesday and the Tuesday is not a public holiday then you will be paid as if the public holiday ended at 6am on the Tuesday.

[11] Mr Flowers was unable to remember if that policy was one he read before signing the employment agreement, but the statement of agreed facts accepted that it formed part of that agreement.

[12] Mr Flowers was rostered to work on 12-hour shifts, either from 6 pm on one day to 6 am the next day or from 6 am to 6 pm on the same day. He described his roster as working this way:

- (a) On his first calendar day of work he would work from 6 pm to midnight.
- (b) On the second calendar day he would work from midnight to 6 am and then 6 pm to midnight.

- (c) The third calendar day was worked from midnight to 6 am and 6 pm to midnight.
- (d) The fourth calendar day was worked from midnight to 6 am and 6 pm to midnight.
- (e) On the fifth calendar day he worked from midnight to 6 am.

[13] Mr Flowers' working week was four shifts over five calendar days. The sixth, seventh and eighth calendar days were not working days for him before the cycle of the roster repeated itself. If the last calendar working day of his roster fell on a public holiday he did not get paid for it and did not receive a day off in lieu.

[14] The proceeding was about the impact on Mr Flowers' entitlements, but the statement of agreed facts concentrated on the examples of his shifts for New Year's Day 2017, Good Friday 2018, and Easter Monday 2018. He worked on New Year's Day 2017 from midnight to 6 am. He was not paid time and a half for those hours and did not receive a paid alternative holiday for working them. That was because Allied Investments considered it had transferred that part of the public holiday to the next day, Monday 2 January 2017. That day was also a public holiday.

[15] Mr Flowers worked on Good Friday, 30 March 2018, until 6 am having started his shift at 6 pm the previous day. He resumed work at 6 pm that day and worked until 6 am the next day, 31 March 2018. He was not paid time and a half, or provided with a day in lieu, for the shift that ended at 6 am. He was paid time and a half for the work from 6 pm on Good Friday to 6 am the next day and he received an alternative holiday.

[16] Mr Flowers worked on Easter Monday, 2 April 2018, from midnight until his shift ended at 6 am. He did not receive time and a half or an alternative day's holiday for that work because Allied Investments considered the period from midnight to 6 am on Tuesday 3 April 2018 had been transferred to the next day.

[17] The effect of the agreement to transfer the public holiday was to move it to the next day and that is what happened in practice.

[18] Against that background the issue is whether the employment agreement purporting to transfer the public holiday complied with s 44A of the Act.²

The Act

[19] The ability to transfer a public holiday is in subpart 3 of the Act. Section 43 introduces that subpart with a statement of its purpose that is:

- (a) to provide employees with an entitlement to 11 public holidays if the holidays fall on days that would otherwise be working days for the employee;³
- (b) to provide for the transfer of public holidays (whether in whole or in part);⁴ and
- (c) to specify the entitlements of employees in relation to public holidays.⁵

[20] The public holidays are listed in s 44(1). They are the calendar days of Christmas Day, Boxing Day, New Year's Day, 2 January, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign's birthday, Labour Day, and the day of the anniversary of a province or the day locally observed as that anniversary.⁶

[21] The ability to transfer a public holiday is provided for by ss 44A and 44B of the Act. Section 44A deals with transferring part of a public holiday. Section 44B deals with transferring the whole public holiday.⁷

[22] Section 44A reads:

44A Transferring part of public holiday

- (1) This section applies if—

² The Authority's determination considered both s 44A and 44B because that was how the investigation before it was conducted, but the plaintiff no longer relies on s 44B.

³ Section 43(a).

⁴ Section 43(b).

⁵ Section 43(c).

⁶ Section 44(1)(a)-(k).

⁷ Sections 44A and 44B were introduced into the Holidays Act 2003 by s 12 of the Holidays Amendment Act 2010 as from 1 April 2011.

- (a) an employee is to start work on a day and finish work on the following day; and
 - (b) one or both of those days are specified in section 44(1).
- (2) If the criterion in subsection (3) is met, the employee and his or her employer may agree in writing (whether in an employment agreement or otherwise)—
- (a) that part of one or both days specified in section 44(1) is to be treated as not part of a public holiday; and
 - (b) that,—
 - (i) if the agreement relates to only 1 day specified in section 44(1), a period of 24 hours is to be treated as a public holiday if the period—
 - (A) is to start or finish during the day specified in section 44(1); and
 - (B) includes the period from when the employee is to start work to when the employee is to finish work:
 - (ii) if the agreement relates to 2 days specified in section 44(1), 2 separate periods of 24 hours are to be treated as public holidays if each period—
 - (A) is to start or finish during the days specified in section 44(1); and
 - (B) includes the period from when the employee is to start work to when the employee is to finish work.
- (3) The criterion is that the purpose of the transfer is not to avoid the employee's entitlements under sections 50 and 56 for working on a public holiday, although the transfer may have that effect.
- (4) Where an agreement to transfer part of a public holiday applies, the employee's entitlements under sections 50 and 56 apply only if the employee works during the period of 24 hours or 2 separate periods of 24 hours (as the case may be) to which that part of the public holiday has been transferred.
- (5) To avoid doubt, an agreement under this section must not reduce the total number of paid public holidays that the employee is otherwise entitled to in any year.

Example

An employee is to work from 10 pm on 24 April to 6 am on Anzac Day and from 10 pm on Anzac Day to 6 am on 26 April.

The employer and employee can agree to treat 10 pm to midnight on Anzac Day as not part of a public holiday in exchange for treating a period of 24

hours that finishes on Anzac Day as a public holiday. Just when the 24-hour period starts before or finishes after a work period is a matter for the parties to agree on. For instance, they could agree that it runs from midday on 24 April to midday on Anzac Day.

[23] Section 44B reads:

44B Transferring whole of public holiday

- (1) An employer and employee may agree in writing (whether in an employment agreement or otherwise)—
 - (a) that a public holiday specified in section 44(1) is to be observed by the employee on another calendar day or during a period of 24 hours (a **transfer**), if the criteria in subsection (2) are met; and
 - (b) the calendar day or period of 24 hours to which the public holiday is transferred is to be treated as the employee's public holiday for the purposes of this subpart.
- (2) The criteria are that—
 - (a) the public holiday specified in section 44(1) to be transferred—
 - (i) is identified; and
 - (ii) would otherwise be a working day for the employee; and
 - (b) the calendar day or period of 24 hours to which the public holiday is to be transferred—
 - (i) is identified or identifiable; and
 - (ii) would otherwise be a working day for the employee; and
 - (iii) is not another public holiday or part of a public holiday; and
 - (c) the purpose of the transfer is not to avoid the employee's entitlements under sections 50 and 56 for working on a public holiday, although the transfer may have that effect.
- (3) Where an agreement to transfer a public holiday applies, the employee's entitlements under sections 50 and 56 apply only if the employee works on the identified or identifiable calendar day or period of 24 hours to which the public holiday has been transferred.
- (4) To avoid doubt, an agreement under this section—
 - (a) may be made in relation to 1 or more of the public holidays specified in section 44(1); but
 - (b) must not reduce the total number of paid public holidays that the employee is otherwise entitled to in any year.

Analysis

[24] Mr Nevell, in his submissions for Allied Investments, described the issue as whether the parties reached an effective agreement to transfer public holidays “forward” six hours to coincide with the start and finish times of rostered shifts.

[25] Allied Investments’ starting point was that an agreement to transfer that was reliant on s 44A must comply with the criterion in s 44A(3). That is, the purpose of the transfer must not be to avoid an employee’s entitlements under ss 50 and 56. The criterion was said to be satisfied in two ways. First, in relation to the public holiday for Easter Monday, it was transferred to the next day and Mr Flowers received all of his entitlements for working on that day as if it was a public holiday. Second, the company said that its analysis of the 2017 and 2018 years showed that he received “...either more or [an] equal number of shifts where he received his entitlements under ss 50 and 56 of the Holidays Act when the agreed transfer was implemented”.

[26] The fact that Mr Flowers was said to have worked shifts in this way was crucial to Allied Investments’ case. Mr Nevell’s submission was that a purposive and “liberal approach” should be taken to the interpretation of the Act and the wording of the employment agreement and policy. He submitted that it was clear the purpose of being able to transfer a public holiday was to provide advantages to both employees and employers for their mutual benefit and there was no intention to reduce Mr Flowers’ entitlements.

[27] From those submissions attention turned to compliance with ss 44A(2)(a) and (b). Those sections were complied with, according to Allied Investments, when clause 14.3 and the policy were considered together. Reliance was placed on the policy referring to the “Holidays Amendment Act 2008”, which was considered sufficient to incorporate into the employment agreement the whole of s 44A.⁸ A submission to the same effect was made about clause 14, because it stated that public holidays were to be taken in accordance with the Holidays Amendment Act 2010, which culminated in an argument that the employment agreement’s references to those amendment Acts

⁸ Mr Nevell acknowledged the intended reference should have been to the Holidays (Transfer of Public Holidays) Amendment Act 2008.

were enough to show the parties intended to create an agreement to transfer public holidays.

[28] Attempting to deal with any concerns about the agreement complying with the Act, Mr Nevell sought to draw an analogy between the assessment required and aspects of the judgment of Anderson J in *New Zealand Airline Pilots' Association Industrial Union of Workers Inc v Air New Zealand Ltd*.⁹ The *Airline Pilots Association* case concerned s 44(2) of the Act which provided, at that time, that an employer and an employee may agree (whether in an employment agreement or otherwise) that any public holiday specified in the Act was to be observed by the employee on another day. That section has been repealed.¹⁰

[29] In summary, therefore, Allied Investments' case was that the wording of the agreement satisfied s 44A(2) so that on each occasion when Mr Flowers' shift began on a public holiday that holiday was transferred to the next day.

[30] I do not agree with Mr Nevell's submissions. The employment agreement does not comply with s 44A(2) and it was ineffective to transfer the public holiday, when Mr Flowers was rostered to work, to another day.

[31] The parties agreed that the way the roster operated led to occasions when Mr Flowers may have received more than his strict contractual and statutory entitlements, but there were occasions when he received less than them. Mr Nevell submitted that meant Mr Flowers had not suffered any detriment because, over time, the position "evened out".

[32] Mr Cranney submitted that such an effect was not permitted under the Act and, even if it was, would only have a neutral outcome provided the employee remained employed. He submitted that, while Mr Flowers may not have a claim for unpaid wages, the roster system could operate to erode his other entitlements. I agree. The Act does not contemplate the type of "evening out" referred to by Allied Investments;

⁹ *New Zealand Airline Pilots' Association Industrial Union of Workers Inc v Air New Zealand Ltd* [2007] NZSC 89, [2008] 2 NZLR 1, [2007] ERNZ 884.

¹⁰ On 30 September 2008, by s 7 of the Holidays (Transfer of Public Holidays) Amendment Act 2008.

either the transfer agreement complies with the Act on each occasion when it is said to apply, or it does not.

[33] To transfer a whole public holiday to another day s 44B must be satisfied. That section requires agreement in writing that the public holiday may be observed on another calendar day, or during a period of 24 hours.¹¹ Section 44B(1)(b) requires the calendar day, or period of 24 hours to which the public holiday is transferred, to be treated as the employee's public holiday. That is not surprising given the purpose of the section is to enable a public holiday to be enjoyed, but on another day.

[34] This case is about transferring part of a public holiday, given that the shifts Mr Flowers was concerned over ended or began on a public holiday. Section 44A(3) is a necessary criterion to be satisfied and, if it cannot be satisfied, the purported transfer is ineffectual. In this case, there was no evidence that the purpose of the purported transfer was to reduce Mr Flowers' statutory entitlements, but that was a consequence of the agreement.¹²

[35] To comply with s 44A(2)(a) and (b) the transfer agreement must be in writing and specify the relevant part of the public holiday being transferred. The agreement was in writing, but clause 14.3, and the company's policy, use concepts from both ss 44A and 44B that make unclear which section the agreement is attempting to comply with. Clause 14.3 is introduced as a transfer of a whole public holiday, both by its heading and in its first sentence. The second sentence is about transferring part of a public holiday, because it deals with when shifts start or finish on the public holiday. That confusion is not clarified by the example, which deals with a situation where a 12-hour shift is to be worked on one day that is a public holiday. In the example that day is a Monday, and the transfer purports to shift the public holiday to another 24-hour period, but provides, instead, only 12 hours, from Monday 7 pm until Tuesday 7 am. That drafting does not satisfy s 44A(2)(b)(i) and it also creates uncertainty about

¹¹ Provided the criteria in subs 2 are met.

¹² Sections 44A(3) and 44B(2)(c) state that the purpose of the transfer must not be to avoid the employee's entitlements under ss 50 and 56. That is, the right to enjoy at least pay at time and a half for working on the public holiday and where the public holiday would otherwise have been a working day, an alternative holiday.

whether the agreement was intended to apply to a situation where the whole public holiday is to be transferred, or to one where part of it is to be transferred, or both.

[36] More importantly, Mr Cranney made the point that the transfer agreement does not address what is to happen when the public holidays in s 44(1) are celebrated on consecutive days. He submitted that the agreement, therefore, did not deal with Mr Flowers' work, because there were occasions when his rostered shifts started on a public holiday and ended on another public holiday.

[37] I agree that the transfer agreement does not address what happens when the shifts involve work on consecutive public holidays. The agreement was written in an attempt to satisfy s 44A(2)(b)(i) but not s 44A(2)(b)(ii). The problem is illustrated by two occasions when public holidays are on consecutive days; 1 and 2 January, and Easter Monday and Southland's anniversary day which is celebrated the following day. In those situations the agreement purported to transfer the first public holiday to the next day, which was also a public holiday listed in s 44(1).

[38] I conclude that the agreement between Allied Investments and Mr Flowers did not comply with s 44A(2). The situation was not saved by the fact that the employment agreement referred to the Holiday Amendment Act 2010 and attempted to refer to the Holidays (Transfer of Public Holidays) Amendment Act 2008. While Mr Nevell submitted that referring to those statutes incorporated them into the agreement, and showed an intention to transfer public holidays in a complying way, the best that can be said is that the result only succeeded in restating the provisions of the Act. It did not demonstrate the transfer agreement had satisfied ss 44A(2)(b)(i) and (ii).

[39] Finally, I am not persuaded that the judgment of Anderson J in the *Airline Pilots Association* case assists. It was about the now repealed s 44(2), and his remarks did not find favour with the other Judges of the Court.

[40] A brief comment is required about one issue identified during counsel's submissions, over the relationship between ss 44A(3) and 44A(5). Under s 44A(5), an agreement made to transfer part of a public holiday must not reduce the total

number of paid public holidays that the employee is otherwise entitled to in a year. Compliance with the section is mandatory; it uses “must”.

[41] Section 44A(5) is consistent with ss 50 and 56 of the Act. Those are the sections that provide for an employee’s entitlements when working on any part of a public holiday. Section 50 deals with the entitlement to increased pay, and s 56 creates an entitlement to an alternative day’s holiday. Both of those sections are also mandatory, using “must” to describe the entitlements.

[42] In combination ss 44A(5), 50 and 56 ensure that, whatever agreement is reached, an employee’s entitlements must be provided for. However, as both Mr Nevell and Mr Cranney observed, the mandatory requirements of those sections do not sit comfortably with s 44A(3), which is the criterion to consider when assessing an agreement to transfer a public holiday. The criterion is that the purpose of the agreement is not to avoid the employee’s statutory entitlements for working on a public holiday “...although the transfer may have that effect”.

[43] Mr Nevell placed some weight on the possibility, in this case, of reaching a conclusion that there was no purpose evident in the transfer agreement that could be said to infringe ss 50 and 56. It followed, therefore, the agreement could stand even if Mr Flowers’ entitlements were adversely affected by it.

[44] In contrast, Mr Cranney concentrated on the conflict between these sections without any indication in the text, or the purpose, of the Act as to how an agreement to transfer a public holiday cannot fall below the mandatory entitlements and yet may have that effect suggesting those entitlements could, somehow, be adversely impacted. Mr Cranney’s submission was that, whatever may have been intended in the drafting of s 44A(3), it had misfired.¹³

[45] I have held that the transfer agreement does not satisfy s 44A, because it failed to deal with the situation where two public holidays were on consecutive days. Had it been necessary to decide the meaning of ss 44A(3), I am inclined to prefer Mr

¹³ Relying on the analysis in cases such as *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Assoc Ltd* [1946] 1 All E R 637; and *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2018] NZCA 562.

Cranney's submissions. How an agreement may not have as its purpose reducing entitlements, but have that effect, is not explained in ss 44A(3), or 44A(5), or anywhere else in the Act. The words "may have that effect" in s 44A(3) are inconsistent with the mandatory expression of an employee's entitlements throughout the Act.

Outcome

[46] I agree with the conclusion reached by the Authority, that the transfer agreement does not comply with s 44A of the Act. It has not, therefore, resulted in a transfer of part of the public holidays worked by Mr Flowers to another day. The challenge is unsuccessful.

[47] That conclusion does not end the litigation. The Authority only dealt with whether the agreement satisfied the Act but reserved leave to deal with remedies at a later time. At the request of counsel, I reserve leave for either party to apply to have remedies determined if they cannot be agreed.

[48] Costs are reserved. If they are to be sought memoranda may be filed and directions will be issued for an exchange of submissions.

K G Smith
Judge

Judgment signed at 3.40 pm on 25 November 2019