IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2024] NZEmpC 56
EMPC 265/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KIWIRAIL LIMITED Plaintiff
AND	RAIL AND MARITIME TRANSPORT UNION INCORPORATED Defendant

Hearing:	27–28 June 2023 (Heard at Wellington)
Appearances:	S Hunter KC and P Swarbrick, counsel for plaintiff G Davenport, counsel for defendant
Judgment:	27 March 2024

JUDGMENT OF JUDGE K G SMITH

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[1] KiwiRail Ltd and the Rail and Maritime Transport Union Inc are parties to a multi-employer collective agreement that applied from 1 July 2021 to 30 June 2023.

[2] The problem that has arisen between KiwiRail and the union is about how annual holidays are dealt with by the company for employees who are union members covered by the collective agreement. The core of the dispute is over the rate at which KiwiRail makes deductions from the accumulated annual holiday or leave balances for certain shift workers.

[3] The shifts in question are those requiring work of 12 hours per day or 12 hours and 15 minutes per day. When an employee who works a 12-hour shift takes an annual holiday that person's accumulated balance of available leave is reduced by KiwiRail at the rate of 1.5 days for each anticipated day on holiday and 1.53 days where the employee works a 12 hours and 15 minutes shift.

[4] KiwiRail says that its handling of annual holidays satisfies the Holidays Act 2003 (the Act) and complies with the collective agreement. The union disagrees.

The challenge

[5] The Employment Relations Authority rejected KiwiRail's method of calculating annual holidays.[1]

[6] KiwiRail challenged the Authority's determination and in doing so sought declarations that:

(a) the relevant employee's entitlement to annual holidays is expressed in weeks and not days;

(b) it had complied with the terms of the collective agreement in relation to the provision of annual holidays for relevant employees who work 12-hour work periods;

(c) it had complied with the terms of the collective agreement in relation to the provision of annual holidays for the relevant employees who work 10-hour work periods;

(d) it had not breached the Act in relation to the provision of annual holidays for the relevant employees who work 12-hour work periods; and

(e) it had not breached the Act in relation to the provision of annual holidays for the relevant employees who work 10-hour work periods.

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1 *Rail and Maritime Transport Union Inc v KiwiRail Ltd* [2022] NZERA 322 (Member English).

[7] Mr Hunter KC, counsel for KiwiRail, acknowledged that the evidence concentrated on shifts of 12 hours, and 12 hours and 15 minutes, but requested declarations dealing with those employees on 10-hour shifts because the issues were the same.

[8] No issue was taken over the declarations not dealing specifically with shifts of 12 hours and 15 minutes.

The work

[9] KiwiRail is a large company operating eight divisions from about 100 work sites. The business operates all day, every day.

[10] Two of KiwiRail's employees are Graham Beazley and Darryn Hawkins, who are both members of the union whose work is covered by the collective agreement.

[11] Mr Beazley works as a ferry terminal operator in Wellington on alternating shift rosters. Mr Beazley regularly works extra shifts as overtime.

[12] Mr Hawkins has worked for KiwiRail for 17 years and is employed as a mechanical engineer at Westfield in Auckland. He works 12 hours per shift and is a day worker.

[13] The rosters for employees such as Mr Beazley and Mr Hawkins are organised on a fortnightly basis. In one week, Mr Beazley will work 12-hour days and in the other week 12 hours and 15-minute days. The nature of Mr Beazley's rosters means that he works day shifts and night shifts. In one week of the fortnightly roster Mr Beazley and Mr Hawkins will work for three days and for four days in the other week of the fortnight. Mr Hawkins' roster is a standard fortnight. His roster rotates through four fortnights and then the cycle starts again. Since January 2023, his roster consists of seven work periods over a fortnight in a format of variously two-day, three-day and four-day blocks.

[14] There was no dispute about how Mr Beazley or Mr Hawkins are paid for the hours they work or about holiday pay.

The Holidays Act

[15] The Act came into force on 1 April 2004.[2] In relation to annual holidays its purpose is to provide an opportunity for rest and recreation.[3]

[16] The Act provides for minimum annual holiday entitlements for employees of not less than four weeks paid leave after the completion of 12 months continuous service.[4] The Act does not prevent enhanced or additional holiday entitlements from being provided but an employment agreement may not exclude, restrict or reduce an employee's minimum entitlements under the Act.[5]

[17] Section 17 of the Act allows the employee and employer to agree on how the minimum statutory entitlements are to be met:

> **17 How employee's entitlement to annual holidays may be met**
>
> (1) An employer and employee may agree on how an employee's entitlement to 4 weeks' annual holidays is to be met based on what genuinely constitutes a working week for the employee.
>
> (2) If an employer and employee cannot agree on how an employee's entitlement to 4 weeks' annual holidays is to be met, a Labour Inspector may determine the matter for them.
>
> (3) In making a determination, the Labour Inspector may take into account any matters that the Labour Inspector thinks fit, including the matters specified in section 12(3).

[18] There is no definition in the Act of what constitutes a genuine working week. However, s 17(3) contemplates a Labour Inspector making a determination about how an employee's minimum entitlement is to be met and, in that exercise, to take into account factors listed in s 12(3). Those factors are not exhaustive but include considering the employment agreement, the employee's work pattern and any other relevant factors such as:

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2 Sub-part 2 of pt 2 in sch 1 came into force on 1 April 2007.
3 Holidays Act 2003, s 3.
4 Section 16.
5 Section 6(3).

(a) whether the employee works for the employer only when work is available;

(b) the employer's roster or other similar systems; and

(c) the reasonable expectations of the employer and employee that the employee would work on the day concerned.

[19] A Labour Inspector was not asked to determine what genuinely constitutes a working week for Mr Beazley and/or Mr Hawkins or for others covered by the collective agreement, but ss 17(3) and 12(3) were relied on to provide assistance and/or support for KiwiRail's approach to annual holidays.

The collective agreement

[20] Work parameters are provided for in cl 23.3 of the collective agreement, which sets out the maximum work period, required rest periods and the number of consecutive days of work before an employee must be off duty. A table in the clause recognises a desired maximum work period of 12 hours per day with an absolute maximum of 14 hours (with listed exceptions).

[21] Clause 23.4 deals with planned days and hours. It provides that the normal practice will be to keep them at about 80 hours and up to 10 work periods in a fortnight. Where changes are anticipated consultation with the union is required.

[22] Annual holidays are provided for in cl 26.2. On the anniversary of each employee's employment, he or she is entitled to four weeks annual holiday, repeating the minimum entitlement under the Act. Employees with seven or more years continuous service earn a fifth week of annual holidays each year. Under cl 26.3, shift workers earn an additional week's leave, prorated if the shift work is for less than a year.

[23] Central to this dispute is cl 26.6.1 which, despite its title, deals with the allocation of annual holidays. The clause reads:

26.6 How Leave is Paid

26.6.1 Annual leave for a full pay fortnight is counted as 10 days' annual leave. Annual leave is otherwise deducted on the basis of one day for every 8 hours absence, rounded to the nearest half day. There is no leave deducted, or paid, for absence on rostered extra work periods or other overtime. Part time employees are entitled to four weeks' annual leave per annum calculated on the basis of their normal hours worked per week.

[24] The collective agreement does not define a "full pay fortnight".

How KiwiRail administers annual holidays

[25] Paul Ashton is KiwiRail's Executive General Manager Operations. He has overall responsibility for managing the company's rail freight, container terminals and rail network infrastructure. A significant portion of the union's membership is employed in the part of the business Mr Ashton is responsible for. He has also been a regular participant in negotiations between KiwiRail and the union.

[26] Mr Ashton explained that KiwiRail operates continuously and uses a range of roster patterns; for example five, eight-hour days per week; four, 10-hour days per week; four, 12-hour days per week, and 80 or 84 hours per fortnight, organised across different days of the week. As has already been explained, some of the rosters rotate fully throughout every day of the week and others involve night shift work.

[27] Presently, 183 of the company's employees who are members of the union are employed on 12-hour per day shifts. It was common ground that KiwiRail has operated 12-hour shifts for many years.

[28] Ms Hills-Davey, who is KiwiRail's payroll expert, explained the complexity of the company's administration of the delivery of annual holidays, which has been the same for the whole of her employment. She explained that the company uses an allocation of annual holidays in notional days to calculate leave because the holidays in the collective agreement are in weeks. For an employee entitled to four weeks holiday the allocation is 20 days. Likewise, for employees who are entitled to five

weeks annual leave the allocation was 25 notional days. These allocations were made on each employee's anniversary of employment.

[29] Taking as an example the 20 notional days allocated for four weeks annual holidays, Ms Hills-Davey described the process applied by KiwiRail as follows:

(a) a "notional" eight-hour day is used for one day's absence, regardless of the number of hours actually worked per day;

(b) if the holiday is for a fortnight, ten days annual leave is deducted from the accumulated balance; and

(c) if the holiday is for less than a fortnight the deduction from the accumulated balance is 1.25 days for every actual day's leave for a 10-hour per day worker, and 1.5 days for every actual day's leave for a 12-hour per day worker. Where the shift is 12 hours and 15 minutes the deduction is 1.53 for each day of holiday.

[30] In November 2020, KiwiRail altered its method of making deductions to automatically ensure that where a fortnight's holiday is to be taken by an employee who works shifts of 12 hours per day the debit is limited to 10 days. That step was taken because without it the rate at which the leave balance is reduced could breach the collective agreement.

[31] KiwiRail provides information about employee's holiday entitlements at the foot of each payroll slip. The information is expressed as a running total, showing both annual holidays due to the employee and what is accruing. Each employee can see at a glance his or her present entitlement and how much is being earned towards a future entitlement when the next anniversary of employment arrives.

[32] The payslip is very precise, because the holiday information is recorded in days and part days to two decimal places. As an example, Mr Beazley's payslip dated 8 September 2021 recorded under the heading "leave entitlement balances" annual holidays due to him of 33.41 days and accruing annual holidays of 18.36 days. The

same payslip recorded his available sick days, alternative leave days due to him for working on a public holiday and long-service leave, all of which were also expressed in days and part days.

[33] Ms Hills-Davey accepted that the payslips reflected what KiwiRail considered to be each employee's actual holiday entitlement and that the information is intended to be relied on.

[34] Ms Hills-Davey also agreed that the company relied exclusively on each employee's work roster in calculating what to debit from the available leave balance. That means, for example, that where Mr Beazley regularly works an extra shift as overtime that additional work is not included in any assessment of his entitlement to annual leave.

[35] KiwiRail applies a different approach when dealing with other leave such as providing an alternative holiday for working on a public holiday, bereavement leave or domestic violence leave. For those types of leave each day of absence from work is treated as one day and that is what is debited from an employee's entitlement.

KiwiRail's case

[36] Mr Hunter accepted that the evidence is not seriously disputed and that the issue is one of interpretation. He identified two issues:

(a) compliance with the Act to provide the minimum entitlement of four weeks annual holiday; and

(b) a separate question of contractual interpretation about complying with the collective agreement.

[37] Mr Hunter submitted that the Act requires annual holidays to be measured in weeks and each week of holiday should reflect the week the employee genuinely works. Once that week is established the minimum statutory entitlement can be determined arithmetically, by multiplying what is genuinely worked by four.

[38] To help in establishing what a week is, Mr Hawkins co-opted the language of s 17, under which an employer and employee may agree on how the statutory entitlement is to be met based on what genuinely constitutes a working week for the employee.

[39] As to how such an assessment might be undertaken, the submission was that it had been established in the Authority that, where employees work variable shifts, annual holidays may be accounted for in hours. Mr Hunter sought to rely on two now reasonably old Authority determinations as being persuasive: *Electrical Union 2001 Ltd v Mighty River Power Ltd* and *Mars New Zealand Ltd v Manufacturing and Construction Workers Union Inc*.[6]

[40] In the *Electrical Union* case, the employees worked variable shifts averaging 42 hours per week. The employer treated annual leave entitlements as being 168 hours per year, that is 42 hours multiplied by four. In that case, deductions were then made from the allocated yearly hours, according to the hours the employees would otherwise have worked on the day a holiday was taken.

[41] A similar approach was adopted in *Mars*, where the Authority determined that there was an agreement inferred by conduct that a week was 40 hours. From that conclusion it followed that annual holidays could be expressed in hours.

[42] Building on the approach in those determinations, KiwiRail said that by showing Mr Beazley's and Mr Hawkins' rostered work in hours it could establish that their annual holidays each year satisfied the Act. Converting the shift work for both employees into hours produced the following:

(a) Mr Hawkins works seven 12-hour per day rostered shifts per fortnight, or 84 hours per fortnight. His genuine working week was said, therefore, to be either three shifts of 12 hours totalling 36 hours or four shifts of 12 hours totalling 48 hours. Averaging over those two weeks produced 42 hours per week.

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6 *Electrical Union 2001 Ltd v Mighty River Power Ltd* [2012] NZERA Auckland 446; *Mars New Zealand Ltd v Manufacturing and Construction Workers Union Inc* NZERA Wellington WA 131/10, 4 August 2010.

(b) Mr Beazley works seven shifts per fortnight, but some of them are 12 hours and others are 12 hours and 15 minutes. Depending on the mix of shift rosters, Mr Beazley works either 84.75 hours or 85 hours per fortnight. Averaging them produces 42.44 hours per week, which could be expressed as 42 hours and 25 minutes.

[43] Reliance was placed on the company's rosters because they were said to be stable and predictable. Mr Hunter excluded from this analysis extra shifts as ad hoc additions to working time the employees elected to work.

[44] Mr Hunter continued with this analysis by expressing what KiwiRail says is Mr Beazley's and Mr Hawkins' genuine working week in hours, in eight-hour days, or in work periods of 12 hours. His submission was that the way the week was expressed would not make any difference to the calculation of compliance with the Act.

[45] Mr Beazley and Mr Hawkins' working week was illustrated in this table:

Genuine working week		
	Mr Hawkins	**Mr Beazley**
Hours	42	42.44
8-hour days	5.25	5.3
12-hour work periods	3.5	3.54

[46] Carrying on those comparisons, converting the four weeks of the statutory minimum entitlement into other periods of time was illustrated in the following table:

Statutory leave entitlement		
	Mr Hawkins	**Mr Beazley**
Hours	42 x 4 = **168**	42.44 x 4 = **169.76**
8-hour days	5.25 x 4 = **21**	5.3 x 4 = **21.2**

12-hour work periods	3.5 x 4 = **14**	3.54 x 4 = **14.16**

[47] KiwiRail's method was described as being different from those that found favour in *Electrical Union* and *Mars* because, in allocating annual holidays, the company does not distinguish between workers with slightly different shift patterns. A precise calculation of that sort was said to be inappropriate, because it would increase the risk of non-compliance as shifts change. Instead, KiwiRail allocates all shift workers an annual holiday of at least 25 eight-hour days. Showing the allocation in hours, or 12-hour work periods, produced the following table:

KiwiRail's minimum allocation to shift workers	
As expressed in 8-hour days	25
Equivalent in hours	200
Equivalent in 12-hour work periods[7]	16.66

[48] On this analysis, KiwiRail says that because both Mr Beazley and Mr Hawkins received annual holidays of 16.66 work periods per year, that exceeded the statutory minimum entitlement of 14 work periods (slightly more work periods in Mr Beazley's case).[8]

[49] Mr Hunter acknowledged a potential argument for the union to the effect that it would be wrong to rely on the approach in *Electrical Union*, because that determination focused on averaging the working week and Mr Beazley and Mr Hawkins do not work 3.5, 12-hour shifts per week, but rather three or four shifts in any given week. He was addressing a possible argument that either of the employees may elect to take an annual holiday only in the shift week where they expected to work for four days and would therefore need to be paid for 16 work periods (calculated in submissions as 16, 12-hour shifts in order to make up four weeks). His response was that the concept of a genuine working week in the Act must allow for an average for workers with a varying shift pattern.

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7 200 / 12 = 16.66.

8 As shown in the table at para [46].

[50] The fallback position was that, even if the union's approach was required, the company is meeting its statutory obligations because it provided to Mr Beazley and Mr Hawkins annual holidays of more than 16 work periods.[9]

[51] Mr Hunter began KiwiRail's case about complying with the collective agreement by noting that the agreement does not define or otherwise specify what constitutes a week for the purposes of annual holidays. However, the agreement was said to contain indicators that they were intended to be based on the equivalent of a 40-hour week, or five 8-hour days:

(a) Clause 23.2 provides that a full-time employee is a person available to work up to 80 ordinary hours a fortnight, supporting a 40 hour or five 8-hour days per week basis of calculation.

(b) Clause 26.6 provides that leave is not paid for "rostered extra work periods or other overtime", meaning hours in addition to ordinary hours.

(c) The provision of an additional annual holiday to shift workers in cl 26.3 which grants an extra week's leave.

(d) Clause 26.6.1 provides that an annual holiday for a full pay fortnight is counted as 10 days annual leave, contemplating an allocation on the basis of five days of each week of entitlement.

[52] Turning to the rate at which holidays are debited, the argument was that cl 26.6.1 is clear and specific. Mr Hunter was referring to the combination of the first two sentences in the clause. As already noted, in the first sentence annual leave for a full pay fortnight is counted as ten days and the second sentence provides that it is "otherwise" deducted on the basis of one day for every eight hours of absence rounded to the nearest half day. KiwiRail maintains that it does exactly as required by the agreement when both Mr Beazley and Mr Hawkins take annual holidays. `

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9 See table at para [47].

[53] As to the fact that KiwiRail's method of calculating leave does not allocate more to employees who work slightly longer hours, such as Mr Beazley, that was said to be addressed in the following way:

(a) Shift workers receive an additional week's leave.

(b) Hours in excess of 80 per fortnight are paid at overtime rates.

(c) Ten days are deducted when an employee takes a holiday for a full pay fortnight, which means Mr Hawkins will be paid for the 84 hours he would have otherwise worked whereas Mr Beazley will be paid for 84.75 or 85 hours depending on the fortnight concerned.

[54] Minor differences between the employees were said to be acceptable because that was a consequence of the collective agreement.

[55] The Court was invited to put aside as irrelevant the union's adverse comparison between KiwiRail's treatment of annual holidays and other forms of leave, and because that was not a subject addressed in the Authority or raised in the statement of claim.

The union's case

[56] Mr Davenport's primary submission was that KiwiRail's case is flawed because annual holidays are addressed in the collective agreement in days, so that each day of holiday should be deducted from the leave balance as one day not at the rate of 1.5.

[57] That submission relied on accepting that cl 26.6.1 had converted the allocation of annual holidays in the Act and collective agreement into days which was then carried into practice. That practice was said to be shown in:

(a) part year accruals of holidays;

(b) full year annual holiday allocation in days;

(c) records on employee payslips being in days and part days;

(d) payslips being intended to be relied on; and

(e) KiwiRail's debiting method from the leave balance operates in days.

[58] The union's submission was that seeking to establish a genuine working week by averaging the fortnightly rosters, or attempts to make comparisons by converting those averages into hours, all fall away because of the conversion of leave into days in the collective agreement.

[59] Clause 26.6.1 was submitted to be an agreement under s 17 of the Act, at least in relation to one fortnight period, but that must be extrapolated to address the balance of the available holiday. When that happens four weeks of annual leave is 20 days, five weeks is 25 days, and six weeks is 30 days for 12-hour per day shift workers such as Mr Beazley and Mr Hawkins. In that context, KiwiRail's description of employees' annual holiday entitlement as "notional" days was criticised as a mislabelling and inconsistent with the company's very precise practice of showing leave in days and part days and then relying on that information.

[60] The union did not accept that cl 26.6.1 is an agreement to debit the annual leave balance of Mr Beazley and Mr Hawkins at the rate of 1.5 days for each actual day away on holiday. The clause was argued to be inconsistent with providing minimum entitlements under the Act and to be a legacy from early agreements where employees primarily worked eight-hour days and had no bearing on employees like Mr Beazley and Mr Hawkins. KiwiRail's interpretation was also criticised as applying a fiction by treating one day as a day and a half.

[61] A further weakness in the company's case was said to arise from the practice of confining its consideration to rosters. The submission was that to capture a genuine working week the employee's actual work needed to be taken into account which averaging did not do.

[62] Mr Davenport presented a number of scenarios to attempt to demonstrate why KiwiRail's approach was flawed. While those examples involved detailed arithmetic, what he was attempting to show was that the amount of time an employee might be entitled to be absent from work on holiday could be adversely affected by KiwiRail's calculations, depending on when leave was taken.

[63] The argument was that a different amount of leave would be debited from the accumulated balance if an employee elected to take 14 days annual holidays in one block of 14 days, compared to 14 days being spread over time and being taken in smaller amounts. The union's case was that the amount debited should not vary in this way and would not if each day of holiday was debited as one day of leave.

Analysis

[64] There is a divergence between the parties over whether the collective agreement expresses holidays in weeks or days. Whether weeks or days are used informs an assessment about whether the Act and the collective agreement have been complied with.

[65] The issues are:

(a) Does the collective agreement contain an agreement under s 17 as to how minimum entitlements are to be provided for?

(b) Have those minimum entitlements been provided?

(c) Has the collective agreement been complied with?

Does the collective agreement contain an agreement under s 17 as to how minimum entitlements are to be provided for?

[66] In *New Zealand Airline Pilots Assoc Inc v Air New Zealand Ltd*, the Supreme Court confirmed that the interpretation principles relating to contracts apply to employment agreements.[10]

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[10] *New Zealand Airline Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428.

[67] The approach is an objective one, the aim being to ascertain the meaning the written agreement would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties at the time of the agreement. This objective meaning is taken to be that which the parties intended. The context provided by the agreement as a whole and any relevant background informs meaning.

[68] While context is a necessary element of the interpretive process, and the focus is on interpreting the document as a whole, the text remains centrally important. If the language at issue, construed in the context of the whole agreement has an ordinary and natural meaning, that will be a powerful, although not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[69] With those observations, it is still important to be reminded that collective agreements are not commercial contracts in the same way that other business transactions are.

[70] Mr Hunter's submissions relied on the Act's entitlements expressed in weeks flowing through into the collective agreement, which then became the foundation for a practical way to consider whether each employee's statutory and contractual entitlements were satisfied. He emphasised clauses of the agreement that referred to leave in weeks. In that exercise s 17 was acknowledged, but in the context of wanting to establish what a genuine working week might be for employees such as Mr Beazley and Mr Hawkins. That, in turn, led to an invitation to establish a genuine working week in hours averaged over a rostered fortnight of work to arrive at a comparator. Implicit in these submissions was that an agreement under s 17 of the Act had not been reached.

[71] As is apparent from the earlier summary of Mr Davenport's submissions, the union's case is that cl 26.6.1 contains an agreement under s 17, from which it is reasonable to extrapolate that annual leave is to be calculated in days.

[72] There was no evidence about the bargaining claims that existed before the collective agreement was settled or, for that matter, the terms of settlement. The stark position presented by each party was that the collective agreement contains holiday provisions in weeks, and one in weeks and days, from which conclusions were invited to be drawn both ways.

[73] Little assistance was provided from the positions of the parties. Mr Ashton said the company's method has been applied for many years. Mr Butson, the union's General Secretary at the time the agreement was signed, said that was news to the union. He acknowledged, however, being aware of concerns over the way debits were made to leave balances when he signed the collective agreement. In the end, the evidence was inconclusive.

[74] What then can be made of the provision? The collective agreement does not explain why cl 26.6.1 refers to a fortnight (or two weeks) as ten days. It stops short of explicitly translating all holidays into days and in the balance of the agreement the holiday entitlements are still expressed in weeks. Had the parties intended to use s 17 to translate all holiday entitlements into days it might be reasonable to expect to see an explicit statement to that effect. In that respect the clause stands out as the only one to mention days at all.

[75] Despite those difficulties, I prefer Mr Davenport's analysis about cl 26.6.1 and what flows from it. Explicitly, two weeks of annual holidays must be treated as ten days. Implicitly, that is an acknowledgment that there is a basis for seeing variable work patterns being translated into more manageable days.

[76] Further, there is considerable force in Mr Davenport's submission that the translation of holidays from weeks to days has been carried into practice by KiwiRail. It converts all annual holidays and other types of leave into days as shown on the payslips. There is no doubt that KiwiRail intends to rely on that conversion because that is what is conveyed on the payslips and used when an annual holiday is applied for. For example, Ms Hills-Davey accepted that it would be possible for an employee to run down the accumulated balance as shown on the payslip to zero, at which point

he or she would either go into deficit against a future allocation or have to wait for a future allocation on the anniversary of employment.

[77] From this analysis it follows that it is not necessary to consider in any detail the two Authority decisions that were relied on in submissions. In any event, they would not have provided any assistance, because one seemed to be a pragmatic response to the situation being investigated and the other proceeded on an agreement about the use of hours to calculate leave.

[78] This conclusion means that Mr Hunter's comparisons with hours or other units of time does not engage with the collective agreement.

Have minimum entitlements been provided?

[79] That conclusion, of course, is not the end of this analysis. The issue still arises as to whether KiwiRail has provided Mr Beazley and Mr Hawkins with their minimum statutory entitlements.

[80] The tables Mr Hunter relied on showed statutory minimum entitlements expressed as hours, eight-hour days and 12-hour work periods. For Mr Hawkins, the table shows that, if an average of 42 hours per week is used, multiplying the statutory minimum entitlement by four produced 168 hours, 21 eight-hour days, and 14 12-hour work periods. As for Mr Beazley's holidays, the table showed him being entitled to 169.76 hours, 21 28-hour days and 14.16, 12-hour work periods.

[81] The combination of minimum statutory entitlements, and enhanced entitlements under the collective agreement, led KiwiRail to consider that 16.66 work periods of leave is provided exceeding the calculations in Mr Hunter's table (of 14 work periods).[11] It would follow on this analysis that the minimum entitlements have been provided.

[82] While arithmetically Mr Hunter's tables are correct, a difficulty which confronts KiwiRail is that they all start from the same assumption, that it is appropriate

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[11] Tables at [45]–[47].

to use an average of the fortnightly roster. While that approach was represented as a way of establishing a "genuine working week", it cannot be reliably said that the result achieves that outcome. It is notable that KiwiRail did not refer to anything other than the rosters in its view of a genuine working week and set aside all additional work. Rosters, however, are only one of the factors in s 12(3). Another is the employee's actual work patterns.[12]

[83] I agree with Mr Hunter's submission that what amounts to a genuine working week for an employee is a highly fact-specific assessment. An element of pragmatism is understandable in such an assessment where it might be appropriate, for example, to put aside ad hoc work such as irregular or occasional overtime as not truly representative. However, that was not what was shown in the work patterns for Mr Beazley. He has, on frequent occasions, worked additional shifts sometimes resulting in him working 13 shifts in a fortnight. The frequency of his additional shifts is more than could be adequately described as ad hoc or irregular additional work. Those extra shifts cannot be put aside in an exercise to determine what a genuine working week would be for him. That work pattern must, consequently, impact on the use of a 42-hour weekly average.

[84] There is also a difficulty confronting KiwiRail in the override it applies. Clause 26.6.1 would, if applied to longer periods of leave, result in an over deduction of available leave from an employee's balance. That alone may suggest that the method has difficulties.

[85] It will be apparent that KiwiRail is only able to demonstrate, on its averaging approach, that the amount of a statutory minimum entitlement is achieved if it "borrows" from the additional holidays that Mr Beazley and Mr Hawkins have earned. In both cases they have enhanced entitlements because of their long service and shift work. The approach being adopted draws on the Court of Appeal decision in *New Zealand Fire Service Commission v New Zealand Professional Fire Fighters Union*.[13] In that case, the majority took the view that a period of time when fire fighters were

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12 Section 12(3)(b).

13 *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2007] 2 NZLR 356, [2006] ERNZ 1109 (CA).

rostered off work, but otherwise not on leave, could be taken into account in assessing compliance with the Act.

[86] While KiwiRail is able to rely on all forms of annual leave to establish that it has satisfied the Act so far as minimum entitlements are concerned, there may be an adverse effect on those other entitlements. However, that point was not developed significantly in argument and no concluded view is expressed about it.

Has the collective agreement been complied with?

[87] It is not clear that the contractual entitlement is being provided. There is room for an argument that there would be no issue in an eight-hour absence being equated to a day in the case of an employee who consistently works 40 hours per week. That employee would be working 80 hours per fortnight, which would be 10 absences of 8 hours, matching the first sentence of cl 26.6.1.

[88] But the same calculation does not apply to Mr Beazley and Mr Hawkins. As KiwiRail shows, in the case of Mr Hawkins, it would take 5.25 absences of 8 hours to constitute an average week. Mr Hawkins also regularly works weeks of 48 hours, which could only be reached with 6 absences of 8 hours, not just 5 absences.

[89] It is true, as KiwiRail states, that Mr Hawkins' leave entitlements end up exceeding the statutory minimum when using the averaging approach. The collective agreement, however, provides Mr Hawkins with five weeks of annual leave, not just the statutory minimum of four weeks. Applying KiwiRail's average of 42 hours per week, Mr Hawkins should be entitled to 210 hours of leave per year. KiwiRail's approach only provides him with 200 hours of leave per year.[14]

[90] Additionally, KiwiRail's approach to compliance with the collective agreement also relied on its ability to adopt an averaging approach to assess a genuine working week without taking into consideration actual work patterns. The same difficulty as identified earlier flows through into this analysis.

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[14] See table at para [47].

[91] Having reached the conclusion that KiwiRail has not established that its method complies with the collective agreement it is not strictly necessary to express any views about cl 26.6.1 where it purports to equate an absence of eight hours with a day of leave. The clause clearly needs to be reconsidered in bargaining to ensure that deductions from leave balances do not breach the Act or collective agreement and, conversely, are not treated in such a way as to overcompensate employees.

Conclusion

[92] This analysis leaves me in doubt that KiwiRail has established both that it satisfies the minimum entitlements under the Act and its contractual entitlements. Given that the collective agreement confers on Mr Beazley and Mr Hawkins additional entitlements it is likely that what they actually celebrate in annual leave exceeds the statutory minimum. However, in the absence of an assessment of their actual work (as distinct from the company's genuine working week analysis) that case has not been established.

[93] As to compliance with the collective agreement, I am not satisfied that the company's method ensures that employees are able to take all of their entitlements.

[94] For the foregoing reasons I decline to make the declarations sought.

[95] Costs are reserved. If they cannot be agreed memoranda may be filed.

K G Smith
Judge

Judgment signed at 12 pm on 27 March 2024