IN THE SUPREME COURT OF NEW ZEALAND

SC 91/2006
[2007] NZSC 89

BETWEEN	THE NEW ZEALAND AIRLINE PILOTS' ASSOCIATION INDUSTRIAL UNION OF WORKERS INCORPORATED Appellant
AND	AIR NEW ZEALAND LIMITED Respondent

Hearing: 13 and 14 June 2007

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: R E Harrison QC and R McCabe for Appellant
C H Toogood QC and K M Thompson for Respondent
T P Cleary and J L Verbiesen for Business New Zealand Inc as Intervenor

Judgment: 14 November 2007

JUDGMENT OF THE COURT

A Both the appeal and the cross-appeal are dismissed.

B The order of the Court of Appeal remitting the proceeding to the Employment Court stands.

C Air New Zealand is to pay the Pilots' Association the sum of $25,000 for costs plus disbursements and any other payments, to be fixed if necessary by the Registrar.

D The order for costs made by the Court of Appeal stands.

REASONS

	Para No
Elias CJ	[1]
Blanchard, Tipping and McGrath JJ	[16]
Anderson J	[79]

ELIAS CJ

[1] The Holidays Act 2003 is enacted with the purpose of promoting "balance between work and other aspects of employees' lives".[1] "[T]o that end", it provides employees with minimum entitlements for both annual holidays and "public holidays for the observance of days of national, religious, or cultural significance".[2] The appeal turns on the meaning of "public holiday" under the Act. At stake are the entitlements provided by the Act for pilots who work on "public holidays".

[2] Employees cannot be required by employers to work on public holidays unless the employment agreement permits such a requirement.[3] If there is no such power to require work on a public holiday, the employee works on a public holiday only if he agrees to do so. That seems to me to be the consequence of s 47 of the Act. I do not consider that it is necessary for any provision in the Act to authorise the employee to agree with the employer to work on a public holiday (and that is a point of difference between me and other members of the Court). But if the employee does work on a public holiday, the Act provides him with minimum entitlements by way of compensation. If the employee does not work on a public holiday which would otherwise be a working day, the employer must pay him not less than the relevant daily pay for that day.[4] If however an employee "works (in accordance with the employment agreement)" on a day that is a public holiday, then the employer must compensate the employee for the loss of the public holiday in accordance with s 48. If the public holiday falls on a day that would otherwise be a working day for the employee, the employer must pay time and a half if the public holiday is worked by the employee and must provide the employee with an

1 Section 3.
2 Section 3(b).
3 Section 47.
4 Section 49.

alternative holiday for which he is entitled to the relevant daily pay.[5] A mechanism for identifying the alternative holiday is provided by ss 57 and 58. If the public holiday falls on a day that would not otherwise be a working day for the employee, the employer must pay time and a half if the employee works on the day but does not have to provide an alternative holiday.[6]

[3] "Public holiday" is defined by s 5 of the Act as "a public holiday provided under subpart 3 of Part 2". Section 44, which is found in subpart 3 of Part 2 of the Act, identifies in subs (1) 11 named or identifiable days as public holidays.[7] Section 44(2) provides immediately after that list:

> (2) However, an employer and employee may agree (whether in an employment agreement or otherwise) that any public holiday specified in subsection (1) is to be observed by the employee on another day.

Section 44(3) provides that any such agreement must not diminish the total number of paid public holidays otherwise available.

[4] Air New Zealand's collective agreement with its pilots, entered into before the present Act came into force, is an agreement by which it can direct pilots to work on public holidays on a roster system.[8] This flexibility and certainty for the employer comes at the cost of 11 additional holidays a year for all pilots, whether or not they end up being required to work on a public holiday. Air New Zealand contends that those pilots who are required to work on a public holiday have agreed by the employment agreement under s 44(2) to "observe" the public holiday on one of the additional 11 days provided for. As a result, they say that the additional day is substituted for the public holiday with the effect that those who work on the s 44(1) day are not entitled to payment at time and a half. (No question of entitlement to a further additional day under s 56 of the Act was raised on the appeal.)

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5 Sections 48(2)(b), 50, and 56.

6 Sections 48(1)(b), and 50.

7 They are Christmas Day, Boxing Day, New Year's Day, 2 January, Waitangi Day, Good Friday, Easter Monday, ANZAC Day, the day on which the birthday of the Sovereign is "observed", Labour Day, and the anniversary day of the relevant Province.

8 The Employment Court held that the transitional provision contained in s 51 does not apply: *Air New Zealand Ltd v New Zealand Airline Pilots' Association IUOW Inc* [2006] 1 ERNZ 956.

[5] I agree with Anderson J that the collective agreement between Air New Zealand and its pilots is not an agreement under s 44(2) that the employee will "observe" the public holiday on "another day". Such an agreement is one which redefines the public holiday itself. The collective agreement is not such an agreement. It provides for work on a day that is a public holiday. Pilots who work on a public holiday do so either because they have been directed to work under the power given to the employer in the employment agreement or because they agree to do so. In either case they are entitled to the compensation provided by the legislation for loss of the public holiday. I would therefore dismiss the appeal and cross-appeal and remit the matter to the Employment Court so that it can determine what is due to the pilots. Other members of the Court come to the same result by another route. Blanchard, Tipping and McGrath JJ, in reasons given by Tipping J, consider that the meaning of public holidays is constant and is as fixed by s 44(1). On that basis, the statutory entitlements apply whenever a s 44(1) day is worked. Their view is that s 44(2) provides authority for an agreement to work a s 44(1) day in exchange for the "alternative holiday" provided for under ss 46, 48 and 56 of the Act. That leads them to the same conclusion (that the collective agreement does not affect the entitlement to time and a half pay for the public holiday worked). I concur in the orders proposed by Tipping J. But I do not agree that s 44(2) serves the limited and essentially auxiliary purpose which is the majority interpretation.

[6] I consider that where there is an agreement under s 44(2) to observe a public holiday specified in s 44(1) on another day, the other day becomes the paid public holiday "provided under subpart 3 of Part 2" within the definition in s 5, in substitution for the day specified in s 44(1). No other "deeming" is necessary than the definition. On this basis, if an employee works on the day identified for observance of the paid public holiday and it is otherwise a working day, the employer must pay time and a half and provide an alternative holiday. If the employee works on the day relinquished by agreement for the observance day, the employer pays ordinary rates and no alternative holiday is provided. This result follows I think from the scheme and language of the Act. It is consistent with the legislative history referred to by Anderson J, although I think it unnecessary to go beyond the terms and scheme of the Act itself. Of importance are the definition of "paid public holiday" as one identified under subpart 3 of Part 2, the policy of the

legislation in promoting balance in the lives of employees, and the fact that s 44(2) is superfluous if public holidays are always those identified in s 44(1). It is superfluous because no legislative authority to agree to work a public holiday is necessary and because the entitlement to and process for identifying an alternative holiday in exchange for working on a public holiday is provided by the legislation. On the view I take of the proper interpretation of the legislation, there is a single regime of entitlements which applies when an employee works on a public holiday, but the public holidays provided by subpart 3 of Part 2 of the Act can be modified from the 11 days identified in s 44(1) by agreement between the employer and employee under s 44(2).

[7] I should add that, on the view I take of the purpose and effect of s 44(2), I do not expect that the flexibility it provides will be taken advantage of in many cases. Employees who are willing to agree to observe a holiday on a day of greater personal significance to them may not work for employers who are able to offer work on the holidays identified in s 44(1), and the agreement of the employer is necessary for the substitution. Conversely, where the employer does operate over the s 44(1) holidays, employees who wish to observe one of the holidays on another day will have to be motivated to do so. They will probably lose the opportunity for payment at time and a half rates because the employer will be more readily able to avoid using them on the observance day and will have an incentive to use them on the s 44(1) day instead of a worker who would be entitled to time and a half pay.

[8] I do not find the definition of a public holiday in the Act to be elusive. Section 5 defines "public holiday" as "a public holiday provided under subpart 3 of Part 2". The only public holidays "provided" under subpart 3 of Part 2 are those provided under s 44. If "public holidays" were simply those provided by s 44(1), they would have been defined by reference to s 44(1). Instead, by agreement between employer and employee under s 44(2), the days provided in s 44(1) can be modified by substituting another day for any in s 44(1). That is made clear by the "however" with which subs (2) begins and by which it is linked to subs (1). As a result, the public holidays "provided" under subpart 3 of Part 2 include any observance day agreed to between employer and employee under s 44(2), which is substituted for the holiday under s 44(1) it replaces. It is convenient to mention in

this connection that I do not find convincing the argument that s 44(2) is not "definitional" in language.[9] The definition provided by s 5 points to what is "provided" by subpart 3 as a public holiday, not to further definition. Section 44 "provides" as public holidays those listed in subs (1) as modified by any agreement under subs (2).

[9] I do not agree that a different interpretation is indicated by s 43(b), which identifies one of the purposes of subpart 3 as being "to enable employees to agree to work on a public holiday in exchange for another day's paid leave". (The other purpose being to provide employees with entitlements to 11 days public holidays.) Employees can only be *required* to work on a public holiday if s 47 is complied with but there is in my view no legal impediment to their *agreeing* to do so which requires s 44(2) to be construed as an enabling provision. I do not consider that it is accurate to describe ss 44(2) and 47 as together describing the circumstances in which "an employee may lawfully work on a public holiday".[10] What the Act ensures is that, whether required to work or agreeing to work the public holiday, an employee receives certain entitlements by way of compensation. The entitlements arise from the fact that a public holiday is worked. The "exchange" of the public holiday for an alternative day, referred to in s 43(b), is provided for by the Act. So too is the mechanism for identifying the alternative day to be taken, including by further agreement under s 57, making s 44(2) unnecessary for the purposes of agreeing upon an alternative day. Reliance on s 43(b) begs the essential question whether the "public holiday" there referred to always refers to a s 44(1) day or includes a day substituted for one in s 44(1) by agreement under s 44(2).

[10] Reference to s 81 (a record-keeping provision) seems to me a make-weight and in any event to turn on the same question about what constitutes a public holiday. An employer must record the dates of any public holiday on which the employee has worked because it is only if the public holiday is worked that further holiday entitlements arise. It is not necessary to record the dates of public holidays not worked because the entitlement is exhausted in the holiday. The date of the public holiday, on the view I take, is ascertained either by s 44(1) or by agreement

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9 Compare Tipping J at para [42].
10 Compare Tipping J at para [48].

between employer and employee under s 44(2) that the public holiday is to be observed on another day.

[11] The alternative view adopted by Tipping J makes it necessary for him to read s 44(2) as an additional mechanism distinct from s 47 to enable employer and employee to agree that the employee will exchange a public holiday for the "alternative holiday" provided by s 56(2). For the reasons given, I think this approach is suspect. It is not necessary for there to be any agreement to accept an alternative day if a public holiday is worked on an otherwise working day. It follows by operation of law. The more natural interpretation of s 44 is that s 44(2) provides a mechanism not for exchanging the s 44(1) day for an alternative holiday but for substitution of "another day" of observance of the public holiday.

[12] Some additional points may be made. Section 44, which is headed "Days that are public holidays", would be a strange place to locate a provision with the effect of enabling agreement to work on a public holiday. Indeed, Tipping J expresses the view that the heading to s 44 is a drafting error. There is also obvious dissonance between the requirement in s 47 that an employee can be directed to work on a public holiday only if the employment agreement so provides and the indication in s 44(2) that agreement to observe a public holiday specified in subs (1) on another day can be made "in an employment agreement or otherwise". As a result, Tipping J suggests that an "or otherwise" agreement must amount to "an authorised variation of the employment agreement" and that there is therefore no difference in effect between s 47 and s 44(2). This brushing aside of the distinct language used in s 44(2) strikes me as unconvincing. It seems much more likely that the legislation has deliberately required the formality of the employment agreement before an employee can be required to work on a public holiday, but that exchanging the observance of the public holiday for another day in substitution (a change which does not affect the employee's entitlement under ss 50 and 56 of the Act) has not been thought appropriate for the same formality. It may be noted here that the "practical difficulties" identified by Tipping J in para [45] in distinguishing between a s 44(2) agreement and a s 47 direction are if anything more acute if they are to the same effect (that is to say they permit working on a public holiday in exchange for the compensatory entitlements) than if s 44(2) is an agreement to substitute another

public holiday for one in s 44(1). An employee may well believe that he has no choice but to accede if he thinks, wrongly, that the request is a direction in accordance with the employment agreement under s 47, rather than an invitation to consider agreeing to work. But again, this strikes me as a make-weight argument.

[13] More importantly, s 44(3) is not convincingly explained as being "for the avoidance of doubt". In my view, it would be redundant if s 44(2) is interpreted to refer to an arrangement for an alternative day within the meaning of s 56.

[14] I should add that I do not think the meaning of the legislation is assisted by comparing the references in the entitlement provisions (ss 50 and 56) to "the employment agreement" with the reference in s 44(2) to "whether in an employment agreement or otherwise".[11] In ss 50 and 56 what triggers the entitlement is *working* in accordance with the employment agreement. It is only if the employee performs the work he is engaged to do under the employment agreement that the entitlements arise. In s 44(2) it is the *agreement* to observe the public holiday on another day that may be "in any employment agreement or otherwise".

[15] In summary, confining "public holidays" to those identified in s 44(1) is I think contrary to the scheme and meaning of the Act. It makes s 44(2) redundant unless the strained view is taken that it is necessary to empower the parties to agree if working on s 44(1) days (in circumstances where s 47 does not apply) is not to be "unlawful". It leads to contorted explanations of the legislative scheme. Indeed, Tipping J accepts that it "would have been clearer" if s 44(2) had contained an express reference to the concept of an alternative holiday in s 56. Construing s 44(2) to allow employer and employee to substitute another day as public holiday for one identified in subs (1)) is the least artificial and most convenient meaning. I am encouraged in this view by the fact that the substitution in this way is a concept of long standing[12] and that no change to the law in this respect was signalled in the legislative history (indeed the indications were to the contrary), as described by Anderson J. For these reasons, I would accept that an employer and employee can agree to substitute another day as a public holiday for one described in s 44(1) but

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[11] Compare Tipping J at para [50] and Anderson J at paras [104] – [105].

[12] As the decision of the Employment Court in *Heinz Wattie's Ltd v National Distribution Union Inc* [2005] 1 ERNZ 12 illustrates.

hold that the collective agreement between Air New Zealand and its pilots is not such an agreement.

BLANCHARD, TIPPING AND McGRATH JJ

(Given by Tipping J)

Introduction

[16] Air New Zealand is in dispute with its pilots over the validity of aspects of their employment agreement.[13] The first and primary issue is whether pilots who are rostered to work on any of the 11 days defined as public holidays by s 44(1) of the Holidays Act 2003 must be paid at time and a half. This issue requires consideration of whether those days are always public holidays under the Act. If the day on which an employee works is a public holiday, the employee must be paid at time and a half for working on that day. The debate in this case is about the effect of an agreement under s 44(2), whereby the employee observes a public holiday on another day. Air New Zealand argues that such an agreement transfers public holiday status from the s 44(1) day to the day on which the holiday is to be observed. The pilots contend that the agreement effects no such transfer and simply leads in to the alternative holiday provisions set out later in the subpart. We will refer to the day on which the public holiday is to be observed pursuant to a s 44(2) agreement in deliberately neutral terms as a s 44(2) day.

[17] Air New Zealand argued successfully in the Court of Appeal (albeit that Court was divided) that the consequence of a s 44(2) agreement is that the day on which the holiday is observed becomes a public holiday and the original s 44(1) public holiday ceases to be a public holiday. Hence employees do not have to be paid at time and a half for working on that day because it is no longer a public holiday. The pilots challenge that interpretation, arguing that on the true

[13] Air New Zealand had the support of Business New Zealand Inc to whose submissions we will not make separate reference.

construction of the legislation the s 44(1) day does not cease to be a public holiday as a consequence of a s 44(2) agreement.

[18] The point is one of surprising difficulty. We propose to examine it under the following headings. First we will traverse the key aspects of the Act. Next we will refer to the competing submissions in outline. We will then discuss the legislative and drafting history of the present legislation, discuss in some detail its text and its purpose, and close with a consideration of certain practical and policy issues. Some of the same points arise under more than one heading. We will endeavour to avoid unnecessary repetition.

The key aspects of the Holidays Act 2003

[19] The Act deals with the subject of public holidays in subpart 3 of Part 2, comprising ss 43 to 61A. Two earlier provisions should be mentioned first. Section 5 defines a public holiday as meaning "a public holiday provided in subpart 3 of Part 2". Section 6 prevents contracting out of the statutory entitlements by saying in subs (3) that an employment agreement that excludes, restricts or reduces an employee's entitlements under the Act has no effect to the extent that it does so. Throughout the Act the expression "employment agreement" has the same meaning as in s 5 of the Employment Relations Act 2000, unless the context otherwise requires.

[20] Section 43 states that the purpose of subpart 3 of Part 2 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:
>
> (b) to enable employees to agree to work on a public holiday in exchange for another day's paid leave.

Parliament obviously thought it necessary, or at least desirable, to indicate that one of the purposes of the subpart is to enable employees to agree to work on a public holiday in exchange for another day's paid leave. A further point is that this

statement of purpose forecasts the likelihood of finding an express enabling provision within the subpart reflecting the purpose.

[21] Section 44 of the Act is headed "Days that are public holidays". It provides:

> (1) The following days are public holidays:
>
> (a) Christmas Day:
>
> (b) Boxing Day:
>
> (c) New Year's Day:
>
> (d) 2 January:
>
> (e) Waitangi Day:
>
> (f) Good Friday:
>
> (g) Easter Monday:
>
> (h) ANZAC Day:
>
> (i) the birthday of the reigning Sovereign (observed on the first Monday in June):
>
> (j) Labour Day (being the fourth Monday in October):
>
> (k) the day of the anniversary of a province or the day locally observed as that day.
>
> (2) However, an employer and employee may agree (whether in an employment agreement or otherwise) that any public holiday specified in subsection (1) is to be observed by the employee on another day.
>
> (3) An agreement between the employer and employee under subsection (2) must not diminish the total number of paid public holidays that would otherwise be available to the employee in any year.
>
> (4) If 2 or more of the public holidays specified in subsection (1) fall on the same day, the public holidays must, for the purposes of this subpart, be treated as 1 day.

[22] As already foreshadowed, it is s 44(2) which lies at the heart of the present dispute. We will be reverting to s 44 in some detail after referring to the rest of subpart 3 in outline. Section 45 transfers the Christmas and New Year public holidays to other days if they fall on a Saturday or a Sunday and those days would not otherwise be working days for the employee. When the section applies the

public holiday must be "treated as falling" on the following Monday or Tuesday. Section 46 states that employees are entitled to public holidays and payment for those holidays in accordance with subpart 3. Section 47 states that an employer may require an employee to work on a public holiday if:

> (a) the public holiday falls on a day on which, but for it being a public holiday, would otherwise be a working day for the employee; and
>
> (b) the employee is required to work on the public holiday under the employee's employment agreement.

[23] This route to an employee working on a public holiday can be referred to as a s 47 requirement. There is no dispute that if an employee works on a public holiday pursuant to a s 47 requirement, the employee must be paid at time and a half. One of the significant questions that arises is whether Parliament meant to distinguish, for time and a half purposes, between an employee who works on a s 44(1) day pursuant to a s 47 requirement and an employee who agrees to work on that day pursuant to s 44(2).

[24] Section 48 states when there will be compliance with s 46. It provides:

> (1) If a public holiday falls on a day that would not otherwise be a working day for an employee, section 46 is complied with if—
>
> > (a) the employee does not work on the day; or
> >
> > (b) the employee works on any part of the day and the employer pays the employee in accordance with section 50.
>
> (2) If a public holiday falls on a day that would otherwise be a working day for an employee, section 46 is complied with if—
>
> > (a) the employee—
> >
> > > (i) does not work on that day; and
> > >
> > > (ii) the employer pays the employee in accordance with section 49; or
> >
> > (b) the employee—
> >
> > > (i) works (in accordance with his or her employment agreement) on any part of that day; and
> > >
> > > (ii) the employer pays the employee in accordance with section 50; and

(iii) the employer provides the employee with an alternative holiday under section 56.

[25] In short, the effect of s 48 is that when a public holiday falls on a non-working day, s 46 is complied with if either (a) the employee does not work on the day, or (b) the employee works on the day and is paid at not less than time and a half in accordance with s 50. When a public holiday falls on a working day, s 46 is complied with if either (a) the employee does not work on the day and is paid relevant daily pay in terms of s 49, or (b) the employee works on the public holiday, is paid time and a half and receives an alternative holiday under s 56.

[26] Both situations (that is both when the public holiday falls on a working day and when it does not) have one feature in common. An employee who works on the public holiday must be paid at time and a half. This feature derives from s 50 which is the primary source of the time and a half entitlement.

[27] The link in s 48(2)(b) to an alternative holiday under s 56 leads to the alternative holiday provisions in ss 56 – 61A. Section 56 provides:

> **56 Alternative holiday must be provided if employee works on public holiday**
>
> (1) An employee is entitled to another day's holiday (an **alternative holiday**) instead of a public holiday if—
>
> (a) the public holiday falls on a day that would otherwise be a working day for an employee; and
>
> (b) the employee works (in accordance with his or her employment agreement) on any part of that day.
>
> (2) If subsection (1) applies, an employer must—
>
> (a) provide the employee with an alternative holiday; and
>
> (b) pay the employee for working on the public holiday in accordance with section 50.
>
> (3) The entitlement to an alternative holiday remains in force until—
>
> (a) the employee has taken the holiday; or
>
> (b) the employee has been paid for the holiday in accordance with section 60(2) or section 61.

> (4) An employee is not entitled to an alternative holiday under this section if the employee works for the employer only on public holidays.

[28] The remaining sections dealing with alternative holidays set out machinery for determining when the alternative holiday will be taken. They also specify the payment that must be made to the employee in respect of the alternative holiday. Under some circumstances the employee may exchange the alternative holiday for money and this is provided for as well.

Submissions in outline

[29] The competing arguments of the parties can be stated quite simply. Where necessary we will refer to more detailed aspects of the submissions later. Air New Zealand contends that s 44(2) has definitional effect. Its argument is that a s 44(2) agreement transfers the status of a public holiday from the s 44(1) day to the s 44(2) day. Air New Zealand points out that the subsection is part of a section, the heading to which – "Days that are public holidays" – suggests that the section as a whole is intended to have definitional effect. All statutory references to "public holiday" therefore include a s 44(2) day. The consequence is that the s 44(1) day ceases to be a public holiday and time and a half is not payable to pilots who work on that day but would be payable if the pilot worked on the agreed exchange day. Air New Zealand contends that there is no need to construe s 44(2) as enabling because it is implicit in s 48 that the parties may make an agreement in a way which invokes the alternative holiday provisions.

[30] The pilots' response is that a s 44(2) agreement does not have the definitional effect suggested by Air New Zealand's argument. They say that the purpose of s 44(2) is to give employer and employee the power to enter into an agreement which invokes s 48. It is the enabling provision forecast by s 43(b). The pilots seek to reinforce that conclusion by reference to a number of textual points within subpart 3 and certain aspects of the drafting and legislative history of the relevant provisions. In argument before us Mr Harrison QC framed the issue as being whether Parliament had established two public holiday regimes or, as he was arguing, one regime. Essentially the question is whether Parliament intended to have

different consequences for employees who work on days specified in s 44(1) depending on how they come to be working on those days.

Legislative and drafting history

[31] The immediately preceding legislation was the Holidays Act 1981. Section 7A of that Act, which was introduced by the Holidays Amendment Act 1991, is for present purposes the key provision. It provided:

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

[32] It is also relevant to refer to the statutory provision which applied before s 7A. It was s 173(1) of the Labour Relations Act 1987 which read:

> **173. Holidays** – (1) Subject to subsection (3) of this section [which provided for special industry variations], every registered award or agreement shall provide for the grant to every worker bound by the award or agreement of not less than 11 whole holidays which shall, where they fall on days that would otherwise be working days for the worker, be holidays, on pay, in addition to annual holidays.

[33] Sections 7A and 173(1) were closely examined by the Court of Appeal in *Telecom Networks and Operations Ltd v Vevers*.[14] Despite the very close textual similarity of the two provisions and the lack of any material suggesting that a fundamental change was intended, the majority in *Vevers* decided that, contrary to the position under s 173(1), s 7A(1) required that the 11 whole holidays had to be provided as holidays. The majority held that it was not permissible, as it had been under s 173(1), for the employee to give up one or more of those holidays in return for penal pay. Following the 1991 Amendment Act, if an employee worked on a public holiday, another day's holiday had to be provided. That had not been required under s 173(1).

[34] It appears that those who drafted the 2003 Holidays Bill decided, sensibly, that this was an opportunity to provide expressly for the consequences of what the Court of Appeal had held in *Vevers* to be the implicit effect of the 1981 Act. What was needed in that respect was a clear legislative statement of the entitlements which were to accrue to an employee who worked on a public holiday. They were to be twofold: (a) payment at not less than time and a half; and (b) another day's holiday. What had amounted to an ability to agree to work on a public holiday was to be retained and reinforced as a specific purpose by s 43. This history suggests that Parliament is unlikely to have left important matters regarding public holiday entitlements or lack of them simply to implication.

[35] There is a feature of the change from s 7A to s 44 which has an important bearing on the definitional issue. Section 7A of the 1981 Act was clearly definitional in the sense that the parties were able to define which days were to be the 11 days on which the 11 holidays were to be taken. The days specified in s 7A were default days which applied in the absence of an agreement providing otherwise. When the Bill which became the 2003 Act was introduced into Parliament, cl 38

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14 [1993] 3 NZLR 425.

(which became s 44) dealt with this aspect in the same way as it had been in s 7A. The 11 listed days were introduced by the words "Except as an employment agreement otherwise provides". This was changed by the Select Committee so that what became s 44(1) simply stated that the 11 listed days were to be – "are" – public holidays. The legislators thereby abandoned the concept of the relevant days being merely default days that applied in the absence of agreement to the contrary.

[36] The rider to subs (1), as expressed in subs (2), was that the parties could agree that any public holiday specified in subs (1) could be "observed" by the employee on another day. Prima facie this change in the text and in the arrangement of the section suggests that a s 44(2) agreement was not to have definitional effect. Air New Zealand, however, contends that the change was simply a matter of drafting, there having been no reference in the Select Committee's report to any intention to bring about a substantive change. Against that the pilots point out that the Select Committee spoke of clarifying cl 38 in circumstances which tend to suggest a substantive change rather than simply a drafting preference. We say this because there was nothing textually unclear about the original drafting of cl 38 which coincided with that of s 7A(2). No-one could have thought that the meaning of cl 38 needed clarification, or indeed was being clarified by the subsequent amendment.

[37] Before leaving the legislative history we should mention one specific passage in the Select Committee's report. That report has a heading "Payment of time and a half for working on a public holiday".[15] The first sentence in this section of the report states that the Bill provides for payment of time and a half for work on a public holiday. The report records that many submitters were opposed to this provision. One of the arguments was that it was unnecessary as employees were also entitled to a day off in lieu of a public holiday. The Committee expressed sympathy with these views but said that the underlying principle behind the time and a half provision was:[16]

> that employees should be adequately compensated for the loss of a public holiday. Merely providing an extra day in lieu would not recognise that the

[15] At p 7 of the commentary to the Holidays Bill (32–2).
[16] At p 7.

> employee has missed out on the opportunity to spend quality time with family and friends on special occasions such as Christmas Day.

[38] There is no suggestion in the Select Committee's report or in the debates or other Parliamentary materials that there was to be a basis upon which an employee might work on a s 44(1) day without being paid at least time and a half. In view of the emphasis given to the introduction of a requirement to pay time and a half to employees working on a public holiday, in addition to allowing them an alternative holiday, it is strange that there is no hint anywhere of the crucial distinction which is now suggested. It does seem unlikely that Parliament envisaged that in some circumstances employees who worked on a s 44(1) day would not be paid at time and a half.

Textual considerations

[39] Air New Zealand relies on the fact that the somewhat elusive definition of a public holiday set out in s 5 is not confined to the days set out in s 44(1). The formula used by those who drafted the Act – "as provided in subpart 3 of Part 2" – is used elsewhere in the interpretation section. Examples are the definitions of annual holiday, holiday, bereavement leave and sick leave. There is therefore nothing helpful to the present issue about the way in which the definition of "public holiday" is framed. Furthermore, the lack of specific reference to s 44(1) is explained by the need to encompass within the definition the Mondays and Tuesdays to which the Christmas and New Year holidays may be transferred by s 45. The definition of public holiday is therefore neutral as regards the key issue. Section 6(3) is also neutral. Whether there is or is not contracting out depends on the correct resolution of the crucial issue. Invocation of s 6 risks begging the question.

[40] Section 43(b) says that one of the purposes of subpart 3 is to enable employees to agree to work "on" a public holiday. This suggests that the s 44(1) day on which the employee works remains a public holiday. Air New Zealand's argument, which has the effect that the s 44(1) day ceases to be a public holiday, is not consistent with the language of s 43(b).

[41] Section 44(1) says that the 11 days listed "are public holidays". That terminology suggests that the 11 days are and remain public holidays for all purposes. The word "However", which introduces s 44(2), obviously suggests some retreat from the apparent absoluteness of s 44(1). Employees may work on a s 44(1) day. But the question is whether s 44(2) has the definitional effect ascribed to it by Air New Zealand. That it does have such effect is supported to some extent by the heading to s 44 which suggests that the whole section is descriptive of days that are public holidays. The force of that proposition is, however, much reduced by the fact that subss (3) and (4) are not definitional.

[42] Furthermore, the language of subs (2) is not definitional either. The subsection does not say, as it could easily have done, that the day of observance is to be treated as or deemed to be the public holiday, or that in the event of a s 44(2) agreement the s 44(1) day ceases to be a public holiday. This absence is all the more significant because the very next section, s 45, uses the terminology of the public holiday being "treated as" falling on the following Monday or Tuesday. All subs (2) does is to make it clear that despite subs (1) the parties can agree that the employee may "observe" one of the s 44(1) days on another day. Here, the concept of observance is practical not definitional: the term "observe" is suggestive of taking a day's holiday rather than of the other day becoming by definition a public holiday. We say this despite the argument based on paras (i) and (k) of s 44(1) where the word "observe" is used in a general sense. In s 44(2) it is used as part of the expression "observed by the employee" which has a different and narrower connotation.

[43] The power given by s 44(2) to employers and employees is not a power to agree that a s 44(1) day shall not be a public holiday. That was the effect of the agreement envisaged by s 7A(2). Section 44(2) is materially different. Neither expressly nor implicitly does an agreement as to observance constitute an agreement having the effect of removing from the s 44(1) day its status as a public holiday. The heading to s 44, while apt to describe the effect of the section as initially drafted, ceased to be apt to describe the section as a whole after the addition of subss (2), (3) and (4). This point cannot have been appreciated by the drafters.

[44] The expression “on another day” in s 44(2) is both linguistically and conceptually aligned with the reference in s 56(1) to “another day’s holiday”. The heading to s 56 and the internal definition in s 56(1) define the other day’s holiday as an alternative holiday. Section 44(2) envisages that the “other” day to which it refers will be an alternative holiday under s 56. The significance is that pursuant to s 56(2)(b) the employer must pay the employee at time and a half for working on the public holiday. It would have been clearer if s 44(2) had contained an express reference to the concept of an alternative holiday, but we note that there is no such reference in s 47 either. There is as clear a conceptual link between s 44(2) and the alternative holiday regime as there is with s 47. What we are calling a s 44(2) day is an alternative holiday.

[45] We come now to Air New Zealand’s argument that s 44(2) is redundant as an enabling provision because s 48 implicitly enables the parties to agree. It is quite clear that s 44(2) is enabling; the real question is whether it enables the parties to redefine a public holiday. We mentioned earlier that s 43(b) anticipates an enabling provision. Parliament thought it important enough to state the s 43(b) purpose expressly. It therefore seems most unlikely that its fulfilment would have been left to implication. The language of s 43(b) does not suggest an agreement having definitional effect. We consider that s 44(2) is the express enabling provision envisaged by s 43(b). Section 48 is consequential. It assumes the necessary power to agree. Any implicit enabling effect should be seen in that light.

[46] Air New Zealand also argues that subs (3) would be redundant unless its argument is accepted. We do not consider that is so. Subsection (3) seems to be designed to reinforce the minimum entitlement and also the inability to contract out. We read it as having been included for the avoidance of doubt. Its presence does not logically suggest that Air New Zealand’s argument must be correct, particularly because any redundancy would exist equally if Air New Zealand’s argument is accepted. Its concept of an “exchange agreement” necessarily requires another day’s holiday in exchange for the public holiday. Incidentally subs (4) also seems to have been an attempt to avoid doubt. It is designed to catch an extremely unlikely event, namely two of the s 44(1) days falling on the same day. What is more, it covers that

contingency without stating whether and, if so, how the missing day is to be provided.

[47] That brings us to s 48. We have already seen that irrespective of whether the public holiday does or does not fall on an employee's normal working day, an employee who works on a public holiday must be paid at least time and a half. The section makes no distinction between an employee who works on a public holiday pursuant to a s 44(2) agreement and an employee who does so pursuant to a s 47 requirement. There is no suggestion in s 48 that there is a fundamental difference between the two.

[48] Section 50 is the simplest and most direct provision on the time and a half issue. It states that employees must be paid at least time and half for working on a public holiday. What then is a public holiday? The days listed in s 44(1) "are" public holidays. Therefore an employee who works on any of those days must be paid time and a half. It would need something equally clear to justify any other view of the matter. Section 50 contains no suggestion that there is a crucial distinction between the two statutory provisions (s 44(2) and s 47) under which an employee may lawfully work on a public holiday. If a s 44(1) day were capable of losing its status as a public holiday we would have expected that to be made clear somewhere in the subpart. Section 50 is certainly an obvious place. The combination of s 50 and s 44(1) is a powerful one. Time and a half is payable to an employee who works on any of the days listed in s 44(1). The case advanced by Air New Zealand for departing from the simplicity and strength of this construction lacks sufficient force. An ability to agree that there shall be alternative observance is not an ability to agree that the s 44(1) day will lose its status as a public holiday. That would amount to unauthorised contracting out.

[49] As Chambers J points out, there are several places in the subpart which distinguish between a public holiday which "falls on" a working day and one which does not. We consider, as did he, that it is unlikely this terminology would have been used if a s 44(2) day was viewed as a public holiday. A s 44(2) day is likely to be identified in the agreement or left for later identification. In either event the day fixed does not have the randomness implied by the word "falls". It would only be in

the much less likely case of a day identified by description (such as Yom Kippur or "my daughter's graduation day") that there would be any element of chance as to whether it fell on a working day or not.

[50] We move now to the use in the subpart of the expression "in accordance with his or her employment agreement" and Air New Zealand's reliance on the absence of the words "or otherwise" from ss 48(2)(b)(i), 50(1) and 56(1)(b) where that expression appears. In each of these three places the phrase is linked with the concept of an employee working on a public holiday. The legislation is thereby referring to the case of an employee who works on a public holiday in accordance with his or her employment agreement. In s 44(2) the employer and employee are authorised to make their agreement "whether in an employment agreement or otherwise". An "or otherwise" agreement is obviously meant to have contractual effect and must therefore amount to an authorised variation of the employment agreement. Hence an employee working on a s 44(1) day pursuant to a s 44(2) agreement can and should be regarded as working on that day in accordance with his or her employment agreement. Furthermore, it would be most odd if there was a material difference for time and a half purposes between working on a public holiday pursuant to an "or otherwise" agreement as opposed to an agreement contained in an employment agreement. We cannot therefore accept there is any force in Air New Zealand's reliance on the absence of the words "or otherwise" from ss 48(2)(b)(i), 50(1) and 56(1)(b) or their presence in s 44(2). We are not saying anything general about variation of employment agreements. Our conclusion is driven by the terms of this legislation.

[51] Our final reference in this textual analysis is to s 81 which requires employers to keep a holiday and leave record for each employee. Section 81(2) lists the information that must be recorded, including:

> (g) the dates on which any annual holiday, sick leave, or bereavement leave has been taken:
>
> (h) the amount of payment for any annual holiday, sick leave, or bereavement leave that has been taken:
>
> (i) the dates of, and payments for, any public holiday on which the employee worked:

> (j) the number of hours that the employee worked on any public holiday:
>
> (k) the date on which the employee became entitled to any alternative holiday:
>
> (l) the details of the dates of, and payments for, any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay:

[52] Neither para (g) nor para (i) requires employers to record the dates on which any public holiday has been *taken*, although they have to record the dates of any other leave. This suggests that "public holiday" dates are the same for all employees, and are defined by s 44(1). That is why there is no need to record those dates. Paragraph (g) implies that the days specified in s 44(1) do not cease to be public holidays where the employer and employee enter into a s 44(2) agreement.

[53] Paragraph (l) requires the employer to record the details of the dates of, and payments for, *any public holiday or alternative holiday* on which the employee did not work, but for which the employee had an entitlement to holiday pay. The only kinds of day on which an employee might not work but still be entitled to holiday pay (defined as "pay for an annual holiday or a public holiday") are a public holiday or an alternative holiday. The legislation does not recognise the concept of an "exchange day", a concept that the majority of the Court of Appeal had to adopt in order to reach the conclusion they did.

[54] The most significant feature of s 81 is the absence of any requirement to record the dates on which an "exchange day" might be taken, or the content of an "exchange agreement". It seems unlikely, given the detail of s 81 and the nature of the information that is required to be recorded, that such important information would not have to be recorded. This suggests that Parliament only envisaged one regime: if you are required, or agree, to work on a public holiday, that is a s 44(1) day, you receive an alternative holiday as per s 56 and time and a half as per s 50.

Scheme and purpose

[55] As we have seen, the principal question is whether s 44(2) should be read as having definitional effect. If Parliament had meant to achieve that outcome we must say that it has made its point (an important one at that) most elusively. Surely if Parliament was intending to set up two materially different consequences for those who work on a s 44(1) day, it would have done so more clearly and directly. The answer must be that Parliament did not intend to achieve the outcome which Air New Zealand's argument ascribes to it. In short, we do not consider the scheme of the Act suggests that a s 44(2) agreement removes public holiday status from a s 44(1) day.

[56] Nor do we consider that was Parliament's purpose. The purpose of subpart 3 was to introduce a right to time and a half and another day's holiday in return for working on a public holiday. Sections 48, 50 and 56 all convey that theme very clearly. The introduction of time and a half for working on a public holiday was a major focus of the debate both in Parliament and in the Select Committee. Against that background it seems most unlikely that Parliament meant to set up a regime under s 44(2) whereby employers who obtained the agreement of their employees to observe the public holiday on another day could thereby avoid paying time and a half for work on a s 44(1) day. This would be a surprising method of effectively allowing pro tanto "contracting out".

[57] Section 3 describes the purpose of the Act as being to promote balance between work and other aspects of employees' lives. The minimum entitlements provided in the Act are designed to that end. The 11 days specified in s 44(1) as public holidays were described by the Select Committee as special days. One of the purposes of the Act is to provide public holidays for the observance of days of national, religious or cultural significance. It is quite natural that part of the minimum package which the Act provides to employees should comprise premium pay for working on a special day. The characteristics of a special day do not alter according to whether the employee works on that day pursuant to s 47 or s 44(2). The characteristics of the special day do not shift to the day of observance (the

alternative holiday); they remain with the special day. For these reasons the social realities support the pilots' contention.

[58] The social realities also lead us to reject Air New Zealand's argument that its construction does no more than defer or transfer the time and a half entitlement to the s 44(2) day. The entitlement can apply only if the employee happens to work on that day. But the whole purpose of an agreement under s 44(2) is that the employee will take a day's holiday on the selected day. Thus, in most cases, the employer will have avoided paying time and a half because time and a half will not be payable on either day. To describe this as a deferral or transfer of the entitlement is inaccurate because, in most cases, the employee will never receive time and a half. In its written submissions in support of the proposition that employees' holiday entitlements would not be diminished Air New Zealand emphasised that the s 44(2) day would actually be taken as a holiday. Yet, to avoid the suggestion that the time and a half entitlement would be lost, Air New Zealand was forced to argue that it could well be that the employee would work on the s 44(2) day.

Practical issues

[59] The approach we favour has the advantage of greater simplicity and certainty than the alternative. Acceptance of Air New Zealand's argument could well lead to practical difficulties. First, it would be necessary to distinguish between a s 47 requirement and a s 44(2) agreement. The employer and employee could each have different impressions as to which regime was being invoked. Whether time and a half was payable could turn on the precise words of the agreement. An employer with a power to require under s 47 might say to an employee: "I would like you to observe Waitangi Day next Friday and work on Wednesday [the real Waitangi Day]". The employee says "OK". Would that conversation amount to a requirement or a redefining agreement? The employer would say that the use of the word "observe" meant it was a redefining agreement, so time and half was not payable. The employee would say that he thought it was a polite requirement and the word observe had no significance for him, let alone any concept of redefinition. Each party might well be acting in good faith. Second, if Air New Zealand is correct, it

would be necessary to distinguish between a s 44(2) agreement and an agreement implicitly authorised by s 48. That, in most circumstances, would be an almost impossible task. Lay parties would be most unlikely to appreciate the subtle, but financially important distinction which Air New Zealand's argument involves between a redefining agreement under s 44(2) and an agreement implicitly authorised by s 48 leading to the alternative holiday regime.

[60] This is the kind of uncertainty that Air New Zealand's approach could introduce. Parliament can hardly have intended to create this potential for confusion and disputes. There would also be potential for abuse by employers if s 44(2) was construed to have definitional effect. Parliament's purpose must at the very least have been that in the general run of cases those who worked on a s 44(1) day would be paid time and a half and receive an alternative holiday. However, in businesses that operate on all or at least some public holidays each year there would, if Air New Zealand is right, be a significant incentive for the employer to include a s 44(2) agreement as part of the standard employment agreement. Similarly there would be an incentive for an employer who had a s 47 right of requirement not to use that power, with its time and a half consequence, but to resort to ad hoc individual or general agreements with staff under s 44(2), with no time and a half consequences.

Decisions below

[61] The Employment Court correctly stated the issue as being whether Air New Zealand, as the employer of the pilots, was obliged to pay them time and a half in accordance with s 50 of the Act for time worked "on the public holidays specified in s 44 of the Act".[17] It is not clear whether, by this reference to s 44 as a whole, the Court was signalling the view that s 44(2) was definitional. The reasoning which followed did not address the legal issues as they emerged in the Court of Appeal and in this Court.

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17 *New Zealand Airline Pilots Association Inc v Air New Zealand Ltd* [2005] 1 ERNZ 180 at para [38].

[62] In its earlier decision in *Heinz Wattie's Ltd v National Distribution Union Inc*[18] the Employment Court stated that under s 44(2), if the parties agree that the public holiday is to be on another day, then that other day "becomes the public holiday". The Court added that in this situation "the payments at time and a half under s 50 for work on the holiday nominated by s [44(1)] do not apply". The Court was dealing with a different point and did not give any reasons for these conclusory observations. It seems likely that it did not have the benefit of the detailed submissions which we received.

[63] In the Court of Appeal William Young P and O'Regan J, who comprised the majority, were persuaded by Air New Zealand's argument.[19] Chambers J dissented on this point, although not on the ultimate outcome. Writing for the majority O'Regan J said that in their view:[20]

> the [pilots'] position incorrectly characterised s 44(2) as an enabling provision for the entitlement regime. The entitlement regime does not require an enabling provision, authorising the parties to enter into *agreements requiring* employees to work on specified days, yet that is the purpose which the union attributes to s 44(2).

[64] With respect we cannot accept that analysis. The pilots' argument, at least in this Court, does not seek to characterise s 44(2) as enabling an agreement which permits a s 47 requirement. The pilots' argument rightly characterises s 44(2) as enabling an agreement which invokes the alternative holiday regime. The crucial question is whether a s 44(2) agreement also has what we have called definitional effect.

[65] Their Honours then posed an example involving a non-Christian employee who wanted to swap Christmas Day for his own feast day.[21] They observed that in those circumstances it seemed unlikely that Parliament would have wished to impose on the employer who agreed to such a request an obligation to pay the employee time and a half on Christmas Day. This example is, however, but one confined manifestation of the variety of circumstances in which either the employer or the

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18 [2005] 1 ERNZ 12 at para [51].

19 *Air New Zealand Ltd v New Zealand Airline Pilots' Association IUOW Inc* [2006] 1 ERNZ 956.

20 At para [20] (emphasis added).

21 At para [21].

employee might wish to make use of s 44(2). It is important to recognise that the initiative for its use can come from either employer or employee. Air New Zealand's stance on this was somewhat inconsistent. While at one point it emphasised the importance for employees of flexibility in the observance of different religious and cultural festivals, it also said in its written submissions that "a transfer under s 44(2) will be *unlikely* to occur on the instigation of an employee" (emphasis added).

[66] Under the alternative holiday provisions, the employee is able to determine on which day the alternative holiday is taken.[22] Hence an employee is equally able, under our interpretation of the legislation, to take a holiday which has religious or cultural significance to him or her personally. There is no less flexibility in terms of the day actually taken as a holiday. Air New Zealand's emphasis on flexibility does not therefore mandate or even support the construction for which it contends.

[67] The majority's further proposition[23] that the obligation to pay time and a half would act as a disincentive to agreements under s 44(2), contrary to the purpose stated in s 43(b), may have some initial attraction. But an employer who wishes to operate on Christmas Day will have to pay all employees who work on that day at time and a half. Having to pay time and a half to the non-Christian employee is not likely to be any form of disincentive to the employer. If it were not that employee, it would be another.

[68] The majority went on to say that it was more consonant with the statutory scheme to classify a s 44(2) agreement as defining the day on which the employee will observe the public holiday.[24] Once that is done, they said, the specified s 44(1) day is no longer treated as a public holiday for the employee and the exchange day takes on that status. For the reasons which we have already traversed in some detail we cannot accept that reasoning. Their Honours went on to say that if for some reason the employee worked on what they called the exchange day (in our

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[22] Section 57(2)(a).
[23] At para [21].
[24] At para [22].

terminology the s 44(2) day) the entitlement regime would apply. That leads to the rather strange result that an employee gets time and a half for working on the surrogate public holiday but not for working on any of the days defined as public holidays in s 44(1) of the Act.

[69] The majority next said that s 44(3) supported their interpretation because it says that a s 44(2) agreement must not diminish the number of paid public holidays otherwise available to the employee.[25] We have already stated what we consider to be the effect of this subsection.[26] We have difficulty with the majority's reasoning in their next sentence, where they say that if an employee works on a public holiday and becomes entitled to an alternative day under s 56, "it is hard to say that has not diminished the number of public holidays for that employee". That seems to us, with respect, not to give proper effect to the alternative holiday regime. The whole point of that regime is that if the employee works on a public holiday the alternative holiday serves as the holiday which the employee would have enjoyed had he or she not worked on that day. The use in s 56 of the expression "instead of a public holiday" cannot mean that the alternative holiday does not count as one of the 11 public holidays to which the employee is entitled. Hence, in our opinion, the majority's reasoning based on s 44(3) cannot be sustained nor can their extension of that reasoning, which suggests that Parliament deliberately intended to set up the so-called exchange day regime as a separate regime, distinct in its consequences from the alternative holiday regime.

[70] The majority concluded their discussion of this aspect of the case by acknowledging that there would be cases in which it would be difficult to determine whether a particular provision in an employment agreement, or we would add an ad hoc agreement, could fairly be characterised as a valid exchange agreement under s 44(2).[27] We have already made reference to these difficulties and they are highlighted in the dissenting judgment of Chambers J. Their Honours dealt with the

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25 At para [23].
26 At para [46] above.
27 At para [25].

point by saying that the fact such difficulties might arise was not a reason for concluding exchange agreements are not permitted. But, in our view, the likelihood of significant practical difficulties suggests that Parliament was not seeking the outcome for which Air New Zealand contends.

[71] We do not propose to lengthen these reasons by making detailed reference to the dissenting reasons of Chambers J. Our reasons are essentially the same as his, but expressed in somewhat greater detail and with different emphases.

Summary and conclusion

[72] In view of the unfortunate complexity of this issue and the length of our reasons, we will summarise what we see as the key points. Air New Zealand argues that s 44(2) allows an employer and employee to redefine the public holidays listed in s 44(1), thereby removing from the s 44(1) day its status as a public holiday and attaching that status to another day. Thus, every time the Act uses the term "public holiday" it is referring to either a public holiday defined in s 44(1) or another day agreed by the parties under s 44(2). This strikes us as a strained and improbable thing for Parliament to have done.

[73] First, Parliament has defined the term "public holiday" in very plain terms in s 44(1). If Parliament had intended individual employers and employees to be able to depart from that statutory definition, it would surely have empowered the parties to redefine "public holiday" in similarly clear terms. Section 44(2) does not do this.

[74] Second, the 2003 Act was intended to herald significant changes to public holiday entitlements. There is a strong focus in the legislation and its history on the need to pay time and a half for working on a public holiday. The introduction of the time and a half entitlement was the source of much debate, yet never was there any suggestion that matters could be arranged so that an employee might work on a public holiday (as defined in s 44(1)) and not be paid time and a half.

[75] Third, and this is perhaps a rather colloquial point, "public holiday", as commonly understood, means a day on which the public at large have a day's holiday. It is not consistent with this perception to describe 17 July, for example, as a particular employee's "public holiday". There is nothing "public" about that day; it is no more than an alternative holiday. It is awkward, to say the least, to read the term "public holiday", in the 70 or so places it appears in the Act, as including any other day of the year on which a particular employee may have agreed to observe a public holiday. We decline to do so in the absence of a clear statutory direction.

[76] The effect of Air New Zealand's argument is to undermine the concept of a "public holiday": the days listed in s 44(1) are merely default holidays having no special status. But this is totally at odds with the changes made by the 2003 Act, including the introduction of the purpose in s 3(b) of providing public holidays for the observance of days of national, religious, or cultural significance. The question what interpretation should be placed on s 44(2) is to be determined from its text and in the light of its purpose.[28] Here text and purpose each point in the same direction. The pilots' argument is to be preferred. We cannot therefore agree with the view that prevailed below.

Disposition

[77] As Anderson J has explained, the ultimate issue in the case is whether the employment agreement entered into between Air New Zealand and its pilots in August 2002 complied with the Holidays Act. The Court of Appeal held unanimously that it did not. But, as we have indicated, the reasoning of the majority in that Court differed substantially from that of the minority. The reasoning which we prefer accords with that of the minority but the ultimate outcome remains the same. The collective agreement does not comply with the Holidays Act. The Court of Appeal remitted the case to the Employment Court so that the consequences of the non-compliance could be determined by that Court. That order must stand but the nature and extent of the non-compliance is as identified in these reasons.

[28] Section 5(1) of the Interpretation Act 1999.

[78] This Court granted leave to the pilots to appeal from the Court of Appeal's order, despite its being in their favour. This was done so that the reasoning of the Court of Appeal could be reviewed in the light of the important difference between that of the majority and the minority. Leave was also granted to Air New Zealand to cross-appeal. In the circumstances, as outlined above, both the appeal and the cross-appeal should be dismissed. The Pilots' Association should receive costs of $25,000 plus disbursements in this Court. The costs order made in the Court of Appeal in favour of the Pilots' Association should stand.

ANDERSON J

Introduction

[79] The appellant (NZALPA) and the respondent (Air New Zealand) entered into a collective agreement, in August 2002, under which pilots could be rostered to work on any day of the year, including a day specified as a public holiday in s 44(1) of the Holidays Act 2003. The agreement made no provision for additional remuneration for working on a public holiday but did provide for 11 days additional to annual leave days, regardless of how many public holidays a pilot might actually work. Following the passing of the Act a dispute arose as to whether, in view of the new legislation, pilots should also be paid at the rate of time and a half for the public holidays on which they actually work.

[80] The scheme of the Act, as it relates to public holidays, is that an employee is entitled to paid public holidays; and if the employee works on a public holiday which would otherwise be a working day for the employee, the employee is entitled to be paid at the rate of time and a half for that day, and is also entitled to an alternative day's holiday. Section 44(1) nominates certain days as public holidays, but s 44(2) is in terms which underlie the dispute between the parties. The crucial issue is the meaning and effect of s 44(2). Consideration of that issue requires an examination of several sections of the Act and makes their reproduction in these reasons unavoidable.

Statutory scheme

[81] Relevant sections are:

3 Purpose

The purpose of this Act is to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to—

(a) annual holidays to provide the opportunity for rest and recreation:

(b) public holidays for the observance of days of national, religious, or cultural significance:

…

5 Interpretation

…

holiday—

(a) means—

(i) a paid annual holiday provided under subpart 1 of Part 2:

(ii) a paid public holiday provided under subpart 3 of Part 2; and

(b) includes any alternative holiday an employee is entitled to under section 56 or section 59

…

public holiday means a public holiday provided under subpart 3 of Part 2[29]

…

6 Relationship between Act and employment agreements

(1) Each entitlement provided to an employee by this Act is a minimum entitlement.

(2) This Act does not prevent an employer from providing an employee with enhanced or additional entitlements (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.

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29 Sections 44 – 56 all come within subpart 3 of Part 2.

(3) However, an employment agreement that excludes, restricts, or reduces an employee's entitlements under this Act—

(a) has no effect to the extent that it does so; but

(b) is not an illegal contract under the Illegal Contracts Act 1970.

43 Purpose of this subpart

The purpose of this subpart 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:

(b) to enable employees to agree to work on a public holiday in exchange for another day's paid leave.

44 Days that are public holidays

(1) The following days are public holidays:

(a) Christmas Day:

(b) Boxing Day:

(c) New Year's Day:

(d) 2 January:

(e) Waitangi Day:

(f) Good Friday:

(g) Easter Monday:

(h) ANZAC Day:

(i) the birthday of the reigning Sovereign (observed on the first Monday in June):

(j) Labour Day (being the fourth Monday in October):

(k) the day of the anniversary of a province or the day locally observed as that day.

(2) However, an employer and employee may agree (whether in an employment agreement or otherwise) that any public holiday specified in subsection (1) is to be observed by the employee on another day.

(3) An agreement between the employer and employee under subsection (2) must not diminish the total number of paid public holidays that would otherwise be available to the employee in any year.

(4) If 2 or more of the public holidays specified in subsection (1) fall on the same day, the public holidays must, for the purposes of this subpart, be treated as 1 day.

…

46 Entitlement to public holidays

(1) An employee is entitled to public holidays, and payment for those holidays, in accordance with this subpart.

(2) Public holidays are in addition to annual holidays that an employee is entitled to under this Act or otherwise.

47 When employee required to work on public holiday

An employer may require an employee to work on a public holiday if—

(a) the public holiday falls on a day on which, but for it being a public holiday, would otherwise be a working day for the employee; and

(b) the employee is required to work on the public holiday under the employee's employment agreement.

48 Compliance with section 46

(1) If a public holiday falls on a day that would not otherwise be a working day for an employee, section 46 is complied with if—

 (a) the employee does not work on the day; or

 (b) the employee works on any part of the day and the employer pays the employee in accordance with section 50.

(2) If a public holiday falls on a day that would otherwise be a working day for an employee, section 46 is complied with if—

 (a) the employee—

  (i) does not work on that day; and

  (ii) the employer pays the employee in accordance with section 49; or

 (b) the employee—

  (i) works (in accordance with his or her employment agreement) on any part of that day; and

  (ii) the employer pays the employee in accordance with section 50; and

  (iii) the employer provides the employee with an alternative holiday under section 56.

49 Payment if employee does not work on public holiday

If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay for that day.

50 Employer must pay employee at least time and a half for working on public holiday

(1) If an employee works (in accordance with his or her employment agreement) on any part of a public holiday, the employer must pay the employee the greater of—

(a) the portion of the employee's relevant daily pay (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or

(b) the portion of the employee's relevant daily pay that relates to the time actually worked on the day.

(2) In subsection (1)(a), penal rates—

(a) means an identifiable additional amount that is payable to compensate the employee for working on a particular day of the week or a public holiday; but

(b) does not include, for example, any additional payment for a sixth or seventh day of work.

(3) This section is subject to section 51.

56 Alternative holiday must be provided if employee works on public holiday

(1) An employee is entitled to another day's holiday (an alternative holiday) instead of a public holiday if—

(a) the public holiday falls on a day that would otherwise be a working day for an employee; and

(b) the employee works (in accordance with his or her employment agreement) on any part of that day.

(2) If subsection (1) applies, an employer must—

(a) provide the employee with an alternative holiday; and

(b) pay the employee for working on the public holiday in accordance with section 50.

(3) The entitlement to an alternative holiday remains in force until—

(a) the employee has taken the holiday; or

(b) the employee has been paid for the holiday in accordance with section 60(2) or section 61.

(4) An employee is not entitled to an alternative holiday under this section if the employee works for the employer only on public holidays.

59 Entitlement to alternative holiday if employee on call on public holiday

(1) This section—

(a) applies to an employee who is on call only if the public holiday would otherwise be a working day for the employee; but

(b) does not apply to an employee who is on call if the employee works, or is on call, for the employer only on public holidays.

(2) If an employee is on call on a public holiday and is called by the employer, or a representative of the employer, to work on that day, the employee is entitled to an alternative holiday in accordance with section 56.

(3) If an employee is on call and is not called in to work, the employee is also entitled to an alternative holiday if the nature of the restriction imposed by the on call condition on the employee's freedom of action is such that, for all practical purposes, the employee has not had a whole holiday.

(4) This section applies in addition to section 50 (which requires payment of time and a half for working on a public holiday).

The Courts below

[82] The dispute was taken to the Employment Relations Authority which removed it into the Employment Court. There a full Court held that the Act provides for minimum entitlements to payment of time and a half for work performed on a statutory holiday, as well as an alternative day's holiday; these are rights that cannot be derogated from except in specified circumstances.[30] Those circumstances are stipulated in ss 44(2) and (3).

[83] The Employment Court held that to come within the scope of s 44(2) and (3), the day on which the public holiday was to be observed must be able to be identified and must be an otherwise working day. The agreement did not meet those

[30] *New Zealand Airline Pilots Association Inc v Air New Zealand Ltd* [2005] 1 ERNZ 180.

requirements and accordingly the pilots were entitled to payment at time and a half in addition to the 11 extra leave days.

[84] That judgment was taken on appeal to the Court of Appeal which found that the Employment Court had not erred in holding that s 44(2) requires, in relation to any transferred public holidays, the observance of a specified public holiday on a particular day which is able to be identified; and further, that the Employment Court had not erred in holding that the agreement did not comply with s 44(2).[31]

[85] NZALPA had cross-appealed to the Court of Appeal against the failure by the Employment Court to deal with the issue of relief in consequence of its finding that the agreement was not compliant with ss 44(2) and (3). That cross-appeal was allowed and the matter was remitted to the Employment Court so that it could deal with relief.

[86] Although unanimous in result, the Court of Appeal was not unanimous in its reasons. William Young P and O'Regan J were of the opinion that the statutory scheme envisaged an agreement which defined the day on which an employee would observe a particular public holiday, in exchange for observing it on the day it actually fell. But they considered that there must be a genuine element of exchange in such an agreement, the specified day relinquished and the agreed exchange day must be identified or, at least, be able to be identified with certainty when the exchange is agreed. Furthermore, that agreement must be made before the specified day on which the employee agrees to work.

[87] In contrast, Chambers J considered that there is a single regime of minimum entitlements under the Act. The purpose of s 44(2) is therefore to empower the parties to agree to exclude an employee's entitlement not to work on a designated public holiday, but not with any derogation from the employee's minimum entitlements, as that is prohibited by s 6. Chambers J was of the view that the observance of a specified holiday on a day in lieu, with no substitute enhancements, would be a restriction or reduction of the employee's minimum entitlements.

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31 *Air New Zealand Ltd v New Zealand Airline Pilots' Association IUOW Inc* [2006] 1 ERNZ 956.

[88] The issues have come before this Court in an unusual way. NZALPA sought leave to appeal against certain of the reasons given by William Young P and O'Regan J, a course which, strictly, was not open to it. Appeals lie in respect of formal judgments, not the reasons for judgment. However Air New Zealand sought leave to cross-appeal against the Court of Appeal's judgment that the agreement did not comply with the requirements of s 44(2) because it did not identify with sufficient particularity the day to which the public holiday was transferred. That aspect of the proposed cross-appeal put in issue the legal reasoning behind it.

[89] It was plain that different aspects of the Court of Appeal's reasons raised issues of general importance and of general commercial significance, sufficient to meet the requirements of s 13 of the Supreme Court Act 2003. Accordingly leave to appeal and cross-appeal was granted on specified grounds which put in issue the matters of concern to each party.

The issues and essential arguments

[90] NZALPA contends that there is one regime in respect of public holidays, as defined in s 44(1), when an employee works on such a day. That regime requires remuneration to be paid at the rate of time and a half as well as the provision of an alternative day whenever an employee in fact works on a day defined by s 44(1), where that day would otherwise be a working day for the employee. NZALPA argues that while an employee cannot be required to work on such a day unless s 47 is complied with, s 44(2) permits the parties to agree that an employee will work on a s 44(1) day. They say that whether the employee is required to work or agrees to work on such a day, time and a half must be paid and an alternative day granted.

[91] On Air New Zealand's approach, there are two regimes when an employee works on a s 44(1) day, each relating to a public holiday as envisaged by the Act, but with different consequences. Thus, where a s 44(2) agreement has been entered into, the public holiday is transmuted from the s 44(1) day into an agreed day which is then itself a public holiday as between the employer and employee, and remuneration for the day worked is at ordinary rates.

[92] As I mentioned in paragraph [80], the meaning and effect of s 44(2) is crucial. The question is whether that subsection enables an employer and employee to agree that a day, other than any of those specified in s 44(1), shall as between them be deemed a public holiday in lieu of a specified day. For example, would it permit an employer and employee to agree that the birthday of the reigning Sovereign will not be a public holiday for the purposes of subpart 3 of Part 2, but that St Patrick's Day will be, in lieu? Or that 2 January will not be a public holiday but Yom Kippur will be, in lieu? If that question is answered in the affirmative, then the compliance provisions will not attach to the specified s 44(1) day but to the lieu day. In my opinion the answer must be in the affirmative.

Statutory history

[93] The idea of observing a public holiday on another day seems to have been first used legislatively in the Public Holidays Act 1910,[32] which had the long title "An Act to make Better Provision for the Observance of certain Days as Public Holidays". Section 2 provided:

> Where in any Act or in any award or industrial agreement reference is made—
>
> (a) To Labour Day, such reference shall hereafter be deemed to be to the fourth Monday in October, and not to the second Wednesday in October;
>
> (b) To Dominion Day, such reference shall hereafter be deemed to be to the fourth Monday in September:
>
> (c) To the Sovereign's birthday, such reference shall hereafter be deemed to be to the next succeeding Monday when such birthday falls on a Sunday:
>
> (d) To Christmas Day or New Year's Day, such reference shall, when those days fall on a Sunday, hereafter be deemed to be to the next succeeding Monday, and in that case any reference to Boxing Day shall be deemed to be to the next succeeding Tuesday.

[32] There had been earlier legislation which provided that in respect of every boy under 18 and every woman employed in a factory when Christmas Day, New Year's Day or the reigning Sovereign's birthday fell on a Sunday, then the whole holiday should be allowed on the next ensuing Monday: s 35 Factories Act 1908.

[94] As appears from this Act, from the outset of legislation relating to public holidays, the verb "observe" was used in respect of a deeming of one day to be a holiday on another day. An example of the application of the deeming provision is *Dew v Ryan*[33] where the Holidays Act rendered unlawful the sale of liquor on a Monday, which was deemed by the Act to be Christmas Day, because the Licensing Act 1908 prohibited the sale of liquor on Christmas Day.

[95] The long title to the Public Holidays Act 1955 was "An Act to consolidate and amend the law relating to the observance of certain days as public holidays". That Act had the effect of transferring holidays and conditions of work in Acts, awards or industrial agreements to other days when public holidays fell on Saturdays or Sundays.

[96] The Industrial Conciliation and Arbitration Amendment Act 1965 amended the principal Act as follows:

> (2) Subject as aforesaid, the holidays to be so provided shall include Christmas Day, Boxing Day, New Year's Day, the second day of January (or some other day in its place), Good Friday, Easter Monday, Anzac Day, Labour Day, the birthday of the reigning Sovereign, and the day of the anniversary of the province (or some other day in its place).
>
> (3) The foregoing provisions of this section shall not apply in respect of any award where there are special reasons for making other provision in respect of holidays. For the purposes of this subsection the expression "special reasons" includes the necessity or desirability of making other provision in respect of holidays because of the nature of the industry to which the award relates; and also includes any agreement made by the parties, in conciliation proceedings under this Act, for the making of such other provision as aforesaid; and also includes provision made in the award for not less than ten whole holidays of which one or more is not a day specified in subsection (2) of this section.

[97] What this historical review shows is that at least since 1910 employment legislation has been familiar with the concept of "public holidays for the observance of days of national, religious, or cultural significance"[34] being observed on days

[33] (1911) 30 NZLR 704 (SC).
[34] Section 3 of the Holidays Act 2003, describing the purpose of the Act.

other than the calendar days on which the nominated day actually falls. The distinction between calendar days giving rise to days of observance as holidays, and the actual days which might be observed as holidays, reinforces the conclusion that s 44(2) and s 48(2)(b) create distinct regimes.

[98] The predecessor to the Act was the Holidays Act 1981, s 7A of which provided as follows:

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

[99] By virtue of the introductory words of subs (2), the specified days could be varied by agreement, although subs (1) prevented their being reduced in number.[35]

[35] See *Telecom Networks and Operations Ltd v Vevers* [1993] 3 NZLR 425 (CA).

The statutory language

[100] When the present Act was given its first reading in the House of Representatives what is now s 44 – cl 38 – began in almost identical terms to s 7A(2) of the 1981 Act:

> *Except as an employment agreement otherwise provides, or as an employer and employee otherwise agree,* the following days are public holidays: (emphasis added).

[101] In what must have been a reference to that provision the Explanatory Note to the Bill stated:[36]

> The Bill gives employers and employees the flexibility to agree to observe alternative days as public holidays. The remaining public holidays are observed on the day on which they fall.

[102] As passed, the Act differed from the first reading of the Bill in various respects, in accordance with recommendations made by the Transport and Industrial Relations Committee of the House of Representatives. The changes included the deletion of the introductory words set out with emphasis in para [100] above, the introduction of s 44(2) and (3), and the introduction into ss 48(2)(b)(i), 50(1) and 56(1)(b) of the expression "(in accordance with his or her employment agreement)".

[103] The Select Committee did not intend materially to alter the effect of the introductory expression in s 44(1), but to clarify the position under that section. This is indicated by the following comments in their Report:[37]

> The bill provides for all employees to continue to receive 11 public holidays annually, and sets out a framework whereby employer and employee may agree to observe the public holidays on alternative days if they wish. It also specifies pay entitlements for persons working on a public holiday, and entitles them to an alternative holiday.
>
> …
>
> By majority we recommend substantial redrafting of the bill to make it explicit in what circumstances the public holiday entitlements would arise,

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36 At p 4.

37 At p 6.

> and to clarify the intent of the bill. [Reference is then made to certain amendments and clauses which include those referred to in paragraph [102] above.]

[104] I turn to the matter of the introduction of "(in accordance with his or her employment agreement)". It should be borne in mind that under the 1981 Act an employee could not lawfully work on a day which was nominated in s 7A(2) unless the employment contract otherwise provided or the employer and employee agreed that some day other than a nominated day would be one of the 11 holidays provided for in s 7A(1).

[105] In terms of cl 43 of the Holidays Bill 2003, and s 47 of the Act, an employee can be required to work on a nominated holiday. In my opinion the expression "(in accordance with his or her employment agreement)" was inserted into the Act in order to emphasise the link between the provision for time and a half and an alternative holiday, and the wording of s 47. The intention was to indicate that if an employee worked on a public holiday as a matter of requirement, rather than pursuant to a s 44(2) agreement, the s 48(2)(b) consequences had to follow in order for there to be compliance with s 46. Those consequences would not follow, however, in the case of a s 44(2) agreement. Thus, the expression was inserted to reinforce the distinction between being required to work on a public holiday and agreeing to do so. There is no other reasonable explanation for the introduction of those words after the First Reading of the Bill.

[106] In my opinion, the effect of the legislation is that there are only two ways in which an employee can work on a day, which would otherwise be a working day, named in s 44(1). One is where there is a s 47 requirement and s 48(2)(b) is complied with. The other is where there is a s 44(2) agreement.

[107] I consider that s 44(2) is clearly definitional in character. That is because it occurs in a section entitled "Days that are public holidays". Further, the subsection is introduced by the adverb "however" which qualifies the whole of s 44(1).[38] Its purpose is to substitute a day defined in s 44(1) with a day defined by agreement.

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[38] See the definition of "however" in *Oxford English Dictionary* (2nd ed, 1989) at note 3: "Qualifying a sentence or a clause as a whole: For all that, nevertheless, notwithstanding; yet; = but at the beginning of the sentence."

This is consistent with the purpose of subpart 3 as declared in s 43(a), which is "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". Also, importantly, "public holiday" is defined in s 5, not in terms of s 44(1), but in more general terms by which s 44(1) is not exclusive nor s 44(2) excluded.

[108] Under NZALPA's approach, a holiday observed as envisaged under s 44(2) is no different from an alternative day under s 56. There are significant difficulties with that proposition. It is clear from the statutory language that an alternative day is a matter of mandatory entitlement (see ss 56(1) and (2)), whereas s 44(2) envisages an agreement to observe a public holiday on a different day. If there were no difference between an observed day and an alternative day, ss 44(2) and (3) would be wholly superfluous. However, the fact that those sections were deliberately incorporated on the report back of the Select Committee indicates that they had a specifically intended purpose. Section 44(3) provides that an agreement between an employer and an employee under s 44(2) must not diminish the total number of paid public holidays that would otherwise be available to the employee in any year. There would be no reason for that subsection if, notwithstanding a subs (2) agreement, all the days referred to in subs (1) remained public holidays in the relevant statutory sense. It must be the case that when an employee agrees to observe a subs (1) public holiday on another day then as between the employer and employee it ceases to be a public holiday and the observed day becomes the public holiday instead. There is, in effect, a deeming.

[109] This is, of course, entirely consistent with the view of the Select Committee, expressed to the House of Representatives, that the Bill gives employers and employees the flexibility to observe alternative days as public holidays.[39] The employee may wish to substitute a nominated public holiday for another day for reasons of cultural or personal significance, or for reasons of convenience. The flexibility that s 44(2) provides is that it enables an employer and employee to substitute a s 44(1) nominated day. This would not diminish the total number of

[39] At p 6.

paid public holidays that would otherwise be available. The payment of wages at time and a half might deter the employer from agreeing to an employee's request but an employer might be prepared to allow the employee to work if that was a fiscally neutral arrangement; hence the utility of s 44(2) from the viewpoint of an employee. The case argued by NZALPA would deny employees the flexibility I have discussed, and would disadvantage them accordingly.

The nature of a s 44(2) agreement

[110] Being of the opinion that a s 44(2) observed day must be something different from a s 56 alternative day I turn to examine how an agreement under s 44(2) must be constructed. Certain features can be identified by inference from the statutory provisions. First, the s 44(1) day which is to be worked must be identified. Second, the other day on which the holiday is to be observed must be identified or be identifiable. Third, that day must otherwise have been a working day for the employee. Fourth, the agreement must be complete, including as to the observance day, before work commences on what would otherwise be the public holiday. If it were not, s 46 would be breached immediately work began. Fifth, there must be a true agreement, one which is informed and voluntary. Sixth, the parties must reach their agreement in good faith, consistent with s 73 of the Act. Absent any of these factors, it cannot be said there is a s 44(2) agreement, and s 46 will be breached. Also, of course, s 44(3) must be complied with.

[111] This leads me to the question whether the requirements of s 48(2)(b) could be subverted by a purported agreement pursuant to s 44(2). As I have indicated by my opinion that s 48(2)(b) relates back to s 47, the time and a half and alternative day provisions compensate for the element of compulsion to work on a nominated public holiday. The compulsion is a product of the existence of three conditions, two of which are that the employment agreement so requires, and the employer in fact requires. In the event that an employment agreement so requires, if an employee does work on a working day the inevitable inference must be that the employer in fact required that. Given the good faith obligation and the essentiality of voluntariness in relation to a s 44(2) agreement it is inconceivable that an employee

voluntarily, and an employer in good faith, would agree to the employee's relinquishing their time and a half rates for the sake of a day off which could have been achieved under the alternative day requirement. In reality a s 44(2) agreement would not be regarded as lawfully displacing a s 48(2)(b) situation unless the employee's entitlement under such an agreement was obviously capable of being regarded as more valuable than s 48(2)(b) provides. An example might be the provision of more than one day in substitution for the particular public holiday, or, where the public holiday does not fall on a working day, the provision of a paid public holiday on another day.

[112] Should it be argued that there is a s 44(2) agreement which displaces the s 48(2)(a) and s 48(2)(b) entitlements the obligation would plainly be on the employer to prove the presence of all the conditions of validity. In the absence of a greater benefit to the employee that would be difficult if not impossible to do. Absent a s 44(2) provision in an employment agreement an important and often conclusive factor would be whether the alleged s 44(2) day was worked at the employee's request. Leaving aside the issue of making shift arrangements practicable, which will usually be covered by a formal employment agreement, one would expect a s 44(2) agreement to occur when an employer is content to allow the employee to observe a s 44(1) defined day but the employee prefers in fact to work that day and observe another, preferred, day. Another factor will be whether the employer paid the employee time and a half or better. Since that could be negotiated and the outcome would provide the employee with the same benefit as s 48(2)(b), such benefits would provide a rational explanation for the employee's agreeing to the arrangement.

[113] Employment instruments often reflect esoteric practices and terminology, the appreciation of which gives the Employment Court a particular advantage over other Courts. That is why appeals do not lie from the Employment Court to the Court of Appeal or the Supreme Court in respect of a decision on the construction of employment agreements. The Employment Court knows that the transfer of public holidays from a nominated day to an agreed day is a widespread occurrence. In

Heinz Wattie's Ltd v National Distribution Union Inc[40] a full Employment Court considered whether a collective agreement which provided for a public holiday on which part of a shift fell was compliant with the Holidays Act by providing for the following day to be observed by the shift worker as the public holiday. The Employment Court observed:[41]

> These work arrangements and the collective agreements that underpin them are both longstanding at HWL and typical of shift work arrangements in a wide variety of industries and other business enterprises in New Zealand.
>
> …
>
> In addition to formally documented arrangements in collective agreements there is evidence of widespread informal observance of public holiday "shifting" in many industries to achieve a "whole" day or shift off work on pay.
>
> …
>
> It is common ground [amongst the employer, Business New Zealand, three major unions, and the Labour Inspector] that s 44(2) of the 2003 Act enables the parties to agree that any public holiday can be observed on a day other than the calendar date set out in s 44(1). For convenience we refer to this as a "transfer" of the holiday although we accept that that word is not used in the statute.

[114] It is, I think, significant that the Service and Food Workers Union Inc argued, and the Employment Court accepted, that the work/life balance identified in s 3 as the purpose of the Act requires a proactive stance that enables employees to meet their social and work needs; and that to achieve this:[42]

> the parties must be able to agree on the arrangements that suit them and address their particular needs for the observance of 11 public holidays.

[115] The Employment Court was of the same view as I have expressed in my reasons in this case. It is a view that employers, employees and the Department of Labour accept is suitable to the needs of all and consistent with the Act. The contrary view favoured by the majority in this case will, I think, cause some concern amongst those who would be affected by such an interpretation. Employment

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40 [2005] 1 ERNZ 12.

41 At paras [14], [19] and [32] respectively.

42 At para [37].

agreements relating to shift work, such as that in the *Heinz Wattie's* case, may not be acceptable to employers in the future, because of the additional cost to them. Employees will have lost the flexibility of working on a public holiday in order to enjoy observance on another more suitable day.

The NZALPA Agreement

[116] I turn now to evaluate the employment agreement in issue. The agreement provides that Air New Zealand can require a pilot to work on a public holiday. If a pilot does so work it will most likely be because Air New Zealand, by means of its roster system, has required the pilot to work on that day. Accordingly the work is carried out pursuant to s 47 and the provisions of s 48(2)(b) apply. It cannot be the case, in any event, that the work is carried out pursuant to a s 44(2) agreement, for the reasons I set out immediately below.

[117] In paragraph [110] I identified six implied requirements of a valid agreement pursuant to s 44(2). The collective agreement in this case does not meet all those requirements. The s 44(1) days that would be worked are not identified or identifiable as at the time the agreement was entered into,[43] and the observance days are also not identified or identifiable. Further, it seems impossible to ascertain whether any observance day is one which would otherwise be a working day in the case of any particular pilot.

[118] In my opinion the Court of Appeal was therefore correct, for the reasons given by the majority, in holding as it did and remitting the matter to the Employment Court to deal with the issue of consequential relief. In my opinion it follows as a matter of strict procedure that the appeal and cross-appeal must be dismissed. Given the unusual circumstances I would not make any order for costs.

Solicitors:
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G L Norton, Auckland for Respondent
EMA Legal, Wellington for Intervenor

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[43] Because a pilot might or might not be rostered to work on any of them.