IN THE SUPREME COURT OF NEW ZEALAND SC 91/2006

IN THE MATTER of a Civil Appeal

BETWEEN **THE NEW ZEALAND AIRLINE PILOT'S ASSOCIATION INDUSTRIAL UNION OF WORKERS**

Appellant

AND

AIR NEW ZEALAND LIMITED

Respondent

Hearing 13 June 2007

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

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

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CIVIL APPEAL

10.03am

Harrison If Your Honours please I appear for the appellant with my learned friend Mr McCabe.

Elias CJ Thank you Mr Harrison, Mr McCabe.

Toogood May it please Your Honours I appear for the respondent with my learned friend Mr Thompson.

Elias CJ Thank you Mr Toogood, Mr Thompson.

Cleary May it please the Court Cleary for the Intervenor Business New Zealand with my friend Miss Verbiesen.

Elias CJ Thank you Mr Cleary, Miss Verbiesen. Yes Mr Harrison.

Harrison If Your Honours please this appeal is a contest over the scope and effect of the Public Holidays provisions of the Holidays Act 2003. We have in the one corner Air New Zealand, which operates 365 days of the year, 24 hours a day, or 24/7 as the Americans like to say and some would say an iconic New Zealand business. In the other corner we have airline pilots perceived as well remunerated, although they might not agree with that proposition, and represented by a strong Union. Now I don't think there's probably going to be much argument that in New Zealand at the moment Union membership stands at around 20% of the overall workforce, so having regard to that I have put forward an alternative scenario which is a single page sheet headed 'Council for Alpers Alternative Scenario' and to save you making any notes about it Your Honours, I have committed it to writing because it is in my submission appropriate to consider an alternative scenario at the other end of the spectrum rather than focusing solely on the implications of this case for Air New Zealand.

Elias CJ But what's this hypothetical directed to Mr Harrison?

Harrison Well just to provide Your Honours with a different scenario to which these Holidays Act provisions

Blanchard J Mr Harrison do you really think we haven't thought it through to even that degree. Of course we can see beyond the particular parties in this case.

Harrison Well I'm not suggesting for a moment Your Honour that you can't or that you won't, but this just focuses how on Air New Zealand's interpretation these provisions would operate in a quite different scenario involving an individual worker in a more vulnerable situation than these Unionised employees, and in my respectful submission the detail of how these things would operate will be of assistance Your Honours. I don't propose to spend too much time on it but

Elias CJ Well for myself Mr Harrison I would have preferred to start on a point of statutory interpretation with the legislation but of course we have read that and it's rather jumping in the middle I would have thought to develop it.

Harrison I'm happy to leave it till later but in my submission it does in fact set the scene for the discussion which is to follow and

Tipping J Is your case basically that it's the relevant sections that provide for holiday pay, sorry for time and a half on the public holiday can't be read down by means of s.44(2) or otherwise?

Harrison It's not a question of reading them down, it's a question of determining the scope of that provision and what it permits contracting out of.

Tipping J Alright, well substitutely your language, but that's the essence of this case isn't it, where the Act says clearly that you get time and a half for working on any of these 11 days it doesn't actually mean what it appears to say.

Harrison Ah quite the contrary.

Tipping J But isn't that the essence of the case and shouldn't we be looking carefully at the statute before we move anywhere else?

Harrison I am going to take Your Honours very carefully through the statute, or hope to do so in just a few moments and I'm happy to leave this alternative scenario or take it as read

Tipping J But it seems to me to be directed to, you know, if necessary it could come later, but I want your help personally on how the statute works and why it can't be read the way Mr Toogood wishes it to be read.

Harrison That is indeed going to be the focus of my submissions and I'm happy to take Your Honours directly to that

Elias CJ Well I think it really would be helpful to start with the provisions.

Harrison Very good I will. Now in terms of interpreting the statute, and I'm going to go through the submissions for the appellant in support of the appeal as against the cross-appeal submissions as I recall them, dealing with the provisions in some depth. Might I invite Your Honours as we go through the provisions to keep an eye out for two important signposts if I can put it that way, one of them critical? The first, and I submit, critical issue is whether under what I will call sub-part 3 for short there is one contracting out regime or two. The answer to that question in large measure I submit will determine the outcome of ground A of the appeal, if not indeed largely the appeal itself. Now why do I identify one regime or two, I'll come to that in just a moment. The second point though, or signpost as we go through is to look at the words 'public holiday' or 'public holidays' when it is used in sub-part 3 with a view to considering whether it can mean anything other than what I call in my submissions a designated public holiday – one of the 11 named ones. So those if I may say are the two points that I invite Your Honours to emphasise and I will emphasise as I go through. Now why do I identify one regime or two for contracting out

as a critical point? In essence for the reasons identified in my cross-appeal submissions – outline of submissions in reply cross-appeal at paras.7 to 9. Now this as I submit is critical stuff so I'll just take a moment to develop the point in a preliminary way. In para.7 I am responding to the Air New Zealand submissions and what they have tried to characterise as a preliminary point regarding terminology and I note at para.8 what Air New Zealand proclaims as a crucial distinction which I have set out there and then in para.9 I make a number of responses to that. But we can see from the quote in para.8 of my submissions the distinction which Air New Zealand seeks to draw is between an alternative day's pay holiday taken by an employee who has worked on a public holiday and the observance by an employee of a public holiday on a day other than a day specified in the Act. If we go to 9.3 below you will see that Air New Zealand makes a distinction between two kinds of replacement day, if I can use that expression, when contracting out has occurred, and what I described as the second leg of Air New Zealand's distinction in 9.3, is that all agreements under 44(2) are those which involved the transfer of public holidays entitlements from the specified day to the other day on which the public holiday is to be observed, thus you have two ways under both the majority approach and under the Air New Zealand approach – two ways of contracting out.

Tipping J Does this argument suggest that s.44(2) provides a distinct and separate regime from that encompassed by ss.50 through to 61?

Harrison That is, as this analysis I hope shows, that is the Air New Zealand

Tipping J That is the argument?

Harrison That is the Air New Zealand's position.

Tipping J Yes.

Harrison So it is also the majority position but there is a significant difference between the way the majority approaches the two regimes it identifies and the way Air New Zealand approaches the two regimes and I'll come to that after I've looked at the statutory

Elias CJ Your fallback position is that if there are two regimes the agreement here doesn't fall within the s.44(2) regime isn't it?

Harrison That's correct. My fallback position is kind of two-step, but first of all it is that the majority was right in saying if there are two regimes and s.44(2) stands apart there must be an exchange, a true exchange, and secondly I submit that however you mince the test for the separate regime purportedly under 44(2), this clause doesn't achieve either an exchange, or to use Air

New Zealand's terminology, a transfer of one or more public holidays for another, so they miss out either way.

Elias CJ Yes, because it's possible on the two different regimes analysis for the s.44(2) regime to be of very limited impact.

Harrison Yes, well indeed that is something I was coming to. If you postulate two regimes and 44(2) is one of them, but it doesn't trigger the statutory entitlements to time and a half and an alternative holiday, you've got to narrow that in order to give some room to the other regime

Elias CJ Yes, absolutely, yes I accept that

Harrison Otherwise it really has nothing to bite on, and that is why the majority said alright we're going to import this concept of an exchange, and a true exchange, one for another, and keeping 44(2) within those bounds, Air New Zealand loses on that approach. So that's my fallback.

Tipping J Mr Harrison is it not arguable at least from your point of view, and I'm not sure whether you do argue this, but whether you enter through 44(2) or through the alternative holiday regime, you still have to observe s.50?

Harrison Yes, yes, I submit that but my over-arching argument is that there is but one regime. There is only one regime – there are not two regimes.

Tipping J Your primary point surely is it doesn't matter whether there are one or two. In either event the provisions of s.50 combined with s.40 (2) b govern the position.

Harrison But if you postulate, if you say this contract was entered into under s.44(2), which we don't accept, but assume it was

Tipping J Yes

Harrison And then you say but it doesn't matter because s.50 et al bite, you're actually saying in my submission that there's one regime, not two.

Tipping J Alright, well

Blanchard J If there's only one regime, if we were accept that argument, how much importance is there left in the second question?

Harrison None, none, because in a nutshell my argument is, and I was going to go through the provisions first, but let's do this. My argument is s.44(2) is an empowering provision that enables you the employee and the employer to agree to derogate from the primary entitlement of observing the designated

public holidays. It's empowering but that agreement doesn't immediately trigger any statutory entitlements. It's only when having done that you then go and work – the employee goes and works on the designated public holiday – that the later sections say time and a half is triggered; alternative holiday is triggered – so the two are not covering identical ground. One's empowering and the other is triggering and they work together to create the one regime, and if I'm correct in arguing that there is one regime then the question falls because if there's only one regime it must be a regime that triggers the entitlements otherwise the entitlements could never ever be triggered.

McGrath J There's no attack on the roster system which otherwise might arise if you were to lose on the first grounds.

Harrison Well that's another of my points about this and the benefit of this interpretation. If there's one regime you don't have to narrow down the scope of s.44(2) to say that it only applies to an exchange for an identified or identifiable exchange day, to use the majority's term. You don't need to narrow that down

Blanchard J On that premise it would then permit a degree of informality.

Harrison Well it just doesn't require

Blanchard J Because there's no prejudice.

Harrison Well not only that, the reason it doesn't require an identifiable other day is because the alternative holiday provisions provide specifically for the ability to identify the other day, the alternative holiday, ex post facto.

Tipping J They provide the machinery?

Blanchard J Yes.

Harrison They provide the machinery so my one regime interpretation allows pooling of days, leave schemes like the Air New Zealand one, and the two regimes as I say in my cross-appeal submissions, the two regimes approach requires that someone, the Court or a decision-maker, in every case where an employment contract, every single case where an employment contract contains provision for working on a designated public holiday, someone is going to have to say which regime does this fit into? Is it Air New Zealand's 44(2) contracting out regime which gives no statutory entitlements whatsoever or is it the other regime under the later provisions which brings with it the statutory entitlements? So you could imagine a raft of litigation arguing about the wording of particular provisions, and as I'll come to

Elias CJ Well you don't if it's narrowly interpreted and there has to be an exchange day, because then it's simply like the effect of s.45.

Harrison Well yes and no, because I will come to this but it's by no means clear what the test is that differentiates between the one regime and the other where that line is drawn. The majority

Elias CJ It's a different day of observance of the public holiday.

Harrison In my respectful submission that doesn't answer the point. If you look at the scenario, if you take the two regimes, under Air New Zealand's s.44(2) regime what happens in practice? The employee works on a designated public

Elias CJ I should say that I think at the moment provisionally it seems to me that both parties have opened their mouths too wide in this and I have a lot of difficulty with the Air New Zealand suggestion that the regime in issue here is within s.44(2), so to the extent that you're answering me by referring not to the statute but to what Air New Zealand is contending for, it may not really be meeting the points I'm putting to you.

Harrison I wasn't attempting to answer on that basis. I'm just submitting if there are two regimes and we are trying to work out what is the test that distinguishes where the dividing line between the two regimes is in order to make a decision of our individual cases, what the majority said was, and I'm sorry if this repeats but we need to, that s.44(2) regime involves an exchange – one for another.

Tipping J But s.44 doesn't set up a regime, it simply provides the power to enter into the relevant arrangement.

Harrison If Your Honour's with me on that one

Tipping J Well it says 'may agree'. It empowers them to agree and to the extent that they agree, that agreement is not so outside the Act, but the consequences of that agreement are found in the subsequent sections.

Harrison Well

Elias CJ Well s.47 also is an empowerment provision and the two regimes, if you're talking about it, are the empowerment either under s.44(2) or under s.47. I mean that's the way it seems. That's the comparison it seems.

Harrison Well with respect I don't accept that characterisation of s.47. Can I come to that?

Elias CJ Yes.

Harrison In response to Justice Tipping. Your Honour's proposition to me is precisely what I'm arguing, but that is not Air New Zealand's argument

Tipping J I fully understand that otherwise you wouldn't be here.

Harrison Yes, but that is not, what Your Honour has just put to me is not Air New Zealand's argument and it's not the majority's

Tipping J Well I don't mind about Air New Zealand or the majority at the moment, I'm just giving you the dubious benefit of how I think this thing naturally reads.

Harrison Well my point is this. If I can just get through this particular point in terms of the dividing line between the alleged two regimes and it's two regimes that Air New Zealand needs to establish under the Act in order to make out its arguments under Ground A of the appeal. The majority said you divide the line between s.44(2) which involves a true exchange of a public holiday for another day and all others. Air New Zealand says no wrong, the exchange concept does not apply to s.44(2), it applies to the other category of regime and the s.44(2) regime involves a transfer not an exchange. Now Your Honours can ask my learned friend about that because the word 'transfer' doesn't appear anywhere in the statute. But that's the point. There are real problems with defining where to draw the line between two regimes, if you have two regimes, and that will cause a lot of argument and litigation because if you say it's an exchange then you've got to go to the contact and say well as a matter of interpretation of these provisions do they involve an exchange, or do they involve a transfer or whatever? Now can we

McGrath J It's the difference as you understand it between exchange and transfer as you're explaining it that a transfer is a bare thing without any relative entitlements, but an exchange imports the entitlements.

Harrison With the greatest respect I do not understand the difference. It's not a difference or distinction that I would draw and in my submission it's a false and unhelpful distinction. It's Air New Zealand's distinction so I'm going to duck that one

Elias CJ I really do think it would be better for you to tell us your argument based on the statute rather than responding in such detail to the arguments put up against you Mr Harrison.

Harrison Yes well I was keen to come to the statute, and let us do that. If we can go to our submissions in support of the appeal

Tipping J Can you encapsulate it just in a sentence or two what your argument is on the statute? I thought I was actually putting it the way you wished it to be seen, that was in a way why I intervened in that way because like the Chief Justice I thought it would be more helpful to have your position firmly identified before we – is that it, that you have three concepts, you have the power, the entitlements deriving when the power is exercised and then the machinery?

Harrison Yes, yes, and one regime dove-tailing them all into one harmonious whole

Tipping J But how do you deal with

Elias CJ Sorry, what do you mean by the machinery?

Tipping J The consequences of how you fix this alternative day.

Harrison Yes.

Elias CJ Well on the narrow view of s.44(2) that has to be a matter of agreement. It is any day in 44(1) made by agreement be observed on another day.

Harrison Yes.

Elias CJ So you don't need a machinery, there has to be specific agreement?

Harrison I think it would be preferable if I did develop my arguments with reference to the statute but shortly we say there is one regime, s.44(2) empowers agreements by way of contracting out – that's the contracting out regime. Once you've contracted out and secondly and crucially once the employees worked on a designated public holiday that triggers the entitlements – substantively the entitlement's there, time and a half, alternative holiday – and if we want to call the rest implementing that machinery as per Justice Tipping, I'm happy with that.

Elias CJ Well I don't see that there's anything to implement so you'll need to convince me of that if under the s.44(2) narrow regime, but I'll just flag that and you develop your argument.

Harrison Well my argument doesn't involve a s.44(2) narrow regime, it involves a single regime. Section 44(2) is empowering

Elias CJ But what does it empower is the question?

Harrison Can we go through the statute Ma'am,

Elias CJ Yes, yes

Harrison I think that would be more helpful. I've picked out the key provisions at page 5 of our submissions and if nowhere else the statutory provisions appear in our bundle of authorities, paginated at page 1 onwards. It's not the entire statute but I think it's what we need, and we begin with the purpose provision and it has two important things to note. First of all the purpose to promote balance between work and other aspects of employees' lives - that's work-life balance – so it's setting out to achieve that and obviously you do that by giving people real holidays, not merely opportunities to contract out of holidays, and to that end to provide employees with minimum entitlements too, and then you've got (a), (b), (c) and (d) and (b) is public holidays for the observance of days of national, religious or cultural significance. So you've got four purposes and you could say that each is described in aspirational terms rather than functionally. That's to say what is hoped to achieve rather than what in fact is achieved, because even with holidays you can take the horse to water but you can't make it drink. So that manner of description is then carried through to each of the four relevant sub-parts. So you've got this expression what I call as aspirational description of observance carried through to sub-part 3. In s.4, ss.2(b) identifies part 2 of the Act as conferring again minimum entitlements to the four categories including public holidays. So you've got this emphasis on the fact that the entitlements are minimum entitlements and then you've got s.5 interpretation, and we've got on the page that's paginated as 6, we've got the definition of public holiday, unhelpfully for our purposes means a public holiday provided under sub-part 3 of part 2. But if we go to the other related definitions as counsel for Business New Zealand has noted, there's a pattern of definitions, just two below. Sick leave means paid sick leave provided under sub-part 4 so it's a functional definition that simply refers to the sub-part in question. Back a page – the beginning of the definitions – annual holiday, that definition follows the same pattern and further down bereavement leave follows the same pattern. All of these definitions are defined simply in those terms. And note also the definition of existing employment agreement which will later become relevant. And s.6 is a crucial section – relationship between Act and employment agreements, (1) each entitlement provided to an employee by this Act is a minimum entitlement; ss.2 doesn't prevent enhanced or additional entitlements on an agreed basis; ss.3 however, an employment agreement that excludes, restricts, or reduces an employee's entitlements under this Act has no effect to the extent that it does so. No a critical question I submit is the inter-relationship between s.6 and s.44(2) and I'll return to that after we're done with s.44(2). There's a couple of other definitions which we can just note for completeness at this point before coming to

sub-part 3. Section 9 defines the relevant daily pay which is part of the calculation process. Section 12 deals with the determination of what would otherwise be a working day and this is ss.1 for the purpose of determining an employee's entitlements to a public holiday etc.

Tipping J Is that section 12(1) of some moment because it refers to public holidays and alternative holidays as if they were a different conceptual thing

Harrison Yes

Tipping J Which rather cuts across the idea that the alternative holiday regime is just simply the machinery for the public holiday regime?

Harrison Well what it does show is that there's a clear distinction between a public holiday and an alternative holiday and it is difficult to interpret public holiday in that context as meaning anything other than a designated public holiday. It's consistent with my argument that when the Act uses public holiday it's referring to a designated

Tipping J Yes

Harrison Public holiday.

Elias CJ But it's equally consistent with public holiday including an exchanged day under s.44(2), because on the argument which you'll come to the question is whether in fact there is any room for the machinery provisions if the narrow view of 44(2) is taken.

Harrison Well this is going to be a debate that probably crops up regularly when we see this expression 'public holiday' so I'll try and face up to it now

Tipping J But the definition of alternative holiday in 56 actually is with you because the transfer day, the substitute day, is an alternative day, holiday.

Harrison Yes on my argument.

Tipping J There's no great huge sort of overall consistency in this legislation and it's not actually very conveniently or logically arranged either, so we're having to deal with a statute that isn't a model of precision and consistency.

Harrison There are round edges on my interpretation and I would argue more rough edges on my learned friend's interpretation. Can I come back to the Chief Justice's point? If you postulate the Air New Zealand or the majority's argument

Elias CJ I'd really rather not. I'd really rather look at the statute and try to work out what the answer is from that but

Harrison But what Your Honour said was well the use of the words 'public holiday' is equally consistent with it meaning 'the exchange day' to use the majorities.

Elias CJ Yes, yes.

Harrison Well my response to that is, no, because if you take an exchange day and give it the concept face value, it's a day which the employer and employee have agreed the employee will not work on.

Elias CJ It's a day on which the employer and the employee have agreed that the employee will observe any public holiday.

Harrison Yes, and entitlement free day, but ex hypothesis under the majority view it's an entitlement free other day on which by definition the employee

Elias CJ No the designated public holiday becomes the entitlement free day. There is entitlement which then attaches to the substitute of public holiday arrived at by agreement.

Harrison The entitlements are not vested, they are simply, can I just explain this in my submission, let's use the expression 'exchange day' which the

Tipping J Why can't we use the expression 'alternative holiday' which is precisely what the Act

Elias CJ Because it's a different concept on the view I'm putting forward.

Tipping J Oh is it.

McGrath J I think that you're right to say we could move on. I mean I don't really think that Mr Harrison was actually saying that s.12 provided huge support for his analysis because of passing aside you were saying it was consistent with it but we've got to grapple with the difference between the terms later don't we? If we can get on with the statute - understand it better.

Harrison Yes, well I'm happy to move on but the point of debate between the Chief Justice and me if I may will crop up again and so I'll try and pin it down

Elias CJ But shouldn't it crop up as Justice McGrath is suggesting when we look at s.44(2)?

McGrath J Absolutely.

Harrison Yes.

Elias CJ That's really where it crops up.

Harrison I'll leave it and come back to it.

Elias CJ Is there any other preliminary matter that you want us to flag?

Harrison You mean early on in the statute?

Elias CJ Yes.

Harrison No, we can proceed now to s.40, we're almost to sub-part 3, this is at page 10 of the materials. Just noting s.40. I'm not suggesting there's any great significance there but it in effect means that if there's an overlap between an annual holiday and a public holiday it prevails as a public holiday. Then you've got sub-part 3, s.43, the purpose section and in (b) there is this notion of an exchange for another day's paid leave which the majority and Air New Zealand treat quite differently in terms of where it has influence or effect. Section 44 headed "'days that are public holidays", ss.1 identifies the 11 in question. Subsection 2 may agree. We should note the words "whether in an employment agreement or otherwise" because that is something that needs reconciling with some later provisions that any public holiday specified in ss.1 is to be observed by the employee on another day and my submission is that one should not get too hung up on the use of the word 'observe' in my submission. There's no sanctity involved in it, it simply means 'observed by not working', and could Your Honours note

Elias CJ Well that's not really the way it's used in the definition is it of public holiday?

Harrison That's not in the definition, it's in

Elias CJ Or do you say it is?

Harrison It's in s.3

Elias CJ Or the observance of days of national, religious or cultural significance.

Harrison Yes, that's why I described it as an aspirational statement but when we come to the nitty gritty of what actually gets agreed to it is I submit the concept is followed through from s.3 but it should not be, the words should not dominate the interpretation.

Tipping J Is the 2nd of January a day for observance of national, religious or cultural significance?

Harrison Well that's why

Tipping J I mean some of them are but I'm not sure that all of them are.

Harrison That's why I speak of the great kiwi long weekend or variations on the saying. The language is aspirational but we need to take it with a grain of salt when it comes to the 2nd of January for example.

Anderson J More aspirin than aspiration.

Harrison Well that's

Elias CJ Are you talking about breathing.

Harrison I won't take that any further Your Honours. So if we're looking at s.44(2), can Your Honours just note because I'm coming to it, contrast a closely related language of s.56, ss.1 - I'll take up that point later. In ss.3 of s.44 it simply says that the agreement can't lower the overall muster, particularly not of paid public holidays otherwise available. Then s.46 gives the basic entitlement

McGrath J Sorry, just before you leave s.44 can you just give me a plain example of where the agreement would be other than in an employment agreement. I'm just looking at the word 'otherwise'. Is this a sort of an ad hoc agreement that might be entered into a few days before or something of that kind?

Harrison Yes, yes, I might have an absolute major hearing starting on the Tuesday following a Monday long weekend and I ask my secretary look would you please work on the Monday otherwise we'll never be ready for the hearing. Her contract doesn't say she is to work on public holidays. That's the kind of alternative or otherwise scenario.

McGrath J And that sort of informal ad hoc arrangement would not be an employment agreement?

Harrison No, I think if we take an employment agreement as being

McGrath J A more comprehensive thing?

Harrison Yes.

McGrath J Thank you.

Harrison Yes, as under the Employment Relations Act.

Blanchard J Well if that occurred she'd be entitled to an alternative?

Harrison She'd be entitled to time and a half and an alternative holiday

Blanchard J Yes but you get to an alternative only via an employment agreement.

Harrison I'm coming to that. That is in fact the main rough edge that I was referring to. Could I

Blanchard J Well wouldn't you in fact simply be informally varying the employment agreement in your scenario with your secretary?

Harrison Well with respect I don't think it's critical to determine that issue because

Blanchard J Well I thought I was trying to help you.

Harrison Yes, well I'm not sure that my answer would be yes because her employment agreement wouldn't say 'she shall not work on a public holiday', we're just reaching ad hoc arrangement, you could call it 'varying the agreement'.

Blanchard J Well the employment agreement would very likely say she's entitled to public holidays.

Harrison True, true indeed. She's got to be because of the statute.

Anderson J It depends doesn't it on what it is connoted by in accordance with the employment agreement in s.48(2)(b) and s.56(1)(b)?

Harrison Yes.

Anderson J Now it could mean as required by the employment agreement or it could mean consistent with the obligations or consistent with the scope of the employment obligations, and if it's the second then your argument just slots straight into it. It says if you happen to work in your usual job sort of thing you get time and a half in alternative.

Harrison Yes, yes, I was coming to that and that is precisely the interpretation I'm urging which then doesn't create any disjuncture between or otherwise in s.44(2) at a later reference.

Elias CJ But why does 44(2) enter into that at all?

Harrison Well

Elias CJ Why isn't 44(2) there to deal as suggested by its inclusion in the section that identifies what days are public holidays to provide opportunity by agreement to observe, or to take an observance of a public holiday on a different day?

Harrison Well I

Elias CJ Because you don't need, you don't need to get to the position of paying your secretary time and a half and also giving her a day in lieu under this legislation via s.44(2).

Harrison No, no, if I simply say please work on a Monday public holiday, I don't have to go on and say and I will pay you time and a half and I will provide you with an alternative holiday. The statute says it whether we agree with it or not. I accept that, but sub-part 3 seems to have taken on an extraordinarily belt and braces approach to ensuring that these entitlements are provided on the dot, even to the extent of as well as having section, if I can digress for a moment, as well as having s.50 which expressly provides for the time and a half payment, there's another section that says there shall be in every employment agreement a contractual provision that says the same and the irony is that the legislature took so much trouble to double up and ensure that everything pointed in the same direction that we are now having this argument and can apparently be accepted by the majority that all you need is a simple section 44(2) and employees miss out completely.

Elias CJ Well except they took the view that s.44(2) was a very narrow provision designed to enable those who want for example to observe, I don't know, Yom Kippur or something like that, instead of Good Friday and to make that arrangement and you will I imagine deal with the fact of the heading to s.44, it's placement in the part of the Act which is followed by s.45, all of which establish really what are public holidays, then the entitlements are dealt with later.

Harrison Yes.

Elias CJ And the ability to require, the ability of the employer to require work on a public holiday.

Harrison Well this in a way can and should take us back to s.6 and can I just spend a moment on the inter-relationship between s.6 and s.44(2)?

Elias CJ Yes.

Harrison Because in my submission if we read s.6 and s.44 together and give s.6 its proper weight, it all becomes clear. Section 6, at the risk of repeating myself, makes it plain that each entitlement provided by the Act, including the sub-part 3 entitlements obviously, is a minimum and yet the employment agreement that excludes, restricts or reduces employees' entitlements under this Act has no effect. Now that plainly applies to the sub-part 3 entitlements and the legislature must have considered that in order to make plain a limited derogation from s.6, a stand-alone provision was needed - that is s.44(2), and yet permits contracting out contrary to what otherwise would be the effect of s.6, particularly ss.3, but not holis bolus only to the extend

Elias CJ Sorry, contracting out of what?

Harrison Contracting out of the entitlement.

Elias CJ The entitlement being?

Harrison Those under sub-part 3 to time and a half and an alternative holiday. Section 6 says 'each entitlement is a minimum entitlement and you cannot contract out'.

Elias CJ Yes.

Harrison So in order to derogate from s.6 when we came to sub-part 3, you have s.44(2) that says ah but you can contract out of your right or entitlement to observe each and every designated holiday, you can do so by

Elias CJ Agreeing to observe it on another day?

Harrison Yes.

Elias CJ Well how does that effect the entitlements, because you have exactly the same entitlements? You have an entitlement to a substituted day of more significance for you and all the entitlements apply by operation of statute if you're required to work on that day then you get time and a half and a day in lieu.

Harrison Well

Elias CJ You see I just feel that you're answering the very wide argument that's been put up by Air New Zealand whereas what I'm trying to put to you is a much narrower one, which is what I think the majority were expressing.

Harrison Yes, well at the end of the day of course the majority

Elias CJ You get there anyway.

Harrison We get there anyway.

Elias CJ Yes.

Harrison And that's the fallback position.

Tipping J Well that's point isn't it? As I say whichever way you look at this or however you enter it you must end up with not losing your basic entitlement.

Elias CJ Yes.

Harrison Well

Tipping J That's the long and the short of this case.

Harrison But the basic entitlement under sub-part 3 is if you work on a designated public holiday you get time and a half. That's the basic entitlement.

Elias CJ Well that is what I'm querying and I'm doing that on the basis of the structure of s.44 which ss.2 is part of and s.44 it seems to me that there is a very respectable argument for saying that that is how you identify what public holidays you are entitled to are and it includes the ability by agreement to exchange any designated day for another day.

Harrison Well my submission is that that approach reads too much into the heading to s.44

Elias CJ Well what about the structure where it appears in the Act being followed by s.45 which has a similar effect?

Harrison Well again in my submission, admittedly it appears at the beginning of sub-part 3 and then we go on to the entitlements part of the sub-part, but it would be wrong in my submission to read too much into that so that in effect you treat the first three sections as completely independent from what follows by way of entitlements and I submit that because of

Elias CJ Well it's not independent, it's rather that it's the definition of what the public holiday is to which the entitlement's then attached.

Harrison I can understand the argument but that in my submission, to go down that track does leave you with the two regimes approach.

Elias CJ Yes but one is a very limited one.

Harrison Yes it may be limited but it leaves

Elias CJ And indeed I wonder whether it's right to say it is two regimes because the entitlement remains constant.

Harrison It is certainly on the majority's approach and on Air New Zealand's approach two regimes, and on that approach you are left with asking what kind of agreement, because you need an agreement to work on a designated public holiday in order to trigger these entitlements. Now if a s.44(2) exchange or call it what you will is not an agreement that triggers the entitlements in the sense of vesting them, then you have to postulate some other kind of agreement that does, otherwise we get into the situation where you've done your exchange under s.44(2); your exchange day comes up and the contract could say this. There's nothing to stop the contract from saying on the exchange day the employer may direct the employee to work on the exchange day in return for a further exchange day. Unless you say

Elias CJ But that's okay because you just end up with the entitlement you would have had if you were observing Easter Friday for example.

Harrison No, because if s.44(2) can bite once without entitlements vesting, it can bite again and an employment agreement that was appropriately drafted could have that effect. That's a point which Justice Chambers makes in his

Tipping J Mr Harrison I find all this remarkably complicated. This is supposed to be a simple piece of legislation. If I work on ANZAC Day say, perfectly consentually, either because I'm required to or because I'm agreed to, in exchange for say the 22nd of August, surely ANZAC Day still remains ANZAC Day. ANZAC Day for me doesn't become the 22nd of August. I am working on a designated holiday, and therefore I'm entitled to another holiday and time and a half. I can't understand why this has got so complicated.

Harrison Well with respect Your Honour, what Your Honour has just put to me is entirely my argument but it runs quite counter to as I understand it what the Chief Justice has put.

Elias CJ The question's been put to you

Tipping J Well Mr Harrison it does run counter to the Chief Justice's proposition. I don't think she's suggesting that if you exchange Good Friday for some other day you don't get time and a half for working on Good Friday.

Elias CJ Yes I am.

Tipping J Oh you are.

McGrath J That's the way I understood it. Mr Harrison can I come back. Is it in the focus of the point the Chief Justice is putting to you the scope of the phrase 'observed by the employee', because it seems to me that your argument is really as you said of observe just that simply means taking the holiday but the argument the Chief Justice is putting to you would mean taking the holiday with all of the entitlements that you get on a public holiday, and so it seems to me that you've probably got to address that concept of 'observed by the employee' a little more to encourage us to take that as a narrower.

Tipping J Wasn't that a key point in the majority's reasoning, this word 'observed'?

Harrison Yes.

Tipping J Yes, I think that's the crux of it if there is to be a crux.

McGrath J Observed by the employee – I think you've got to look at the whole phrase rather than just observed. It doesn't talk about being observed by the employer for example.

Harrison Yes, yes.

Anderson J It seems to have envisaged for example the emigrant from the Republic of Eire who says I don't want to take time off on Queen's Birthday, I want St Patrick's Day instead.

Harrison Well

Anderson J And so St Patrick's Day then becomes the public holiday and the difficulty here is because of s.44(2), if it wasn't for that there would obviously only be a single regime where you could only contract out pursuant to an employment agreement, and you'd always get time and a half and alternative days so there's some particular reason why s.44(2) is there and it seems to be linked to national, cultural or religious matters because of s.3 which refers to public holidays by reference to those cultural factors.

Harrison Yes, well all I can submit is that is reading too much into a drafting change which occurred at the Select Committee process and which

Elias CJ Do we have anything on that legislative history that throws light on what's meant by 44(2)?

Harrison Yes we do have some legislative history which is of significance. I may need to come back to the Bill as introduced but if we go to the appellant's bundle, page 25, I'd like to just go through this material anyway. This is the Bill as reported back, page 25 and identified in brackets the parts

McGrath J Sorry, which page are you at?

Harrison Page 25 of the appellant's bundle. So there is a reiteration there as I identified of the key minimum entitlements – 11 public holidays a year – and then over the page summarising Unions and employees supported the Bill in terms of clarifying the law and providing increased minimum standard. Employers etc welcomed the attempt to clarify the law but had concerns about the increase in entitlements and the ensuing costs, and that no doubt includes the time and a half. Then we go to page 30 of the pagination 'public holiday entitlements'. The Bill provides for all employees to continue to receive 11 public holidays annually, sets out a framework whereby employer and employee may agree to observe the public holidays on alternative days if they wish

Tipping J The framework presumably is the sections 56 to 61.

Harrison In my submission.

Tipping J Yes.

Harrison Also it specifies pay entitlements

Elias CJ Not necessarily at all. That may be a specific reference to s.44(2)

Blanchard J When did 44(2) go in? Did it go in at that stage?

Harrison Yes I'm just coming to that Sir if I may just proceed through. Then submitters were concerned that the public holiday entitlements in the Bill would be too onerous. By majority we recommend substantial redrafting of the Bill to make it explicit in what circumstances the public holiday entitlements would arise; clarify the intended Bill and then held as. This is effected by deletion, amendments and then we go on, and the insertion of new clauses 46, 47, etc, etc, as below. Now over the page my marginal notes in handwriting are to assist in identifying the clause numbers by contrast with the corresponding section. 'Payment of time and a half on a public holiday'. The Bill provides for payment of time and a half for work on a public holiday. Many submitters were opposed to this provision, arguing it would impose significant costs. Additionally they argued that it would be unnecessary to pay time and a half as employees would already be entitled to a day off in lieu of a public holiday. Sympathise however underlying principle behind this provision is 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 employee has missed out on the opportunity to spend quality time etc. Now that must be referring to what I've been calling a designated public holiday, and we're talking about the generality of employees, not this minority religion or cultural person

Elias CJ Well it could be referring to – you keep talking about a designated public holiday, but it could well be a public holiday identified pursuant to s.44.

Harrison Well I'm using the word designated public holiday which is my only expression just for the sake of clarity. I'm using that so that Your Honours know what I'm talking about

Elias CJ Well are you talking about a s.44(1)?

Harrison Yes.

Elias CJ Alright.

Harrison And I'm just using that expression so that it's a shorthand for s.44(1), not 44(2).

Tipping J Mr Harrison at the risk of causing some irritation, if they had wanted the subsection to be regarded as a public holiday surely they would have said J, K, L any day agreed to be a substitute day as per clause 2.

Harrison If they wanted another day deemed in law to be a public holiday they would have said so either that way, in that way or some other way.

Tipping J Well that would have been one way of doing it, no doubt there would be others. But far from doing that, they've actually called it not a public holiday but an alternative holiday.

Elias CJ Well, where?

Tipping J In s.56.

Elias CJ Well that begs the question.

Harrison Well the point is equally that in s.44(2) they have called it another day rather than

Elias CJ Yes, another day.

Harrison Another holiday

Elias CJ Yes.

Tipping J Well they haven't said yes on an alternative day.

Harrison They haven't said another public holiday. But my point is this that if we read through, the concern here, the Select Committee is saying look employers are saying we don't like the time and a half and the Select Committee is saying well we're actually going to make it even clearer that the entitlements vest here, and this is the middle of page 31

Elias CJ But they do do that. I mean nobody's really contending that they don't once the s.50 etc regime applies. The question is what is a public holiday? I don't read anything in the Select Committee report which bears on that question of definition under s.44.

Harrison Well in my submission as a matter of natural use of language you would not get a Select Committee using an expression like 'public holiday' in the context of legislation that talks about quality time with family and friends on special occasions. They are not using public holidays to say well we actually also mean a substitute or exchange day, which isn't a public holiday at all. The natural use of language, the reading of all this material is there is one regime and we are talking about the consequences of working on a designated public holiday. My submission is it's impossible to read this material in its totality in any other way.

McGrath J What you're really saying Mr Harrison is that there's nothing in here to suggest that in expressing sympathy with the submitter's views, they're indicating the answer will be to allow you some scope to contract out if you can get an employee to agree to transfer the day to another day. There is no suggestion of that kind. They're really signalling a firm adherence to the concept of extra pay if you have to work on a public holiday.

Harrison That's so indeed and halfway down page 31 they say well not only that but we're going to clarify clause 46 that an employee who works on a public holiday is entitled to one and a half times and to avoid any misunderstanding we're going to insert what is now s.52 to specify that new employment agreements must include provision relating to this time and a half payment. Now if we go to s.52, but keep that open because I want to come back to it, s.52 says that new employment agreements must include provision that confirms the right of the employee to be paid in accordance with s.50 for working on a public holiday. Now

McGrath J Sorry, you're looking at s.52 as of before the amendment are you now?

Harrison Yes, sorry

McGrath J At page 12 of your bundle, is that the?

Harrison Yes, it's before and after the amendment although the change is not of great significance. You've got s.52, ss.2 before the amendment and again I submit that that must be referring to working on a designated public holiday, and s.52, the new one, which is on the righthand side in small print is to the same effect.

Tipping J I wonder Mr Harrison whether one could properly read this concept of public holidays as simply meaning on any of the days listed in 44(1)?

Harrison That's my submission, that's my submission.

Tipping J But the other side wants to argue to they, or do argue, that somehow or other the other day becomes a statutory public holiday?

Harrison That is their argument and that is the Chief Justice's point, but if you

Elias CJ Well I'm sorry I'm not adopting the argument put by Air New Zealand. I am referring to the narrow interpretation of s.44 by which a substituted day in terms of 44(2) takes on the characteristics of the public holiday - a very narrow provision.

Harrison Yes, I understand that Ma'am.

Elias CJ I mean I think the arguments that you're addressing to us on the legislative history are very telling against the wider interpretation contended for by the respondent, but I don't think they quite meet the point that I have been raising with you but I understand your argument on that. Your argument is that it's 44(1) that identifies the public holiday, 44(2) has nothing to do with the scope of public holidays, and I think that's probably as far as I need to exploit it.

Blanchard J Mr Harrison I wonder if you'd mind going to page 36 which has the previous version of what became 44.

Harrison Yes, I was going to take Your Honour to this, yes.

Blanchard J It seems to me that if they hadn't amended what was then clause 38, it would have been possible either in the employment agreement or by some other form of agreement for there to be a specific agreement that for example Christmas Day was February 14th, just to take a day at random.

Harrison Yes.

Blanchard J Now that was struck out and ss.2 came in instead. Does that indicate that ss.2 had a more limited effect than you would have had if the opening portion of the old clause 38(1) had continued?

Harrison That certainly is a tenable point.

Tipping J Well I think it's crucial. It's taken it out of the definitional subsection and put it somewhere else.

Harrison So that a designated public holiday can only be the named eleven.

Tipping J Yes as per the statute, not as per the agreement.

Elias CJ But that isn't the amendment that perhaps is of significance

Blanchard J It depends on the view one is taking.

Elias CJ Yes, well it does, but it certainly can't be imposed on you by a formula in the employment agreement. There needs to be specific agreement for that treatment which is what 44(2) provides for. This would have permitted really what Air New Zealand is arguing for here.

Harrison Yes and if we go back to page 31 of that same document that's why it says halfway down 'however it is clear that the Bill as introduced contains uncertainties concerning payment if an employee is required to work on a public holiday and thus there's a whole lot of things..'

Elias CJ Yes.

Harrison Now if I can just come back to my point about what is now s.52 which inserts the provision in every new employment agreement. Realistically in my submission why would the legislature be putting this in if it is a provision which can be rendered nugatory by an agreement under s.44(2) as to observance on another day. That s.52 must be referring in my submission to the designated public holiday or it would be worded quite differently, otherwise you just go around and around in circles within the particular individual or collective employment agreement.

Elias CJ Well, except the employment agreement doesn't enter into 44(2). There has to be a specific agreement on the narrow interpretation of 44(2) so the employee is in the whip seat.

Harrison Well no, in my submission the 44(2) agreement can be in an employment agreement. When you say it's in the whip seat we go to my alternative scenario of Mary the struggling cleaner. If she gets a take it or leave it offer of employment and feels required to take it and it does what Air New

Zealand says can be done then it's any employment agreement and it's under s.44(2) ex hypothesis. Can I go back

Tipping J I'm wondering what the policy would be of allowing this escape from what seems at least to me to be a clear indication that if you work on any one of these 11 days you will get time and a half. Now I can't quite see what the policy would be for allowing this particular escape.

Harrison Well none in my respectful submissions. One's completely counted to s.3 and all of the pronouncements during the legislative history.

Tipping J Well I'd be very interested to hear from Mr Toogood on that because it just seems to me to be an odd consequence.

Harrison Can I just go back Your Honours to our stroll through the provisions of the 2003 Act and just look in a little more detail at some of this language? If we go to the bundle, page 11, and the part of sub-part 3 that starts with s.46. You've got the basic entitlement in s.46(1), then s.47 'when an employee is required to work on a public holiday', I think Your Honour The Chief Justice proposed that s.47 could be the other empowering provision on a two-regimes approach and that was the submission for Business New Zealand in their written submissions. My submission is that s.47 is a stand-alone provision and not an empowering provision. All that it does is restrict the ability of an employer to require an employee to work on a public holiday – I say a designated public holiday – by requiring two things to be established. (1), that the employment agreement requires that anyway. So first of all you've got to be able to say 'you must work on Christmas Day', the agreement says that, but 47(a) says that the public holiday must also on top of that fall on a day that would otherwise be a working day for the employee. So if you've got a Monday to Friday employee and the public holiday falls on a Saturday, even if the employment agreement says we can require you to work on any public holiday, under 47 the employee can't be required because Saturday would not otherwise be a working day for the employee who works Monday to Friday only. So my point is it's a stand-alone provision that restricts the extent of requiring that can be done; it is not a provision which empowers. And another point about s.47

Elias CJ Why is there any need to have, you say it's a restricting provision, but it's only necessary to empower them in the circumstance that the public holiday falls on the working day for the employee.

Harrison What the legislature is saying here, and it comes back to this work-like balance is that even if you've contracted with your employer so that the employer has a provision that says I can require you, the work-like balance equation says well too bad because only the employee who works

ordinarily on the day in question, which turns out now to be a public holiday, can be compelled. If it's a day which would not otherwise be a working day for you, you can resist that completely.

Elias CJ But how could the employer compel in those circumstances anyway?

Harrison Well if you look at 47 and (a) was removed and all that was required was her contractual obligation, the employer could compel or require. What this is saying is no that's not enough, we will distinguish between those employees for whom the designated public holiday in question would otherwise be a working day and those not. My point however is that it is not an empowering provision which enabled contracting. It's a restriction on the employer's ability to require. We also have the language in 47(a), if the public holiday falls on a day on which, and we go 48(1) again public holiday falls on a day, and 48(2) falls on a day, that language as Justice Chambers noted is much more consistent with designated public holidays which fall on working or non-working days

Tipping J Because you'd never have the alternative day falling on a non-working day would you because it would be crazy?

Harrison Well that's right. It's a contradiction in terms but also under 44(2) the agreement to observe on another day, there's no falling on the day, even on the narrow interpretation, you've picked out the day or rendered it identifiable so that this kind of language supports my submission that where throughout this part where public holiday is used it is referring to a designated public holiday, not the deemed public holiday which is another day in terms of 44(2). And 44(3) also supports that where it talks about it must not diminish the number of paid public holidays that would otherwise be available. That's an inquiry judged against the designated public holidays otherwise be available, not the another day. So those provisions I submit support my argument. Perhaps we can come to this point where we're looking at these provisions

Elias CJ I'm sorry, I'm not sure that I do understand the significance of this argument. I just wonder whether you could just re-express it very briefly for me, the significance of the 'falling on a day' terminology in terms of the interpretation of s.44?

Harrison Well if we go to the s.44(1) list of public holidays, some of them may be identified by a date. The 2nd of January is an obvious example.

Elias CJ Yes, yes.

Harrison But most of them will be observed on or fall on if you like different days of the calendar year in year out. Christmas Day may be on a Sunday in the first one year etc, etc.

Elias CJ Yes.

Harrison So the expression 'fall on' is entirely apt to describe a designated public holiday because in any one year you it's not automatic and you've got to work out where it lands in terms of a particular date of the calendar. If on the other hand you are doing what Your Honour is putting to me under s.44(2) and you are taking a designated public holiday and you're saying 'I will observe it on this other date', and that is a deemed public holiday, when come to s.46 and following, one the 44(2) exchange has occurred you've got a deemed public holiday and everywhere in ss.46 and following public holiday means deemed public holiday.

Elias CJ Yes.

Harrison The language falls on a day is not apt to describe that kind of concept.

Elias CJ Well it's not inapt, it's not necessary to be as exact, but it covers it.

Harrison The language falls on a day

Elias CJ And in the case of substituted festivals say, the same thing may be appropriate. The Jew who wishes to observe Yom Kippur, this language is going to be important there in terms of the entitlement, because that's a shifting date.

Harrison Well by definition if s.44(2) operates as Your Honour is putting it to me, it will have been agreed for example that Christmas Day goes to Yom Kippur, but when we look at these entitlement provisions, and ask what, and the lack of entitlements that follows, how does that square with say any of these sections, ss.47 and following, where the language falls on a day, it doesn't square with that and moreover it doesn't square with the idea of the public holiday falling on a day which would otherwise be a working day for the employee, because if the agreement under 44(2) has been reached, Yom Kippur is not a working day; they've agreed that it is a day off.

Elias CJ Well no they've agreed that it will be the day on which the public holiday is observed so it's treated as a public holiday. If it falls on a working day week then the consequences provided for under the entitlements of public holidays follow.

Harrison The consequences are an absence of entitlement unless and until the employee actually works on the day which everyone has agreed he or she will not work on. There are no entitlements. The argument for Air New Zealand and the majority is that there are no entitlements that attach to another day the subject of a s.44(2) agreement, so that none of these sections

Elias CJ I understand that and I have difficulty with that. I'm not putting that to you.

Harrison Right.

Elias CJ But for example, using Yom Kippur as the example, why would an employer agree ever to let Good Friday be observed by a Jew on Yom Kippur, because if it fell on a working day week he would not only have to pay time and a half, well he'd have to pay time and a half for Good Friday and time and a half for Yom Kippur on your argument.

Harrison No.

Elias CJ Oh, you'd say that he doesn't have to pay time and half for Yom Kippur because that's simply a, but he doesn't achieve his purpose of securing observance of a holiday of significance to him.

Harrison As I say in the submissions, in practical terms it's only going to be where the employer's operation is going to be working on the designated public holiday that this idea of an exchange can crop up, so the employer is going to have to pay employees time and a half anyway, thus when the Jewish employee comes along there's no financial loss to the employer to have the Jewish employee work on the public holiday because the employer's going to be paying employees to do that. If the employer isn't working its operation on the public holiday the question doesn't arise so I suppose my submission is that we can't take that one quite unlikely and certainly rare scenario and treat that as dominating the whole analysis of these provisions

Elias CJ Anyway I might be quite Australian in thinking that it's not a fixed date. I can't remember the answer.

Harrison There are other

McGrath J But what you're really saying Mr Harrison is that in reality there's no fiscal disincentive for the employer in agreeing to this sort of arrangement under s.44(2)?

Harrison Yes, if we're concerned about this minority.

McGrath J Yes, it's not just such a small matter, you're saying there's no disincentive anyway because he's going to have to pay someone to work on the public holiday?

Harrison Yes.

McGrath J The point's better I think than you are putting it.

Harrison Yes, yes.

Elias CJ Well I suppose except that if you take Christmas Day but which may fall on a – oh then there's the substituted arrangements aren't there? I'm thinking about a holiday that actually falls in a particular year on a non-working day, whereas the exchange holiday may in fact fall on a working day, the employee would not be entitled under the scheme of the entitlements in the legislation to time and a half pay.

Harrison If the designated public holiday falls on a non-working day for the employee, then we're not going to get into a s.44(2) scenario. It just doesn't arise. It's only where the designated public holiday falls on a working day there has to be a

Elias CJ Yes, yes, I understand that but a substituted holiday may fall on a working day.

Harrison Must do because otherwise you're not getting a day off.

Elias CJ Yes.

Harrison If you substitute a day on which you would not have been working, well you breach section

Tipping J Well you're crazy

Elias CJ No, no, I'm putting it badly, I mean the other way around. You substituted a designated festival which happens to fall on a working day in a year where a designated public holiday falls in the weekend. For you the impact is that a day of significance to you which you had agreed you would use as the day of observance of the public holiday is a day for which you would not be entitled to time and a half. Anyway, I did start by saying that perhaps we shouldn't get into hypotheticals and I ended up leading you into one.

Tipping J Time for a holiday, Chief Justice.

Elias CJ Time for morning tea, thank you.

11.33am Court Adjourned
11.42am Court Resumed

Elias CJ Now Mr Harrison we've been very assisted by the discussion, although it may not have seemed so at times and I think that you're probably quite well through the points you want to make to us, but we'll try not to interrupt as much.

Harrison Oh I'm perfectly happy to be interrupted and I'm sure I will be if I may say so. I just want to make a few more points about these statutory provisions and referring to the appellant's bundle at page 12. No, go back to page 11. I'll come to the transitional provisions separately. The argument I'm advancing of course involves one regime and has s.44(2) dove-tailing into the entitlement provisions, not perfectly but pretty well and the language of 47(b) and 48, where it refers to 'working under the employee's employment agreement is to be noted because it can be contrasted with whether in an employment agreement or otherwise in s.44(2). We note that that language appears in 47(b). Strangely 48(1)(b) 'the employee works on any part of the day' doesn't have in accordance with his or her employment agreement which does however appear in 48(2)(b(i), but the point I'm making is although that language appears, my submission is that which Justice Anderson put to me earlier that this doesn't mean that there needs to be a separate agreement regime but rather it really is just to say that the employee is working within the scope of her employment if your employer invites you out on his yacht on Anniversary Day Regatta. You're not working in accordance with your employment agreement even though it may be an employment-related occasion. Now if we move on to, I'll skip the transitional provisions but come back to them, if we move on to s.56,ss.1, page 13, the language there is 'an employee is entitled to another day's holiday – omit words - instead of a public holiday if', and that is called an alternative holiday. There is a similarity, not an exactitude of similarity between that wording and s.44(2). The idea that there is another day, another day's holiday instead of, there's an exchange for the public holiday of an entitlement to another day's holiday, so that these two provisions can dove-tail and work together perfectly well in the single regime. And again over the page, s.56(1)(a) uses the expression 'the public holiday falls on a day'. Section 56,ss.4, is it significant for my argument that public holiday means a designated public holiday. It says 'and employee is not entitled to an alternative holiday under this section if the employee works for the employer only on public holidays'. That must mean designated public holidays and it's to avoid kind of an abuse of the system where you've got someone who only comes in that you've contracted with someone to work Christmas Day, Boxing Day specifically.

They get their time and a half but they don't get their alternative holiday because that's the nature of the employment, supports the interpretation I'm urging as I say that where a public holiday or a holiday is used, it means a designated public holiday likewise s.59(1)(b) which deals with the employee on call situation, the provision does not apply to an employee on call if the employee works or is on call only on public holidays. Now the alternative holiday regime, s.57, I think Your Honours are on top of this. The point that s.57 contains its own mechanism for determining when the alternative holiday will be taken under ss.1 by agreement and it must be a day that would otherwise be a working day but ss.2, if you can't agree then the employee can just give notice, and that's why I was urging that the one regime approach which doesn't narrow s.44(2), enables all manner of sensible leave pooling arrangements. There's no requirement of certainty or identifiability of the substitute day. Section 61 allows a sort of cut-off if the employee simply never gets around to taking the alternative. It can be subject to a negotiated payment. You will note also s.61(a), which on the righthand side of page paginated 15, this provision applies to an employee who's required or has agreed to work on a public holiday, doesn't because of illness for example. Subsection 2, if this section applies the public holiday must continue to be treated as a public holiday - again my argument about what a public holiday means. So the statute in my submission supports the approach I am urging. I'd like to go to the, I think if we go back to my appeal submissions we got a little way down page 6. I can take the next bit of analysis as read and I want to move to the statutory history. I'll need to come back to page 13 for those submissions. If we go, this is not in the written submissions, but we're really at around about page 15 of my submissions in support of the appeal. If we go to the Holidays Act Advisory Group Report

Elias CJ What are you taking us to this legislative history for? What point is it going to eliminate?

Harrison That what was intended was always one contracting out regime, not two primarily Your Honour. If we go to the respondent's bundle of authorities, tab 4, the second report of the Holidays Act Advisory Group, using the pagination of that report which on the page is dated 17 May 2001, the report states the Group's position sometimes separately where employer and Union interests differ and sometimes jointly and they note at para.5 on that page 'the primary issues turn on the objective of public holidays, whether an employee should be paid for a public holiday, a designated public holiday I would submit, regardless of whether it would otherwise be a working day for the employee, the level of payment, ie, whether penal rates should be paid'. The continuing on in we go to the page that has a 4 at the bottom and the paragraph numbering begins at 4.7 – Your Honours have that. 4.8 'What rate of pay should an employee be paid for working

on a public holiday (in addition to a day in lieu)? – (a) Employer Position: The rate of pay for an employee who works on a public holiday should be rate and a half unless negatived or varied by agreement, so the default time and a half payment which the employers were prepared to support'. But you had to contract out of your entitlement to time and a half. (b) The Union Position: 'the rate of pay for an employee who works on a public holiday should be rate and a half, which is consistent with the Labour Party election policy. The improved legislation will include a minimum additional payment plus a day in lieu for those who work on a public holiday'. And it makes nonsense I submit of this material to say well it's not merely talking about designated public holiday, it's also talking about the thing that you agree to in substitution. Then 4.12 over the page 'Who should determine when a day in lieu is taken' – (a) Employer Position: by agreement etc, etc, and then over the page (b) the 'Union Qualifications' set out, and I don't need to take you through that. Page 7 of the document towards the bottom an answer to the question whether all employers should be covered by the same rules, Default penal rates for public holidays: Employer position – 'the rate of pay for an employee who works on a public holiday should be rate and a half unless negatived or varied by agreement, and the Union position is set out there. So there was a great deal of consensus in the working group report that you work on, as I call it, a designated public holiday, you get paid time and a half, and yet the interpretation we've ended up with, with the majority of course effectively negates that. Page 19 of the document, 7.4 deals with an aspect of the contracting out asking about providing more favourable entitlements. The Employer Position: the entitlements offered by an employer should be measured against each of the statutory entitlements on a package basis. Union position there-stated.

Tipping J When did the change in terminology from statutory holidays to public holidays take place Mr Harrison? They used to be called statutory holidays didn't they or am I right in thinking that?

Harrison There's always been a distinction between annual holidays and public holidays. Maybe, I'm not sure when that came in.

Tipping J Alright, that's not a big point.

Harrison But reviewing this material you couldn't possibly, where there is quite a significant degree of consensus and it heads on into legislation, you couldn't I submit possibly interpret this as - we support legislation that has two regimes. One is you get to do call it an exchange or call it a transfer depending on whether you're the majority or Air New Zealand, and you've got one regime with no entitlements whatsoever, but if you get yourself contract in different terms, you've got a second regime and all of the statutory entitlements are automatically coming to you.

McGrath J But isn't that what the employers are consistently saying, that that time and a half unless negatived or varied by agreement

Harrison Yes but one regime, not two. My point is no one could suggest that anyone throughout this build-up to the Act was saying we will have two contracting out regimes depending on how the parties expressed themselves with diametrically opposed consequences. If you manage to express your contracting out as in terms of the narrow interpretation of 44(2), it's an exchange for the express purpose of observance on a different day you have one regime, but if you failed

Elias CJ But it's not a different regime though because the consequences are the same, but anyway

Harrison No, the consequences with respect are diametrically opposed. If you bring yourself within the interpretation, if you bring your contract within s.44, ss.2, interpreted as Your Honour has been urging on me, you get no immediately vesting statutory entitlements. If your contract is a contracting out which agrees that you will work on a designated holiday but it falls outside that narrow ambit, you do get vested statutory entitlement. That's the two-regime approach. It's Air New Zealand's submission

Elias CJ Well on any view that I've been putting to you there are vested statutory entitlements and they're the same. The issue is whether the public holiday moves by agreement that's all, but

Harrison With respect Your Honour they're not vested as I'm using the expressing. If on the approach to s.44(2) that Your Honour is putting to me, your Jewish employee gets Yom Kippur. Yom Kippur has no vested statutory entitlements. All it has is the potential for a statutory entitlement further down the track if that employee says 'oh I'm not going to work Yom Kippur, I'd love to give that up in return for another day further down the track', then that's when the entitlements would bite. They are not immediately vesting, whereas on my approach whenever you work on a designated public holiday, bang it vests, time and a half.

Anderson J Can I suggest this analysis to you Mr Harrison? A public holiday under s.44(1) will fall either on a day that the employee works or on a day that the employee doesn't work. If it falls on a day that the employee works then the employee will work pursuant to the provisions of s.47. If it falls on a day when the employee doesn't work, but the employee in fact works, the route will be through s.44(2) and s.48(1). Section 48(1) links to 44(2) and s.48(2) links to s.47. The consequences are the same and this would explain the difference of terminology about working in accordance with

the employment agreement s.48(2) compared with s.48(1), so if you come through the s.44(2) route you either don't work on that day or if you do work which can only be by agreement, you get paid in accordance with s.50 and you get effectively another day because you're going to observe it on a different day. So the consequences are the same but the routes are different.

Harrison Yes, the consequences are the same as regards the time and a half payment but

Anderson J And having another day as well.

Harrison Yes, but the one difference is that your other day in the one instance attracts the

Anderson J Is more specific.

Harrison Attracts the machinery, to use Justice Tipping's terms, the machinery attached to an alternative holiday and in the other case it doesn't.

Anderson J Yes, you probably have to agree a specific day in some sense or be able to define it by the time the agreement's entered into.

Harrison Yes, well as Your Honour says either of those interpretative routes achieves the result I'm arguing for

Anderson J Yes, but it also achieves time and a half and another day.

Harrison Yes, but in my submission it's actually simpler to approach it on the one regime basis as I have argued, but I wouldn't discourage Your Honour

Anderson J It's one regime in the sense that if you happen to work on a public holiday when you would not otherwise be working, you get time and a half and you get another day, but it just comes through different routes.

Harrison But on that approach there are two different kinds of other day. One is simply another day as agreed and the other is the alternative holiday with intended entitlement.

Anderson J Yes, yes.

Harrison Yes I can see that and for my purposes I suppose I would be while urging my interpretation, my clients no doubt would be happy with either

Anderson J I was just trying to find an explanation for what seems to be surplusage or why there is a distinction between s.48(1) and s.48(2) with reference to employment agreements.

Harrison Yes, yes, well that might well make sense of that one, yes Your Honour.

Anderson J Just a talking point really.

Harrison Alright, if I need to take Your Honours through other aspects of the legislative history. This is page 16 of my submissions in support of my submissions in support of the appeal para.43. I have been through that Bill as reported back material and the drafting change. I haven't been to the second reading debate material. Let's just remind myself whether that is of sufficient assistance. This is our bundle, the appellant's bundle page 62. The hansard pagination begins at 10453 and I have marked the passages in brackets. Over the page, 10454 the Minister who's moving the reading says 'in terms of public holidays one of the key provisions in the Bill is that all employees should genuinely be paid rate and a half for the time they work on a public holiday

Elias CJ Sorry I've lost you, where are you?

Harrison Sorry, this is page 63 of our bundle

Elias CJ Oh 63 yes.

Harrison The pagination and at the lefthand which is page 10454. The first brackets. 'The key provisions is that all employees should genuinely be paid rate and half for the time they work on a public holiday. This acknowledges the fact that the employee is sacrificing a day of national, religious, etc, etc. As well as this we want to ensure that employers, employees and Unions understand what the requirement to pay rate and a half for time worked on a public holiday means for them, and that employees are genuinely provided with that. To address these concerns the Bill now provides that employment agreements will have to include a specific provision stating that rate and a half will be paid for work on a public holiday'. Further down, 'minimum standards such as those provided in the Bill will promote fair dealings, protect vulnerable employees and prevent a race to the bottom'. That's probably all I need to refer to. Again supporting my argument I submit that public holiday means in the popular sense a designated public holiday and that's what they were debating and the Government was very clear and firm on the proposition that you got paid time and a half for working on a designated public holiday. Not surprising because that was the employer position on the Joint Advisory Group anyway. Now I just want to go back to an alternative argument which I am advancing which is at page 13 of the

appellant's submissions, under the heading Further Obstacles to Air NZ's Reliance on S.44(2). This arises out of the transitional provisions which we skimmed over to some extent and these are at the appellant's bundle, page 12. So the argument at page 13 of the submissions is that even if Air New Zealand is right, and s.44(2) empowers an agreement having the effect that it contends for, factually the position is that the subject collective agreement was not one entered into pursuant to s.44, ss.2. It's effect in public holidays terms is to be determined by applying the transitional provisions, the Act being plainly retrospective, the transitional provisions are ss.51 and 53 and the provisions worked in a staged way as I have set out and explained in paras.33 and 34 of the submissions. Initially and at the time of the Employment Court judgment in this case, s.51 applied because the collective agreement was an existing employment agreement as defined and for 12 months after the Act came into force Air New Zealand was able to pay its pilots – this is ss.2 of s.51 – for work on a public holiday as part of the employee's regular pay, if the requirements of ss.3 are met, and those are set out specifically 3(a), (b) and (c). We go to my para.33 where I note the course that the case took in the Employment Court. The Employment Court held that s.51 applied in the present case but could only be relied on by Air New Zealand if its terms were satisfied, obviously. The Court went on to hold later that the s.51(3) requirements I've just referred Your Honours to were not satisfied. The result was that Air New Zealand could not rely on s.51(2) as a defence to the allegation of underpayment in breach of s.50 that was because the time and a half payment objective of s.50 was not met. The Employment Court so held on the facts. Its conclusion on that issue was not appealed, thus if indeed the transitional provisions applied to this agreement then the cross-appeal necessarily fails for that reason which was advanced in the Court of Appeal in any event. Now Air New Zealand seems to suggest that the transitional provisions can simply be ignored and the agreement can be judged directly against s.44, ss.2.

Tipping J But presumably for consistency they must be saying that the original public holiday ceases to be a public holiday. It's the same argument isn't it? The way they escape is by saying that the dye in s.44(1), which is presumptively a public holiday, ceases to be a public holiday if there isn't a substitution. That's their only escape I would have thought, the same argument. We're back to the same point.

Harrison But no exactly because s.51 approaches the whole thing transitionally in a different way. It says well you can continue with your existing pooling type of arrangement, but only if the requirements of ss.3 are met. The Employment Court held that they weren't met

Tipping J Well on the premise that this was still a public holiday.

Harrison On that premise, yes.

Tipping J Yes, it's the same point isn't it?

Harrison Well I'm not resisting the point Your Honour's making to me but I'm not sure it's the same point.

Tipping J Well we'll find out.

Harrison If we can just go to the leave provision as well. We haven't looked at that yet, volume 2 of the case on appeal, page 186.

Elias CJ Sorry, which volume?

Harrison Volume 2 of the case.

Elias CJ Yes, thank you.

Harrison Now the whole s.16 leave provision needs to be read as a whole but the critical part of it is 16.1.1, second sentence. 'The specified number of days of annual leave do include provision for statutory and public holidays as specified in the previous Act' because this pre-dates the enactment of the 2003 Act. Now reading that provision and s.16 generally however one may, in my submission it neither effects an exchange for the purposes of "observance" not does it effect a transfer, if transfer is the concept involved here. Air New Zealand says transfer is the concept. So read them how they may, this provision doesn't set about doing what Air New Zealand's argument premise is that it has to do, so just purely in terms of the contract itself there is a further obstacle in this area. Now that's all I wanted to say about these further obstacle points. The submissions from page 16 on I critique the majority reasoning and we can take those as read unless Your Honours have any questions about that. The cross-appeal issues are addressed in the written submissions and I do not think I need to respond further to that at this stage because if need be I understand I'll have a right of reply on that aspect anyway.

Elias CJ Could you just pause and I'll enquire whether there is any questions on the written submissions. Thank you.

Harrison In that case with a nod in the direction of Mary, who should not be forgotten here

Elias CJ Do you want to conclude with Mary Mr Harrison?

Harrison I also provided incidentally before we get to Mary an extract from the Employment Relations Act 2000, just to note that it is in our statutory

materials dealing with employment relations that there is an acknowledgement, well one would not be surprised by, that the legislation passed by the present Government has been assiduous in addressing the inherent inequality of power in employment relationships, which can of course cut both ways, but certainly includes the employee power imbalance. If Mary can be taken as read I don't know that I need really to say anything more about her except that this is as Business New Zealand lamented before the Select Committee when it made its submissions, this is one size fits all legislation and merely because Air New Zealand considers it will have difficulties that of course is by no means decisive. There are other people for whom the contracting out implications are much more serious than those represented by a strong and active Union, such was the Pilots, and it is in my submission, having regard to the Parliamentary materials, quite clear that Government had such people as Mary in mind when legislating here, and if the Air New Zealand argument is right I submit, it's not going to be simply the kind of Yom Kippur spot that will be appearing, there will be a whole lot more Harrison variance than that with employers striving to bring themselves under s.44(2) narrowly interpreted or otherwise. Unless I can be of further assistance those are my submissions Your Honours.

Elias CJ Thank you very much Mr Harrison. Yes Mr Toogood?

Toogood Thank you Your Honours. I want to begin by, if I may, taking Your Honours back through the statutory provisions beginning at s.3 to emphasise those provisions which the respondent says lead inevitably to an acceptance of its view and the view accepted by the majority in the Court of Appeal that what we are talking about here is simply the transfer of entitlements from one day to another without any reduction in an employer's obligations or any reduction in the benefits to which an employee would be entitled if the transfer did not occur. The first, and in my respectful submission, most important point is that the Act deals not so much with the giving of a day off on public holidays, but with the observance of public holidays, and I say that because it is important in our submission for the Court to understand and appreciate that a public holiday may be observed in terms of the Act even though an employee works on the public holiday and never gets a day off. The statute does not guarantee to employees, nor does it mandate to employees 11 holidays. It simply provides that certain days, 11 days in the year must be observed as public holidays in certain ways. How those are observed will depend on whether or not the days of observance would otherwise be working days for the employee if it were not for the intervention of the public holiday regime, and whether or not the employee actually works on that day. So s.3(b) talks about observance and that concept is picked up by the section we're dealing with, s.44(2), the question of observance, and I'll come back to that.

Tipping J Are those the two sections in which this word 'observe' or 'observance' appear Mr Toogood? Do they appear elsewhere anywhere else, because you're building a lot out of this observance concept aren't you?

Toogood Well I'm not so much building as demonstrating when we come back through all of the statutory provisions.

Tipping J But as far as I could see the concept of observance appeared only in those two

Toogood I think that's right. I hesitated because with respect but that's certainly my recollection and I was going to ask Your Honour for time to come back after the luncheon adjournment because I'd like to check or I'll ask Mr Thompson to do that now, but I think with respect that Your Honour is right. But that is significant because we say, and this is taking us to s.5, that a public holiday as defined in the Act is not simply and only a public holiday defined in s.44(1). There seems with respect to be no reason at all if the Union's argument is right, why Parliament would have defined public holiday in terms of the whole sub-part rather than merely by reference to s.44(1). And the reason it defines public holiday in that broader sense is because public holidays, as the Act uses that term, are both s.44(1) days and s.44(2) days.

Tipping J How do you get the expanded definition Mr Toogood? I mean 44(1) seems to say that these 11 days are public holidays, being the public holidays referred to under that expression throughout the Act.

Toogood Yes, because 44(2), notwithstanding 44(1), provides however, that's important, and the majority accepted that. The public holiday specified may be observed on another day.

McGrath J Observed by the employee on another day?

Toogood Yes, yes.

McGrath J Now I put that to Mr Harrison who didn't pick it up, but isn't that a narrowing expression observed by the employee. The way you're arguing it would be observed by the employer and the employee.

Toogood Well I suppose the assumption is that the employee is the one who is more likely to want to elect the change. If we're right that the employer's obligations are never diminished, or the employee's entitlements are never diminished, it's more likely than not that the transference of the observation will be at the employee's instigation. But not by any means necessarily so

McGrath J Well it's an agreement that's contemplated.

Toogood Yes.

McGrath J It just seems to me that if it's just the employee, all the employee does by way of observance is take the holiday, so that may be all that ss.2 is concerned with. Not concerned with what the entitlements would be at all.

Toogood No because the observance by an employee of Christmas Day may not entitle the employee to a holiday on that day.

McGrath J Sorry, you'll have to help me with that.

Toogood Yes, an employee may observe Christmas Day by working that day, being paid time and a half, and receiving a paid day's leave on another day which after 12 months they might cash in, so the public holiday is observed by the employee

Tipping J But how can you observe the holiday by working on that day? And that seems like a contradiction in terms.

Toogood Well simplistically with respect Sir it does, but in fact the Act contemplates the observance of a public holiday.

Tipping J Well that's like sort of saying well we'll sort of leave this language in a most peculiar way.

Toogood No, the fact that a public holiday falls or occurs is observed by reference to what happens to the employee if that they would otherwise be a working day. If that day would otherwise be a working day – if Christmas Day would otherwise be a working day for the employee, the employee must work.

Tipping J But if I'm working on Christmas Day I don't think most people would say that I'm observing Christmas Day as a holiday.

Toogood No, you're not observing it as a holiday, no, I accept you're not observing it as a holiday

Tipping J Well I'm afraid this is all getting far too subtle for me Mr Toogood, you'll have to help.

Toogood Well it's not easy legislation to understand conceptually, but if

Tipping J Well I think it's actually very easy but

Toogood But if you start from the perception that observance requires a day's leave, that is not the basis of the legislation. Observance does not necessarily, usually it will. Most of us are working Monday to Friday and on most of these occasions with the help of s.45, we'll get a day off.

Tipping J So your fundamental point is observance doesn't necessarily mean a holiday?

Toogood Yes. It doesn't necessarily mean a holiday on that day, because if Your Honour is unfortunate enough to be rostered on for duty on Christmas Day

Tipping J I've had that experience Mr Toogood.

Toogood And I want to use this by example to my learned friend's put-upon personal assistance, but if you're rostered to work on Christmas Day you will get a holiday if you want it on an alternative, you'll still get a holiday, not that day, but another day, so the observance arises because you have been time and a half for working on the public holiday and you've been given another paid day off. That's how you observe Christmas Day. There's no question in the regime contemplated by s.48 of the public holiday being observed on some other day.

Tipping J But on your case, on your client's case I understood I wasn't going to get paid time and a half for working

Toogood No you will and with respect much of the debate has been predicated on my learned friend's proposition that Air New Zealand's interpretation is to dis-entitle employees by transferring the observance from one day to another. That is not and never has been our case. It is never been our case that this has anything to do with reducing or in anyway diminishing entitlements.

Tipping J Well the statement of problem in the very first level of this case was nice and simple. It effectively said didn't it 'if you work on Christmas Day or one of those 11 days do you have to pay time and a half'. Are you saying yes?

Toogood No, I'm saying no.

Tipping J Well I'm afraid this is

Toogood I'm saying no as a blanket response. Whether anyone gets paid time and a half working on a public holiday and what the other consequences are will depend very much as the statute provides on whether or not the day would otherwise be a working day, and that's why we've resorted to using

examples, not as a way of assisting the interpretation, but as a way of testing the proposition made by the Union and by Justice Chambers that Air New Zealand, or the interpretation advanced by Air New Zealand and Business New Zealand for that is simply a device to avoid obligations under the Act. It's not that at all. The majority understood that and the Employment Court understood that. The three Judges in the Specialist Court fully understood what was involved in this concept of transfer. Where the Employment Court and the majority depart from Air New Zealand is simply in the very narrow question of whether or not the alternative with a transferred day has to be one which is identified or capable of identification. In every other respect the five Judges acknowledged that this was a perfectly appropriate way to approach the legislation, and that's the way it was under the old Act.

Tipping J Could you just answer me a very simple question Mr Toogood because I'm finding this most helpful. Can you state as simply as possible why under s.50 if an employee works on any part of a public holiday in accordance with the agreement, the employer must pay the employee time and a half just to simplify it? Now if our employee works on any one of those 11 days, why doesn't that section, forgetting everything else, mean that they have to be paid time and a half?

Toogood Because a public holiday there is used to refer to both s.44(1) days and s.44(2) days, which might be agreed in substitution.

Tipping J Not both.

Toogood Yes.

Tipping J If there's a s.44(2) day, the s.44(1) day ceases to be a public holiday.

Toogood Yes it does, yes, absolutely.

Tipping J That has to be

Toogood And if I might pick up the learned Chief Justice's Christmas Yom Kippur example. It's a very good

Elias CJ It might be quite wrong. I've had this horrible feeling that I'm wrong in suggesting Yom Kippur as a moving feast but anyway

Toogood Well I don't think Yom Kippur has any relationship to the Julian calendar for example. In fact my own research I think from memory suggested that, because I looked at Rosh Hashanah as another example and they do fall on different days, and there are websites where Your Honour could test this by finding out when

Elias CJ I'll accept what you say.

Toogood Over the next 20 years these days fall.

Elias CJ Yes.

Toogood But that's a very good example. If I may be permitted a personal comment, I remember my father being delighted that his first job was with van Staveren Brothers which was a Jewish firm and he used to get all the Jewish holidays and all the Christian holidays as well.

Blanchard J I had that happy experience in my working life.

Toogood Yes, so instead of being as generous as that the Jewish business may say let's regard Christmas Day, Boxing Day, Good Friday and the Easter Monday as utterly irrelevant for the purposes of observation. We'll just get on and if they fall in the middle of the week we'll just get on and work, and we'll substitute these other say four Jewish festivals, and the agreement simply provides that. Instead of Christmas Day read Yom Kippur. Instead of Good Friday read Rosh Hashanah, and then whenever Yom Kippur falls you first look to see whether that would otherwise be a working day for the employee. If it's not otherwise a working day for the employee then you go to s.48(1). If the employee doesn't work then the obligation to provide a public holiday is met. No question of payment arises because

Tipping J So this whole argument, the absolute crux of your argument is pursuant to one of these 44(2) agreements, there being a substituted day, the 44(1) day is deemed for all purposes, at least this purpose not to be a public holiday.

Toogood Quite.

Tipping J It's completely built on that foundation?

Toogood Yes.

Tipping J It seems extraordinary that the Courts below have wrestled with this without

Toogood No, with respect the Courts below haven't had to wrestle with this point at all. They found it very easy to accept Air New Zealand's argument on this. They have wrestled with the Union's argument and not accepted the Union's argument that everybody who works on any one of those 11 days set out in 44 must get paid time and a half, and that was the point that the majority made, if I might just go to the judgment, by saying what's the

point in allowing this say transfer of observance to another religious feast day. If the Jewish employee who's been prepared to disregard Christmas Day in favour of Yom Kippur happens to work on Christmas Day, why should they get paid time and a half?

Tipping J But would it matter if it was as clean an exercise as you and the Chief Justice have been postulating or whether they just simply say instead of the 11 days, there'll be 11 other days. I can understand the force of the reasoning when it's a direct swap from Christmas Day to some equivalent, but does it allow you to do a wholesale swap?

Elias CJ Well that's the key issue in terms of the disposal of the appeal it seems to me, but you're addressing at the moment the preliminary question of whether s.44 is interpreted as a whole

Toogood Yes I do.

Elias CJ Which is the point that I was putting to Mr Harrison.

Toogood I'll come to the disposal because the answer to Your Honour's concern about disposal lies in the concessions made in terms of the factual circumstances here.

Tipping J But I'm looking at this from a conceptual point of view

Toogood Yes I understand that.

Tipping J Not this case

Toogood No I understand that.

Tipping J I don't really mind about this case, although don't misunderstand that

Toogood No

Tipping J Please don't misunderstand that but from the point of view of the administration of this Act as a whole, does your argument apply whether it's day for day or 11 days for 11 days?

Toogood Yes, absolutely, absolutely, and again that's why invite Your Honours unless it's necessary I don't want to take you through the examples, but I do invite you to consider them because they explain how in practice, how rarely these 44(2) agreements will be reached in practice, because for most employers it's not necessary, but when they do, when 44(2) agreements do arrive there is no diminution or reduction in entitlements and this was the view of the majority. They made it quite clear it was simply a substitution.

A transference of entitlements from one day the default position being that set by Parliament, to another day by agreement between the parties. No more and no less than that, and all of the machinery provisions and the consequential provisions simply apply in exactly the same way to s.44(2) days as they do to the statutory days defined in 44(1).

McGrath J Mr Toogood you mentioned the Employment Court judgments, now if you're relying on any parts of that Court's reasoning as supporting your proposition bar the bars of a conclusary statement, I'd like you to point me to it because I couldn't see anything.

Toogood I'd like to come back to that after the adjournment because I will go to it Sir, but there may be a specific reference there that I've overlooked but it really arises from an assumption by the Employment Court

McGrath J Yes.

Toogood Because this was the regime which they have accepted in a number of other cases as well. The argument that

McGrath J If it's an assumption you conclude that, I'd like you to confirm we can proceed on that basis.

Toogood Yes I will but there are cases – the Heinz Wattie case for example is one where there's just that underlying assumption so that the proposition advanced by the Union in this case is entirely novel. No one has every suggested before that you must get paid time and a half for working on Christmas Day, irrespective of whether you've agreed to transfer it under 44(2). In other words you might end up getting both. My learned friend debunks the windfall argument, and the fact that there's a windfall is simply a consequence, it's not a reason for interpreting the statute in a different way, but there is a windfall and it might be helpful to explain how that arises. There was no suggestion that employees employed under this collective employment agreement, there's no question but that they get 11 whole paid holidays in addition to annual leave in every year. Most employees who are subject to the public holidays regime do not get 11 whole paid holidays in every year. Most employees don't get that. Whether or not you'll get a paid holiday in addition to working on a public holiday will depend very much on whether the public holiday on which you have worked would otherwise have been a working day or not, and that's what s.44(3) is all about. It's ensuring that the paid public holiday entitlement is never diminished, and we're not suggesting it should be, but the pilots here are guaranteed 11 additional paid public holidays whether or not they actually work on a designated public holiday set out in the Act. So my learned friend's argument if accepted would mean that not only

would they get 11 what he calls alternative days, but they would also get time and a half for every day they work, I'll go back one point. Under this contract most pilots would probably fly on a statutory or s.44(1) day, maybe four or five or six times a year but they still get 11 alternative holidays instead of only five or six. Most employees get alternative holidays only for the days on which they work on a public holiday, whereas the pilots are guaranteed 11, so that is the windfall argument.

Tipping J That doesn't affect the construction does it? It simply shows that they're not being hard-done by?

Toogood Yes, and it shows that there is nothing in Air New Zealand's and Business New Zealand's and the majorities and the Employment Courts interpretation about transference which necessarily leads to disadvantage to employees. It doesn't. It simply means that whatever the consequences are of working on a public holiday they will attach to the transferred day rather than to the s.44(1) day. That's all it means, and in order to get to that point you need to interpret public holidays where it appears in sub-part three as meaning both kinds of day. The transfer day and a

Tipping J Well both in one sense

Toogood Not the one for which it is the substitute.

Tipping J Both in one sense but one substituting for the other.

Toogood Yes, quite Sir, quite.

Tipping J Yes.

Toogood So that there are only 11 in total, and it's interesting because the argument we advance is the 44(2) achieves by agreement what s.45 does by statute. It's exactly the same concept, and 45(2) makes it clear that for example

Elias CJ Although of course s.45 I accept that structure argument as a powerful one but it is the case that it's made very clear in s.45.

Toogood Yes.

Elias CJ And similar language isn't used in 44(2).

Toogood No

Tipping J That argument could run against you.

Toogood You'd need to explain that with respect.

Tipping J By the very fact that it's done expressly by statute here and you would have thought that if the intention of a consensual one was to the same effect as 45, that would have been spelt out.

Toogood Again one has to go back into the history, but that is because of the special nature of those holidays.

Elias CJ And

Toogood Of the Christmas and New Year break - they have a special significance. You see on the other hand Waitangi Day and ANZAC Day there is no Mondayising so every so often we'll only get 10 or 9 days off, but Christmas and New Year is special and 45(2) makes it clear that you're not getting two bites. You don't get time and a half for working on Christmas Day and for working on the Monday. Say for example a shift or a roster requires an employee to work through all four of those days – 25, 26, 27 and 28 December, the employee will get time and a half on only two of those days, not on four of them.

Anderson J I suppose Mr Toogood an employee works on what would otherwise be a non-work day?

Toogood Yes.

Anderson J It could only be done by agreement.

Toogood Yes.

Anderson J It couldn't be an agreement pursuant to s.47.

Toogood No, because if it's otherwise a non-working day that's presumably because that's what the employment arrangements provide.

Anderson J So it has to be pursuant to s.44(2) because it's the only other enabling provision for contracting up.

Toogood I think that's right.

Anderson J And on your reproach the person who voluntarily goes along and works on a non-work day doesn't get time and a half, but if he's required to work pursuant to s.47 he does. That can't be right.

Toogood Well it depends on why they're working on the statutory day. If you simply volunteer to come in

Anderson J Well it will be by agreement won't it in reality?

Toogood Yes, but you're not losing anything

Anderson J Yes you are, you're losing the day off.

Toogood No you're not losing the day off, you're volunteering, there can be no compulsion to work

Anderson J How many people volunteer to go and work for their boss on Christmas Day for ordinary pay?

Toogood Well I suppose what I'm trying to do is envision

Anderson J Tribute to altruism

Toogood What it is that would give rise to the scenario Your Honours.

Anderson J Well usually it would be by agreement.

Toogood It's bound to be covered in one of the examples we've given because there are only four possible scenarios.

Anderson J Forgetting the person imbued with Christmas goodwill and he wants to go and help the boss, it will be by agreement.

Toogood Yes

Anderson J If it's not by agreement it will be illegal.

Toogood Yes.

Anderson J So you can only

Elias CJ I'm sorry, what illegal?

Toogood I'm not quite sure what the mischief is. If the employee has an entitlement to a day off and if it's not normally a working day then it will just be a day off, not a paid day off.

Anderson J But they go into work on that day.

Toogood Yes.

Anderson J And they can only be working on that day, which is a public holiday, by virtue of s.44(2). Section 44(2) and s.47 are the only contracting-out provisions.

Toogood No, well I suppose, I think the answer to Your Honour's question is that what Your Honour is predicating is not correct with respect because if the day is not otherwise a working day and the employee works then 48(1)(b) applies.

Anderson J Yes, and they get time and a half.

Toogood Yes, so I'm not quite sure why Your Honour suggests that there would be a scenario where an employee comes into work on a public holiday that is not otherwise a working day for them and doesn't get time and a half.

Anderson J Well they always get time and a half.

Toogood I'm sorry I must have misunderstood Your Honour's proposition which was I thought that the employee volunteers to come in and doesn't get time and a half.

Anderson J Agrees, agrees

Toogood Yes

Anderson J Agrees to come in.

Toogood Then they must get time and a half.

Anderson J And the agreement must be pursuant to s.44(2).

Toogood No.

Anderson J Well how else can they contract out?

Toogood Well they're not contracting out. The Act is applying because they're working on that day and they're getting paid time and a half for it.

Anderson J Pursuant to what statutory dispensation?

Toogood No dispensation. Section 48(1) deals precisely with the situation Your Honour's describing.

Anderson J Yes, but how do you get to that situation? How does it come about that a person is working on a public holiday which is a non-work day normally?

Toogood Well it could only be by agreement.

Anderson J And the agreement would be pursuant to s.44(2).

Toogood Not necessarily.

Anderson J What else would it be pursuant to?

Toogood Because the employee may still want to observe the holiday in the sense that I have described by getting a time and a half payment.

Tipping J By working flat out.

Toogood Well the

Tipping J That's part of your argument that frankly I find very difficult Mr Toogood.

Toogood But it's only difficult because Your Honours are assuming that the employee would be entitled to something in other circumstances which in fact the employee's not entitled to.

Anderson J He's certainly entitled to Christmas Day off for example, but they agree to come and work. They're not required to under s.47 because it's normally a non-work day. So the agreement must be legitimated by something else in the Act because generally you can't contract out of benefits.

Toogood Yes.

Anderson J And the only other place that it could be legitimated is s.44(2).

Toogood Yes.

Anderson J So

Toogood And if that's right

Anderson J Then they get time and a half

Toogood Yes.

Anderson J And they observe the day on another day.

Toogood Yes.

Anderson J So they get time and a half and another day.

Toogood No, not necessarily

Anderson J That's Mr Harrison's argument.

Toogood Because s.43 would prevent an arrangement which involved the observance being on a day which was otherwise a working day for the employee, because that would be depriving them of a right to a paid holiday.

Anderson J Well how can you ever come within the scope of 2.48(1)(b) then?

Toogood Well I mean that could well be a s.44(2) arrangement, and what it means is that you then find another day to observe the public holiday

Anderson J And you get time and a half.

Toogood And whether it's a paid public holiday would depend on whether or not the day on which they work would otherwise have been a working day. If not then they get a day off but they don't get a paid day off.

Anderson J They get a paid

Toogood The requirement to provide an alternative holiday only bites if the employee is being deprived of a paid holiday by working on the public holiday. So you see there's the possibility that an employee for whom the public holiday is not otherwise a working day might come in. There's a possibility for whom it would otherwise be a working day but they want to take the day off and then at the last minute because my learned friend is in Court the next day and says come on in that that employee would come back in, get time and a half and get an alternative day's holiday only if they would otherwise have been entitled to a paid day. For example take that example, Labour Day. Normally for my learned friend's PA she's working on Mondays. Labour Day arrives and she is entitled to a holiday and it's paid because it would otherwise be a working day for her. My learned friend says come on in. She comes in. She gets time and a half and an alternative holiday – another paid day's holiday. Let's assume my learned friend's PA works only Tuesday to Friday. She's entitled to the day off on Monday because it's Labour Day but she doesn't normally work so she volunteers to come in on Labour Day

Anderson J Or agrees, agrees

Toogood Or agrees.

Anderson J It's more likely Mr Harrison would say would you come in on Monday than she would say would you like me to come in on Monday Mr Harrison.

Toogood He'd do it nicely though, I'm sure he'd do it nicely. But she comes in on Monday and works on Monday. She gets time and a half. She does not get an alternative day.

Anderson J Well when does she observe Labour Day?

Toogood The observance is in the payment of time and a half. It takes me right back to my initial proposition. The Act does not require the taking of a day off work in order to observe a public holiday.

Anderson J How can you comply with this? How does 3 fit in then that you can't get less when you're otherwise had.

Toogood Well the employee volunteering to come in on Labour Day is not necessarily agreeing to transfer the observance to another day. Well in fact she might be and the observance is simply a day off work and that could be any Monday because she doesn't normally work Mondays.

Blanchard J But s.44(2) provides for observance on another day, not for observance by money.

Toogood No, but how it's observed on the substitute day will depend on whether the substitute day would otherwise be a working day and whether or not the employee actually works on that day.

Elias CJ I think we might need to take a pause at this stage and you might want to return to that. I should indicate that it may be necessary for us to adjourn at 3.30pm today. I hope not but I'm in some difficulties about the Silks' admissions.

Toogood Yes I understand and in a sense I hope Your Honour is because I'd like to be there too.

Tipping J Could I signal I'd like any help you can give from the Employment Court, the Specialist Courts' approach, because I think that's significant.

Toogood Yes, we'll certainly look at that.

Elias CJ Right we'll take the adjournment.

1.04pm Court Adjourned

2.17pm Court Resumed

Elias CJ Yes Mr Toogood.

Toogood I'll take a number of the points which have been raised by Your Honours just before the adjournment. Firstly, looking at the Employment Court's view of this concept of transfer which we say amounted to an acceptance of our position and also the position which are in favour with the majority. In this case it is dealt with beginning at para.40 of the Employment Court's judgment which is on page 51 of volume 1 of the case on appeal and Your Honours will note at once that in para.40 in talking about the observance or observation of a public holiday on another day, the Employment Court adopted the concept of transfer as we have done, rather than exchange which is the word that the majority in the Court of Appeal used.

Elias CJ There's nothing really in that terminology.

Toogood Not really, except that we say that there is a genuine exchange of entitlements when an employee works on a public holiday, because instead of getting the day off that Justice Anderson would have them taking, they have to work on that day, but in exchange for that they are getting something different which is time and a half and another paid day's holiday, whereas here it's simply a shifting of the entitlements without any changes at all. So it starts there and at 49 the Employment Court talks about 44(2) signalling Parliament's continuing intention. We say that's important because it really means that the provisions are mirroring or reflecting the arrangement under the old Act, 'signals Parliament's continuing intention to allow parties to make their own agreement about days to be observed as public holidays'. Then they go on to talk about the restraints; the transfer not unfettered, and that's when they start to talk about the identification of the particular day. So Justice McGrath is right with respect that they didn't directly confront the issue and deal with it. They assumed in our submission this concept of transfer which we're talking about.

Tipping J Did they talk in any place in this judgment of the definitional aspects of this problem?

Toogood No, no.

Tipping J Because I see that as key.

Toogood Well they had done that in the *Heinz Wattie* case, which is also before Your Honours in the materials. But even then they didn't go into looking at the statutory wording and looking at it from that point of view. I

suppose again for Employment Court Judges having lived with these concepts for a long time, they may not have felt it was necessary to do that, but *Heinz Wattie*

Elias CJ If they lived with it for a long time, does that mean it's to be found in earlier decisions, and in particular is it a hangover from pre-2003 legislation?

Toogood Well the concept is the same in that, and Your Honours might be assisted by looking at the respondent's materials, at tab 2, where we set out side by side the provisions of s.7(a) of the old Act.

Elias CJ Oh yes, I see.

Toogood And at ss.2 'unless the contract otherwise provides or a worker and the employer otherwise agree, then the holidays shall be'. The interesting thing about 7(a) is that the only reference to public holidays is in the title to s.7(a). There's no reference to public holidays in the text.

Tipping J Well that was the drafting that was in the Bill

Toogood Yes.

Tipping J But then it got changed.

Toogood And that is because under 7(a) the concept of a paid holiday wasn't so important and certainly the question of time and a half didn't arise. Under the new 44 it was necessary to, well perhaps necessary is not the right word, from a drafting point of view it was helpful to express the same concept as previously but in a different way so that you could then conveniently ensure in ss.3 that there was no reduction, or diminution in the total number of paid public holidays which would otherwise arise. The holidays under 7(a) had to be holidays on pay in addition to annual holidays where a worker would otherwise have a holiday and Your Honour Justice Tipping may not remember, but one of the real issues about s.7(a) in the *Telecom* case was whether or not Parliament really was being a paternalistic as the majority

Tipping J Was that the case in which I was bold enough to dissent Mr Toogood?

Toogood Yes, and I entirely agreed with Your Honour's reasoning.

Tipping J Well that's in a way shocking.

Elias CJ Shocking!

Toogood It was a question about paternalism really and whether employees had the right just to give up their holidays.

Tipping J I think the key to that case was that I didn't think the change had been sufficiently signalled. The question here is (a) you say there's not change, but if there is a change

Toogood Not on this point, yes.

Tipping J No, whether it's been sufficiently signalled.

Toogood Yes, yes and the other issue is that while the new legislation gave something which wasn't previously there, namely the time and a half, it also gave what was not in the old Act as the *Telecom* case said, and that is the right to cash in your lieu day, or your alternative holiday. So we accept that the legislation is not identical but on the question of transfer, we say there is no material difference between the way it's expressed in the old Act and the way it's expressed in the new Act.

Tipping J Well I'm not sure that that's right. There's no question of transfer in the old Act. It's a definitional question of what are public holidays in the old Act.

Toogood Or what are the whole holidays.

Tipping J Or whatever you call them. I think there is at least arguably a material difference between the presentation in the old Act and the new.

Toogood But that's only because the entitlement was very narrow under the old Act and that the entitlement was simply to a whole holiday. The question of lieu days fell by inference

Tipping J But under the old Act you could define what were to be the 11 days or more, couldn't you?

Toogood Yes.

Tipping J You could redefine it completely.

Toogood And you can do that here.

Tipping J Well that's the question, and if we can with what affect?

Toogood Yes.

Tipping J Does the day that's changed cease to be a public holiday? It still is in a generic sense.

Toogood For that employee it does.

Tipping J So you make a distinction between that employee or group and generically?

Toogood Yes, because, and that's really to pick up a point Justice McGrath raised, is why does s.44(2) talk about a day observed by the employee and that is because in a workforce you might have any number of employees who are observing, actually observing Christmas Day, but one or two might, and so their employer as far as they're concerned is observing Christmas Day, but one or two of them may want to transfer their Christmas Day entitlements to Yom Kippur, so for that employee Christmas Day in s.44(1) is in fact being observed on another day – that employee. And then the use of the term 'public holiday' right throughout the balance of sub-part three is entirely consistent with the definition, but it nevertheless is a shorthand way of referring to a 44(1) or a 44(2) day, whichever applies.

McGrath J So is your point on this aspect that the days observed by the employee that in relation to other employees the employer may be as you would put it observing the public holiday in a sense that they would be taking their public holidays then?

Toogood Yes, yes.

McGrath J And how is it that that leads to the use of the phrase in ss.2, and I can see as a matter of fact it's a situation but what's the connection?

Toogood Well Your Honour raised the question as to s.44(2) not referring to the employer observing the public holiday on another day and I'm simply suggesting that that might have created difficulty where an employer had some employees observing the public holiday on the specified day and some employees observing the public holiday on another day. It's better to take the employer out of the equation.

McGrath J I see the point now thanks Mr Toogood but could you just give me a synonym for 'observed'? Obviously you don't think it's simply taking another holiday.

Toogood Recognised would be another way of putting it. It's a recognition of the fact that the employee has an entitlement which is most succinctly stated in 46.

McGrath J Yes, so it's recognising the holiday rather than taking the holiday?

Toogood Yes, and the ordinary regime, putting aside 44(2) altogether, the ordinary regime acknowledges that a public holiday may be observed by an employee who works on it, gets paid time and a half and has another paid day off if the public holiday being observed is one on which they would otherwise have had a paid holiday.

McGrath J Okay, thank you.

Toogood And I would just add so as to underline the point even further, that holiday can be cashed in so that the concept of the employee actually being off for rest and recreation and celebration and so on, is not necessarily imported into the lieu day alternative day argument, because

McGrath J But that can be cashed in but only 12 months later?

Toogood After 12 months, because normally the employer has the right to determine when the alternative day will be taken.

Tipping J How does this fit with this s.3 purpose – 'promote balance between work and other aspects', and to that end to provide for?

Toogood Well because work-life balance involves in our submission the concept of choice and flexibility and Parliament is, while it's talking about that, it's not imposing its view entirely on employers, and particularly on employees on that basis. The work-life balance is achieved best by allowing, particularly by allowing employees to make choices, and one of them will be the choice to enter into an agreement to observe a public holiday on a day other than that specified. If I can come back to the question of the Employment Court accepting this concept, in the *Heinz Wattie* case at the beginning of para.50, which is under Tab 9 of the respondent's authorities, and it's page 25 of the judgment at para.50. They're talking here of the clauses in the collective agreement. They were drafted before an alternative day became mandatory. 'An alternative, and this is important, an alternative under s.56 is not the transfer of the observance of the holiday as contemplated by s.44(2). It is a statutory guarantee that a person who works on any part of a holiday is entitled to another day's holiday. It differs from the s.44(2) observation of a public holiday on another day'. Now that deals directly with my learned friend's argument. It's a rejection of the notion that 44(2) days and lieu days or alternative days under 56 are the same thing. The Court then goes on to explain how that occurs. 'If an employee works on Christmas Day which is a normal working day, he or she would receive payment at time and a half plus a s.56 alternative holiday. Under s.44(2), if the parties agree that the public holiday is to be observed on another day, then that other day becomes the public holiday', and that is our submission.

Tipping J And the Christmas Day ceases to be a public holiday.

Toogood Ceases to be.

Tipping J That's the unexpressed premise.

Toogood But it 'becomes the public holiday' in my submission necessarily implies that the day specified is no longer the public holiday for the purposes of the Act.

Elias CJ The effect being if this is correct that under ss.2 you nominate for observance another day in place of the holiday identified in 44(1)?

Toogood I accept the proposition subject to our argument that it's not necessary to identify in the employment agreement.

Elias CJ Yes I understand that, yes.

Toogood Yes, but Your Honour is correct, yes that is the proposition, and clause 52, the wording of the clause is that is the one's in the agreement in *Heinz Wattie*, not in our case, 'is clear and unambiguous. The words "the next shift shall be allowed as the employee's public holiday" can only mean what they say and the specific reference to public holiday eliminates the possibility that it is to be regarded as an alternative holiday here'. The parties had agreed to regard part of a calendar day, which was say Christmas Day or ANZAC Day, as not being a public holiday for the purposes of the agreement. So the employees' public holiday again is a concept recognised there. Then just to conclude Your Honours I invite you to go to para.66 of the judgment. This was talking about the prohibition on contracting out. 'We're not persuaded that the clauses in the agreement restrict, exclude or reduce the employees' entitlements. The Act specifically provides for the observance of a public holiday on another day. There is therefore no loss of the entitlement to leave. We accept the submission that the parties are at liberty to transfer the public holiday to another day'. Note the transfer of the public holiday, not just the observance. 'But do not accept the restrictive argument that the transfer must be to another day seen as having national, religious, or cultural significance'. And bear in mind this is dealing with the current Act. This is not dealing with the old legislation.

Tipping J Were they in any way faced in that case with the question of whether time and a half had to be paid on the nominate day from which the shift had taken place?

Toogood No I don't think it arose because of the way in which the Union were arguing the definition of 'day'.

Elias CJ Well at para.3 of the conclusions there seems to be a reference to the time

Toogood Yes that's a consequence of them having upheld. It's where there was an overlap into the specified day.

Tipping J That does seem to imply doesn't it the cessation

Toogood Of the right.

Tipping J Yes, well, the cessation of the original public holiday as being no longer a public holiday. It seems to imply that, but is there any reasoning, or is it just seen as a natural corollary of the definitional concept.

Toogood Natural consequence. Yes in my submission that is right.

Tipping J So you're saying to allow the appeal here we would have to differ in a material and substantive way from *Heinz Wattie*?

Toogood Yes.

Tipping J Thank you. What did the Court of Appeal or Justice Chambers make of *Heinz Wattie*? It didn't seem to feature very heavily did it?

Toogood No.

Tipping J Why was that? Because this seems to be a powerful point in your favour.

Toogood Yes, it may not have been well argued, but I don't believe the majority made any reference to it.

Anderson J In *Heinz Wattie* both the employer and employee were very anxious to get the same result weren't they?

Toogood Yes, for different reasons.

Anderson J Yes, and the remarks made in para.66 were made without any explanation for the conclusion that they reached.

Toogood Yes, but with respect Sir it's the common-sense outcome, because it's simple.

Anderson J This case was against you wasn't it on the question of whether it had to be a specific day?

Toogood And only that point, only that point. That's the only point at which departed from the reasoning of the majority, and in saying that I confess to being slightly concerned by the Chief Justice's observation that our interpretation is somehow wider, or we're seeking to impose a wider interpretation of the majority, because that's not an intention.

Elias CJ I'm talking about whether it has to be a specified day and a specific exchange on that point.

Toogood Yes, no I can understand Your Honour's concern and I'll come to that. But certainly just in terms of the general principle of just simply moving entitlements from one place to another without diminution

Tipping J Was *Heinz Wattie* cited to the Court of Appeal?

Toogood Yes.

Tipping J Yes.

Toogood It's certainly the case these days in any appellate situation that often the argument is focused, as it has been today, on the points which the Judges having had the benefit of detailed submission exchanged in advance, really focus on some issues, so we didn't really get into that, and I think it's fair to say that Justice Chambers had not articulated in the same way during the hearing his acceptance of the Union's submissions on that point. My learned friend certainly discussed his argument but I don't recall it being as obvious during the hearing that two of the learned Judges disagreed with the third.

Tipping J Well you won't be able to make that point at this hearing will you Mr Toogood?

Toogood No.

Elias CJ There may be some other point though

Toogood Yes.

Anderson J It's a tortuous path and there's some dodging around the potholes.

Toogood It is. Well I think it's certainly helpful in these situations to have everything laid out well in advance so that we don't waste time. Next can I turn to, if I can come back if I may to Justice Anderson's point that where an employee, where there's a specified public holiday falling on a

day which would not otherwise be a working day for an employee, and that employee agrees to work, it can only be a s.44(2) agreement.

Anderson J Yes.

Toogood I think that was the point, and in my respectful submission it wouldn't be at all 44(2)

Anderson J Yes and having thought that through it's really a question of how s.46 applies.

Toogood Yes, and 48 really is the key to that. Now I was looking at the scheme of the legislation and got to the definition in ss.5 and I made the point and I don't need to go back into in detail that the definition is instructive because it isn't confined to s.44(1), so that assists in our submission the interpretation that public holidays in the Act means both 44(1) and 44(2) days. Section 6 is essentially a 'no contracting provision' and we don't seek to contract out at all. Section 12 is helpful to our argument we submit because it does distinguish between public holidays and alternative holidays in ss.1. An alternative holiday is something that arises as a consequence of the employee having worked on a public holiday.

Anderson J It's crucial to your argument isn't it that an agreement under s.44(2) means what would otherwise have been the public holiday as between the parties becomes 'the public holiday'?

Toogood Yes, and the specified day is an ordinary day.

Anderson J If that's the case then, if they work on Christmas Day they're not working on a public holiday, but it seems odd to describe that situation in terms of an employee observing.

Toogood Well it comes back to that question of it being possible to observe the public holiday even though one is working on it.

Anderson J It's difficult to explain then why the original Bill was amended as it was by the Select Committee's recommendation. Because there it was intended to be definitional. The public holidays are these or any other one that you agree.

Toogood Yes, yes.

Anderson J And they changed that.

Toogood Yes well I suppose one could suggest that they didn't really intend any difference by splitting up the concepts into different subsections rather

than leaving them in the one subsection. It's still under the heading of 'days that are public holidays'.

Anderson J And ss.2 might then have said 'an employer and an employee may agree, etc, etc, etc, that in lieu of any of the specified public holidays, another day shall be the public holiday.

Toogood Well it really does that simply by using the word 'however' in my respectful submission.

Anderson J Suppose you were wrong about that, would that lead you then to either s.48(1)(b) or s.48(2)(b)? One's time and a half with no further day and the other's time and a half plus a further day.

Toogood Yes, and whichever it is depends on whether the employer would otherwise

Tipping J If you lose the definitional point you're done.

Anderson J In the money terms.

Tipping J Yes.

Toogood Yes, because 44(2) actually is meaningless.

Tipping J Oh I don't know about meaningless, but it doesn't achieve definitional significance.

Toogood It doesn't achieve anything that 48 in the other sections don't achieve. In other words if my learned friend's argument is right, 44(2) and (3) are unnecessary – they're redundant.

Anderson J Well suppose the parties reach an agreement about observing day, but it's not a different public holiday, does that mean that s.48(1)(b) applies, because they're then working on a public holiday that would not otherwise be a work day, and it wouldn't otherwise be a work day because they've agreed that it shan't be. It's the other way around isn't it?

Toogood No

Anderson J It would otherwise be a work day.

Toogood That scenario is likely to arise where the 44(2) agreement is a sort of a substitution of Christmas Day for Yom Kippur kind of arrangements, so that one doesn't quite know if it's specified just whether in terms of that employees' rosters for example. Bear in mind these sections only bite in

this way for employees who are rostered on to work on public holidays – that's really when they kick in. And you may not know at the time you reach an agreement as to what the 44(2) day will be; you may not know what the rosters are going to be, and then all of a sudden you say 'right, we've now got a situation where this employee's roster says they are required to work, s.47, on a public holiday, what are the consequences'? Now one of the possibilities is that they agree another 44(2) day, but in any event they cannot reduce the number of paid holidays that the employee would get. The other alternative is the employee simply works, gets paid time and a half and gets another day off on pay some other time. At best from an employer's point of view there's a deferral of the obligation.

Anderson J If in the case of your client, a pilot in fact works on what would otherwise be a public holiday, and assuming now 44(2) is not definitional

Toogood Excepting our interpretation, yes.

Anderson J They are then working on a day that would otherwise have been a public holiday and they're working in accordance with their employment agreement because it specifies these obligations and it then comes squarely within s.48(2)(b).

Toogood And then we'd have to pay it. We say, and this is somewhat complicated and sometimes difficult to grasp because of the peculiar arrangements here, but we would say that that never occurs because a pilot can never be required to work on a leave day except by agreement. But putting that issue to one side, if it happened that a pilot was required to work on that 44(2) day then 48 would kick in.

Anderson J If the agreement didn't say the annual holidays take account of the public holidays, but said you can be required to work on a public holiday, s.48(2) would still apply.

Toogood Yes, but there wouldn't be

Anderson J So they're not offering any

Toogood Sorry, there wouldn't be a 44(2) agreement then because the nub of the 44(2) agreement in this case is a combination of those provisions in the agreement.

Anderson J That's right, it wouldn't be, it would simply be a 47 agreement.

Toogood Yes, which could arise on a completely ad hoc basis.

Anderson J The difficult position seems to be for people who volunteer to work when they're not obliged to. They get time and a half and nothing extra.

Toogood Yes, well that's because the public holiday which they're observing by working would not have been a paid holiday.

Anderson J I can see that justification point because the purpose is to give them public holidays on days when they would otherwise be working as the Act says.

Toogood Yes, it's again like my learned friend's accommodating PA who says well I really normally take Labour Day off

Anderson J Well why isn't the agreement that we're talking about a s.47 agreement? What makes it not a 47 agreement?

Toogood Well we say it's not a 47 agreement because the parties have accepted that it's not a 47 agreement and I'll come to that in answer to the Chief Justice's point, but the

Anderson J But it's an agreement that in terms of

Toogood The agreed facts and the submissions made by the Union to the Employment Court make it clear that it's a transfer situation, not a s.47 situation.

Anderson J It seems to me to come squarely within s.47 because it requires them to work on a public holiday.

Toogood Well the parties haven't approached that on that basis and so it is a question of fact in my submission. I mean Justice Chambers referred to this and the majority referred to this. There may be in some cases some issue as to whether or not you're dealing with a s.44(2) arrangement or simply an arrangement which has an employee working on a public holiday and getting an alternative day. But that's just a question of fact. It doesn't affect in any way the interpretation of the section in our submission and I will come to explaining how the concessions are important in this case because the whole argument has been predicated on an acceptance by the Union, at least at the Employment Court stage, that this was a transfer of the public holiday and not an agreement to work on a public holiday.

Anderson J Well if they're legally wrong, are we bound by it?

Toogood Well as I say because whether or not it is either a transfer under 44(2) or some other arrangement is a question of fact, mixed with law of course, but essentially a question of fact for each case, and here the Union has

accepted in the agreed statement of facts and in its submissions that this was a transfer. They didn't say under 44(2)

Harrison Not correct.

Toogood Well my learned friend can reply in due course and I will come to this because there are specifics that we should see. Now essentially we say that from s.46 which is the entitlement provision onwards, the Act is simply dealing with the consequences of an employee working or not working on a public holiday however that is defined, and that those provisions work perfectly well if you define public holiday to mean what we say it means. So unless Your Honours want me to take you through

Tipping J Yes I would like some help as to whether that proposition is valid in relation to s.47.

Toogood Yes.

Tipping J I would have some difficulty accepting that your expanded definition, expanded in one sense, contracted in another, is apt in 47.

Toogood It's not likely to apply I agree, it's not likely to apply to a 44(2) situation, I accept that.

Tipping J But the use of the term 'public holiday' in 47 seems to me to be premised on the basis that it is one of the days in 44(1) and no other.

Toogood In practical terms that's right, but it doesn't do violence to the wording or the definition we advocate to say it covers both. It's just that in practice that scenario contemplated by 47 isn't going to arise from the very point that you wouldn't normally agree to a transferred day which is one which you know you're going to be required to work on, but it does apply in the substitution of Christmas Day by Yom Kippur example for example if the roster then happens to result in the employee being required by the employment agreement to work on that day, then 47 is apt to apply to that kind of public holiday.

Tipping J Yes I think that's probably right but as you say it's a rather remote possibility.

Toogood 44(2) agreements are going to be very rare. What we're dealing with here is an agreement and we're looking to see whether it fits because it's an agreement which pre-dates the legislation. Does it fit within the legislation? It's not as though the parties sat down, looked at this Act and said what can we agree to or not. We're trying to see whether or not the

parties' arrangement fits because if it doesn't there's non-compliance and then we're going to have to take some other step to resolve it.

Tipping J I'm really focusing on the definitional.

Toogood Yes, and in my submission, putting aside Air New Zealand's position, on a definitional basis s.47 is entirely apt to deal with a 44(2) day as a public holiday.

Tipping J Thank you.

Toogood Now I just want to make sure that I've picked up the other points, and that may be a convenient way of dealing with a point that Your Honour Justice Tipping raised earlier in talking about an escape – s.44(2) being some kind of an escape. I think I understood Your Honour correctly when talking to my learned friend.

Tipping J Yes well I need persuasion that this doesn't have the capacity to diminish entitlements.

Toogood Well all I can do is invite Your Honour to look at the examples that we've given in our submissions.

Tipping J Alright, alright, we'll certainly do so. I've looked at them but I'll need to revisit them Mr Toogood.

Toogood Yes, because looking at it, whether they are an employee-initiated or employer-initiated, the result is the same; the entitlements are not diminished in any way, and s.44(3) makes it clear that they cannot be diminished in any way so far as paid holidays are concerned. So I want to next just look at what we say, or why we say the single regime argument advanced by the Union just doesn't fit and it really goes to the heart of question A before the Court. In other words can there be this transfer of entitlements from one day to another? As I understand the argument from my learned friend, time and a half must be paid if an employee works on any day specified by either s.44(1) or 45, so that irrespective of any arrangements, an employee must be paid time and a half if they work on a specified day, including s.45 days. Second, they say that if that work takes place on a day which would otherwise be a working day for the employee, then they get a paid holiday on the alternative day under s.56. Now we say those propositions are provided for in s.48. My learned friend says no you've got to get through the 44(2) gateway before you get to 48 and our point is simply 44(2) and 44(3) are completely redundant if my learned friend's argument is right. And the majority in the Court of the Appeal accepted that argument that you don't need an enabling provision. 48 stands perfectly well on its own without any gateway in 44(2). The

difference we stand, this is the second point, the difference between a transferred day or what the Court of Appeal described as an exchange day, and an alternative day under s.56, we say is demonstrated by ss.44(3) and 61. 44(3) says that an exchange or a transfer agreement may not diminish the number of paid public holidays otherwise available. 61 however makes it clear that an employee can agree to diminish the number of paid public holidays by simply cashing in their alternative or lieu days after 12 months if they haven't taken them, so in our submission that difference in approach demonstrates the difference in the nature of the days under 44(2) and the sort of arrangement that occurs when an employee simply works on a public holiday.

Tipping J But how does that fit with the dichotomy that you seeking to establish between public holidays and alternative holidays, because 61 refers only to alternative holidays?

Toogood Yes, and that's the point and we're saying that there is this distinction. My learned friend says a 44(2) agreement is really just a recognition of an alternative day. We say that can't be right because a 44(2) agreement must not diminish the number of paid holidays.

Blanchard J Must not diminish the number of paid holidays that would be available.

Toogood Available, yes.

Blanchard J But not necessarily taken?

Toogood No, I accept that, not necessarily taken.

Blanchard J And that's consistent with s.61?

Toogood Except that well I'd say that 44(3) goes further than 61 because that is the paternalistic approach, that if an employee had an entitlement to a paid holiday that cannot be taken away.

Blanchard J Well you can't take away the availability

Toogood Paid public holiday that is.

Blanchard J Yes, you can't take away the availability that the employee might decide after the appropriate period of time had gone by and they hadn't taken it that s.61 should come into play.

Toogood But s.61 does not refer to public holidays. It's referring only to the alternative days. Let's assume there's no transfer. The public holiday is Christmas Day. The alternative day is just a day's paid holiday, a paid

leave. Instead of, and that's an important point in 56, it's instead of a public holiday. So 44(3) is preserving the right to a paid public holiday and 61 is dealing with the cashing in of an alternative day which is instead of a public holiday

Tipping J So the transferred day is not an alternative holiday?

Toogood No.

Tipping J Is the corollary of your argument.

Toogood Absolutely.

Elias CJ It's the same argument though isn't it?

Toogood It is, it's just coming at it from a different way.

Tipping J But you can't cash in a public holiday?

Toogood No. You can't cash in a paid public holiday.

Tipping J Paid public holiday, yes.

Elias CJ Well you can't, if leaving aside s.44(2) altogether, you can't do it, so there would be something odd if you could cash in the substituted one?

Toogood Yes, yes.

Tipping J Yes.

Toogood Now the next question which hasn't really been touched on in argument so far is the one as to why it's necessary to specify the transferred day, and for that

Tipping J This is really into question 2 now is it, the specificity point?

Toogood Yes.

Tipping J Yes. The two main points that I want to address, which remain to be addressed in our submission are whether or not the majority and the Employment Court right that you have to specify or be able to identify the transferred day, and then to come and answer the learned Chief Justice's point as to whether or not even if that was not right, whether what was agreed here was in fact a s.44(2) agreement. So taking that point first and looking at our submissions in support of a cross-appeal, the first main argument

Elias CJ In this context I'm just sort of puzzling about the amendment that was made in the Select Committee, which I do think must have been significant, except as an employment agreement otherwise provides, being dropped, I'm just wondering really whether it's sufficient that it be to put it on the basis of an identified day, whether this change was not rather to prevent the formulaic approach, so it's not identifiable, there has to be a specific agreement as to the exchange rather than something generic in the employment contract.

Toogood The principal rationale for requiring specificity was to ensure compliance with the consequential provisions where an employee works on a public holiday. That's the basis on which the Employment Court and the majority predicated that finding.

Elias CJ Yes, I'm raising a rather more fundamental point really as to whether in context s.44(2) doesn't envisage a specific agreement, not one that effectively can be imposed by formula on the employee, as is your case.

Toogood It probably does, I accept that, it probably does, and one would assume that if the parties were renegotiating these provisions in light of the 2003 Act they would be making reference and making it clear as between themselves whether they're talking about a s.44(2) arrangement or not. So because if my learned friend's argument is right, Air New Zealand would certainly not want to guarantee 11 paid additional leave days if it was having to pay time and a half on perhaps only five days on which the pilots actually worked. That's been the trade-off. You don't get your Christmas Day time and a half because you're not going to work on all of the named specified days, but you're still guaranteed a paid day's leave which is a bonus.

Elias CJ Well I'm really wondering what I'm really raising is whether you can accomplish that within s.44(2) as it's framed at all. So it's not just a question of making it clear in terms of the application of the language of the consequential regime, but that s.44(2) envisages discrete agreement between particular employee and employer, not something arrived at through the generic employment contract.

Toogood Well I'm obliged to argue that that is not necessary although I would say that it's almost always going to happen now

Tipping J Doesn't the very force of your primary argument that it is a discrete exchange where one substitutes wholly for the other strongly support the view for specificity?

Toogood Yes, except that the wording suggests only another day which we say could be any other day.

Tipping J Any old day.

Toogood And we

Tipping J I think your clients are trying to have it both ways Mr Toogood.

Toogood No, no, because we say, our fallback argument is if the majority, the Employment Court and the Chief Justice's argument are correct, we say you don't have to upset the employment agreement. The employment agreement itself doesn't have to identify or provide the means of identification. That can be done independently and that's the 'or otherwise' point which is our fallback position

Tipping J May agree either in the employment agreement or otherwise. It's got to be consensual. It hasn't got to be mandatory in terms of the employment agreement

Toogood No, no.

Tipping J But surely the agreement, the content of it, must imply we will exchange Christmas Day for whatever the day is.

Toogood Let's assume that we lose the argument that it's unnecessary to specify the transferred day. Let's accept that for the moment and then look at these arrangements. It is possible in our submission to have a s.44(2) agreement which is comprised of provisions in the employment agreement and an agreement reached by the parties later as to which day will be the transferred day, and we say that that could happen here, for example when the pilot makes the bid for leave he or she can say 'and I want of those days which I'm bidding, I want X,Y and Z to be Christmas Day, Boxing Day and New Year's Day observance.

Tipping J But surely he's got to agree to the specific day that he's actually substituting.

Toogood Yes, and that would happen then, so that would happen at the time the pilot is bidding for leave.

Elias CJ I'm sorry the penny's very slowly dropping. You're not troubled about losing the point of principle, you're bothered about the application to the particular employment contract because you end up paying time and a half to more people than you'd need to pay it to.

Toogood Yes, the outcome of this

Elias J I see.

Toogood May be that we accept an obligation between the parties to identify or provide a means of identifying the transferred day, but you don't need to upset the arrangements in the employment agreement to do that, it does not entitle the pilots to time and a half just because they happened to fly an aircraft on Christmas Day. What it would require, the pilot and Air New Zealand to do, is identify at an appropriate time what the transferred days will be so that you can then ensure that there has been compliance. They've had all of their paid holidays; that they are being treated appropriately if they happen to work on one of those days, but that can be done later.

Blanchard J How will that work as to the past?

Toogood I would say that is a compliance issue and it might be an arrears issue and the pilots would have to prove in this case

Blanchard J Well you wouldn't be able to point to an agreement that Christmas Day was the 14th February.

Toogood What I suppose we would be required to do is to say that in the absence of agreement the last 11 days of the 50-odd of the entitlement would be deemed to be the statutory days because they're in addition to the annual leave entitlements, so that you get the total number of days

Blanchard J But you wouldn't have an agreement on that.

Toogood We'll you'd have to imply an agreement. I mean the fact is they haven't sat down and talked about it, I accept that, so how do you unwind that?

Elias CJ And this is really why you say that most, but not that I think it actually affects the interpretation point, this is why you say that your client's not in a position of being able to say well we've got these unintended consequences arising out of this employment agreement, we simply won't fly on Christmas Day.

Toogood So there is necessarily going to be a degree of artificiality if there's to be a claim for arrears as to how you treat that. I mean the reality is that they've had 37 days leave of which 11 are recognition of public holidays.

Tipping J If they've had more than they're strictly entitled to, there could be an argument that that should be offset against any technical arrears.

Toogood Depending on the outcome here we've still got potentially some litigation in the Employment Court, because it's been sent back.

Elias CJ I haven't concentrated on the transitional arrangements but they don't assist?

Toogood No.

Elias CJ Thank you.

Anderson J If you didn't have this arrangement, and you just said they could be required to work on a public holiday, you'd still have to pay those who worked time and a half, so the argument

Toogood Yes, depending on how you define public holiday, yes.

Anderson J So the extra benefit here is more days not working on ordinary pay than they would otherwise get and that might be the trade-off against the risk of having to work on a public holiday.

Toogood Except that again to get into the, if I can put it crudely, the guts of the rostering and leave and arrangements and so on, if you look at 16, and this is in volume 2 of the case in appeal, page 189, 16.1.4.10, 'once leave requested by a pilot in his bidding period has been allocated it will not be changed or cancelled without consent of the pilot concerned except in exceptional circumstances, or as necessary to facilitate promotion or transfer. In these cases leave will be altered in consultation with the pilot concerned'. In other words we say that they never have to work on a public holiday. There are call-back provisions but they require consent so that the agreement itself perpetuates a pilot not actually working on a public holiday however that's defined.

Anderson J One thing that concerns me about a situation and it envisages no specificity is that employers whose bargaining position is significantly greater than the employees will get out of the penalty regime simply by the use of words.

Toogood Oversight, yes.

Anderson J They will say the employee agrees to work on every public holiday and in lieu those will be observed on a day to be agreed, and the upshot is that you never get time and a half for working on a public holiday even though you're required to.

Toogood Well the entitlement exists though. The question is can you ensure that the employee actually gets it, and this is why the Court, from what I suspect

from a policy point of view said well you need to have a requirement for specificity

Anderson J No, my point is that if you don't then persons who are in fact required to work on public holidays will get their alternative days but they will never get the penalty rate that they would get under s.48(2)(b).

Toogood Well that will depend on what happens on the s.44(2) day.

Anderson J If it happens to be a day they would normally work.

Toogood If they're not getting time and a half for the day they work that would be because it was not otherwise a working day for them, so nothing changes, it's just the timing of the observation of it and the timing at which the entitlement's crystallised for that employee.

Anderson J I can understand that but the scheme of the Act really is to give people the time and a half if they give up the public holiday, if they are required to, and some tough employers will say you will work every public holiday and you'll observe it in lieu on some other day to be agreed. Now in your argument they don't get time and a half because they've just shunted the public holiday.

Tipping J This is poor old Mary.

Anderson J Yes.

Toogood Except that whether or not they have been disadvantaged will depend on what happens on the transferred day, whether or not on the transferred day they are required to work by their employment agreement.

Anderson J Suppose it's a devout Catholic who thinks it's really tough, I can't be with my family on Christmas Day; I've got to work on Good Friday; I've got to work on Easter Sunday for ordinary time, and instead I'm going to get some rainy day in September and a couple of days flicked at me when the business down in the middle of July.

Toogood That's the kind of scenario that we say is illusory and again I demonstrate that by reference to the examples that that sort of situation doesn't actually arise under s.44(2). There cannot be this constant deferral of benefits in that way.

Anderson J So long as you get them all within 12 months, you're compliant with ss.3.

Toogood Yes, but that's in the nature of the 24-hour seven day a week business and working in that industry, and the way Air New Zealand deals with it, just

to give an example, that recognising that Christmas is a special family time, although pilots can be required to work at Christmas, if they do that in one year then the chance of them doing it the next year and so on are diminished, so that there is a way of dealing with that.

Anderson J The interpretation is not governed by the practices of a responsible employer.

Toogood No, but on our interpretation there is no disqualification from the entitlements. They are simply deferred and I just again refer Your Honour back to the examples that we give, because we trace all of those scenarios through the statutory provisions and demonstrate in my respectful submission that there is not the disqualification from benefits which occurs as suggested by Your Honour.

Anderson J There's a disqualification from time and a half.

Toogood No, because time and a half will arise if the employee works on public holiday; if the employee agrees that Christmas Day is not to be a public holiday but some other holiday will be that holiday, the employee's getting a holiday

Anderson J I understand that argument. What I'm saying is that argument opens up potential for abuse by the words that are used in employment agreements. Instead of saying we require you to work on the public holidays so as to invoke the s.48(2) regime which is time and a half plus an alternative, they say we hereby agree that every public holiday will be observed on another day to be agreed in each case, which in effect is requiring them to work on public holidays; using words to suggest it's a deferral; giving them the alternative, but doing them out of their time and a half.

Toogood But s.44(3) prevents that if the employee is to be deprived of a paid public holiday as a result.

Anderson J No, I'm not talking about losing a day - they get the day but they lose the time and a half by a cement device which is quite easy to impose if the bargaining positions are largely unequal.

Toogood Well it's possible under a s.44(2) agreement that on the day which is specified in the Act as a public holiday, an employee will work without getting time and a half. I mean that's the natural consequence of it.

Tipping J What I find difficult Mr Toogood is that we seem to be setting up a distinction and this I think is my brother's point in a different guise, we seem to be setting up a distinction between when you are required to work lawfully and when you agree in terms of 44(2).

Toogood No, no, because the concepts are different. You may be required to work on a public holiday which happens to be a s.44(2) transfer day. Go back to the swapping of Christmas Day for Yom Kippur example.

Elias CJ If your employment agreement permits it.

Toogood If your employment agreement requires it, so that your employment agreement says I'm sorry you're rostered to work on this particular day. It happens to be Yom Kippur, that's bad luck, that's what your roster says, so unless you can make some other arrangement you'll have to come into work. We'll pay you time and a half; we'll give you the lieu day. There's no loss of entitlement. I don't see in practice how the scenario with Justice Anderson poses can arise, it just

Anderson J Well I see it happening in all likelihood. The employee comes along and is told we require you to work so you'll have to agree to that and we require you to work on every public holiday but we'll call it a s.44(2) agreement which means that you're going to observe it on some other day that we sort out later.

Toogood Yes.

Anderson J Well in fact they're being required to work. On your argument they're not working on a public holiday even though they are, so they don't get time and a half.

Toogood Well Your Honour is simply begging all of the questions. Your Honour's assuming that there has been a bludgeoning of the employee into submission to an agreement which has the effect of depriving them of entitlements. We deal with this at pages 8 and 9 of our submissions

Anderson J I'm not talking about the other day entitlement, I'm talking about the monetary entitlement.

Toogood Yes.

Anderson J Because you're saying we've got a 44(2) agreement. That means we give them another day but we don't give them time and a half.

Toogood Not on that day.

Anderson J What day do you give them time and a half on?

Toogood Whenever they work on a public holiday. If they work on the transfer day.

Anderson J That's where the railway track divides.

Toogood No, because

Elias CJ No, because there's no transferred day able to taken up without the agreement of the employee, but that really does get to the pointy end of whether a formulaic approach can be used to designate the day.

Toogood I concede that these are all arguments why it's desirable, and it may be in this Court's view necessary to specify or be able to identify the day, I accept that, but our point is that that identification or means of identification does not have to be in the employment agreement because s.44(2) stands apart from the employment agreement.

Tipping J I think that's beyond argument, because it can be or otherwise.

Toogood Yes.

Tipping J The question is when you reach an agreement, sooner or later you're going to have to have a specified day, otherwise it's a meaningless agreement.

Toogood Well, for reasons which we've developed and I sense that there's not much point in going through at the risk of being like King Canute as my learned friend suggests. We certainly take the view that you don't need to rule as the Employment Court did, and the Court of the Appeal did, the employment agreement, CEA as being non-compliant to achieve the objective of identification. You can say that the means of identification can be independent of the agreement and we say in this case from a practical point of view we will reach agreement with employees at the time they make leave applications as to when the 44(2) day will be, and then one can see whether or not the Act has been complied with in s.81 which requires record-keeping

Tipping J Do you, without wishing to sort of hammer the point Mr Toogood, but do you accept that sooner or later there must be agreement about the substitute day, by whatever means you get there. It needn't be in the CEC, whatever it's called, but sooner or later there must be agreement between the parties on a specified substitute day.

Toogood I'll try not to be too obtuse but I'll say I could live with that proposition is the way I'd put it, rather than saying I accept it.

Tipping J Well I can't see how you can possibly avoid it.

Toogood Well that

Elias CJ And you run the risk of scoring an own goal because you run the risk of making the definitional point you make totally unpalatable.

Toogood I accept that from the point of view of ensuring that there is no loss of entitlements, it's necessary to know what the 44(2) day is so you can ensure and I accept that. So in a sense that proposition is to accept the view of the Employment Court and the Court of Appeal but to say that it does not in this case require them, or you, to overturn the agreement, or to say that the agreement somehow is non-compliant because there is always the opportunity to identify or specify

Tipping J Well that with great respect to whatever view might have been expressed to the contrary, that is totally self-evident. The agreement is not bad because it doesn't contain the specificity.

Toogood Well I'm obliged to hear Your Honour say

Tipping J Well I don't know, I'm just a lone voice, but otherwise you're writing out or otherwise.

Toogood Well that's been

Tipping J And I didn't understand Mr Harrison to be, no doubt we'll hear in a little while, but I'd be very surprised if he said the agreement itself had to contain the necessary specificity.

Toogood Well I'd prefer not to answer for him but in the Court of Appeal it was certainly our position that it was not necessary to strike down any part of the agreement or to say that the agreement does not comply, which was really the question that was being asked, and that's question C before Your Honours. Does it comply and we say even if it's necessary to specify the 44(2) day, the agreement can remain as it is. Pilots don't get their time and a half because they happen to work on Christmas Day, but we have to work with the pilots to identify what those days will be and will do that in the context of the leave applications.

Tipping J I wouldn't have thought you could be found in breach of 44(2) unless by the time the end of the year comes you haven't actually agreed on a date and then I don't know what happens then but logically the ability to agree outside the formal agreement must inure until it's too late to do so. Would you agree with that?

Toogood Yes, absolutely, it just imposes on the parties an obligation to face up to it.

Tipping J Exactly.

Elias CJ Mr Toogood I am, and this is just a personal difficulty associated with the other ceremony, would prefer to take an early adjournment. Is that a convenient time for you to stop or do you want to finish.

Toogood Yes it is because I've only got the one other point about whether or not the concession which we say was made that this is a s.44(2) agreement and my learned friends objecting to that view so I want to deal with it.

Elias CJ Yes.

Toogood That would be a convenient point Your Honour, yes.

Elias CJ Mr Cleary we haven't indicated that we will hear you. You've heard the discussion so far. I would propose to ask you in the morning if there's any additional points having heard that discussion you'd wish to make or emphasise because of course we've read your written submissions.

Cleary Yes, that you Your Honours.

Elias CJ Thank you. Oh well I'm grateful to counsel. We'll take the evening adjournment and resume at 10.00am tomorrow.

3.29pm Court Adjourned

14 June 2007

10.05am Court Resumed

Elias CJ Thank you. Yes Mr Toogood.

Toogood Thank you Ma'am. I'll be I hope relatively brief. I am authorised to abandon the principal argument for Air New Zealand in respect of the question of identifying the day in a s.44(2) agreement and to rely on our secondary submission which is that a s.44(2) agreement does not require either identification or the means of identification to be included in the employment agreement. I will just remind Your Honours that the approved ground of appeal (b) was assuming that it was possible to transfer the public holiday, question (b), if so does the exchange day have to be identified or capable of identification with certainty in the employment agreement? Our submitted answer to question (b) would be first to modify question (b) by deleting the words in the employment agreement and then to answer that question, if so does the exchange day

have to be identified or capable of identification with certainty, the answer yes, but not necessarily in the employment agreement. That in our submission allows for what one would anticipate would be the usual situation of either an employment agreement which contains a complete s.44(2) arrangement, or, and this may be in fact more likely, ad hoc arrangements outside the terms of the employment agreement, but where the parties agree not only on which public holiday will be transferred but will agree also on the transfer or exchange day. For example if the employer is the initiator of this proposal, the employee's going to say well yes I will work on Queen's Birthday, but when will my public holiday be observed, and they'll agree and although that would not require any amendment to the employment agreement, it might be argued that it's a variation, but it would certainly be an agreement and complete at that point. In the present case we would say

Elias CJ In the absence of agreement the identified holidays would be the default position.

Toogood Yes.

Elias CJ Yes, notwithstanding the power conferred upon the employer in the employment agreement.

Toogood Yes. Here we say that we have part of the s.44(2) agreement, and I'll come to that in just a moment, but if Your Honours would accept for the moment that that is the case, to complete the s.44(2) agreement here, or to perfect it, the parties will still have to identify the transfer or exchange day. We say for the purposes of this case, which is highly unusual, I want to stress that, that that can be done conveniently by the pilots nominating when they make their bid for leave which of the days they wish to be regarded as the transferred days. From Air New Zealand's point of view it matters not. They don't care.

Anderson J They'd be silly to say what day they want, because if they don't say it they get time and a half and an alternative day and if they do say it they

Toogood No, well that assumes Your Honour that there is no agreement and my point is that the parties have agreed

Anderson J There must always be an agreement, we're not slaves. You must always be working pursuant to some underlining agreement.

Toogood Yes, and in the present case we say there is an agreement. The parties intended there to be a s.44(2) agreement, but in the light of what one anticipates we hope will be the judgment of this Court, the parties will be told they haven't got it perfected so they will need to take one further step

in order to complete the arrangements which they have put in place in ways which comply with new legislation. They are bound in our submission, both parties are bound to act in good faith, and I'll come to that in a minute but I just want to complete my point that Air New Zealand doesn't care what days are nominated because it says in terms of the leave arrangements the pilots will never work on those days however nominated, but if they do once they've been identified, if for some reason the pilots are called back then they will receive time and a half and they will receive a lieu day under s.56. There's no difficulty with that, but there is a requirement on the parties in this case and generally to act in good faith and the provisions of the Employment Relations Act and I won't, unless Your Honours want me to take you to them, I'll just identify them for you.

Elias CJ And, sorry I'm just trying to think it through, and if nobody wants to nominate another day for observance then pursuant to the power you have in the employment contract, 30 pilots or whatever might be rostered on Christmas Day for example and they will get time and a half for that?

Toogood No because we would say that there will not be, this is why I'm wanting to talk about the good faith arrangements. At the moment there is a partially complete s.44(2) agreement that we say the parties have intended that there would be a valid transfer of their public holiday

Elias CJ I don't really see how you can say that because section

Toogood Well I haven't attempted to yet Your Honour

Elias CJ Oh I see you haven't developed it, but the point being that s.44(2) wasn't in contemplation.

Toogood No, but the concept of transfer of public holidays was, under the old Act.

Elias CJ Alright, so you'll develop that?

Toogood Yes I will. If Your Honours would accept for the moment that that is our position and that may be a factual issue which will have to be resolved by the Employment Court.

Elias CJ It may be an issue that we can give absolutely no guidance on at all

Toogood I accept that.

Elias CJ Because it's not before us.

Toogood No, well it's a factual question and Your Honours don't have

Elias CJ But similarly on the good faith point that you're wanting to

Toogood Well I just wanted to emphasise the good faith provisions generally because

Elias CJ As a solution?

Toogood Yes, because this is a very unusual situation, but even in that there are two things. There's the general provisions of the Employment Relations Act, s.4(1)A,B, requiring the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are among other things responsive and communicative, and that good faith obligation is more than just the obligation of fidelity and good faith in the ordinary common law sense. Section 4B applies; the duty of good faith to any matter arising under or in relation to a collective agreement while the agreement's in force. B(a), bargaining for an individual employment agreement and so on, so there's a statutory obligation on the parties to do the right thing. And there is also s.60A which deals with good faith bargaining for an individual employment agreement and there are also the unconscionable bargaining provisions in s.68, unfair bargaining for individual agreements. So there's plenty of statutory constraint on

Elias CJ Except that what you got with s.44(2) is transferability only with consent?

Toogood Yes, only with consent, only by agreement.

Elias CJ Yes, so using a pre-existing ability to roster seems not to meet that requirement.

Toogood No but here we say

Elias CJ There's an obligation to agree?

Toogood Yes, and I understand Your Honour's concern about that. This is not an ordinary commercial or contractual situation, this is a situation in which the parties in this particular case the parties have not only embarked on the process of agreeing how this leave will be transferred, but they have also accepted in the collective agreement that there may be further things they need to do to perfect the arrangements. If we look, we've cited this in our submissions on the cross-appeal at para.104(3) and I don't believe this is in dispute, but in respect of the 2005 collective agreement the parties recognise that there was legal process in place to determine the validity of the arrangements they had put in place. They would agree that the outcome of the legal process underway may mean that the parties need to vary the terms of this agreement dealing with leave and in particular public

holidays. Should a variation be required, the total number of leave days in each year to which pilots are entitled or have allocated, or are allowed in relation to annual leave and public holidays will remain the same as in this agreement, but in doing so the parties will need to agree to change the way in which those days are delivered to pilots and also the pay arrangements for those days. In other words the pilots certainly did not want to give up their extra 11 days but how they are delivered may require agreement. So the parties have undertaken to sort this out, so it does not leave in our submission lacuna. There is ample provision for the parties to agree and that can be achieved simply – there may be other ways – but certainly can be achieved simply by the pilots simply nominating it and Air New Zealand will have no difficulty in accepting whatever days they nominate. Well then just to turn to the question which the learned Chief Justice raised; is this in any event a 44(2) agreement, and I anticipate my friend will argue that it isn't, and if that remains a matter of dispute then in my submission it can only be resolved in the Employment Court because that's where these proceedings began on transfer from the Employment Relations Authority. But what we say is an effective s.44(2) agreement is contained in the leave provisions, clause 16.1.1 of the collective agreement which is in volume 2 of the case

Elias CJ Sorry, you just a moment ago described it as I think a partial

Toogood Yes, well complete subject to the identification point.

Elias CJ Incomplete, I see.

Toogood Page 186 of the second volume, clause 16.1.1, the second sentence 'however the specified number of days of annual leave do include provision for statutory and public holidays as specified in s.7A(1) of the Holidays Act'. Then there is the leave allocation in 16.1.2.1. Also relevant on page 189 is 16.1.4.10 'once leave requested by a pilot in his bidding period has been allocated, it will not be changed or cancelled without consent of the pilot concerned, except in exceptional circumstances' etc'. It's dealt with also in the rostering arrangements. And then we say, as a factual background to these proceedings there was an appropriate concession in the agreed statement of facts in volume 1 of the case at page 38

Anderson J Sorry, what page Mr Toogood?

Toogood 38 Sir.

Anderson J Thank you.

Toogood Paragraph 11 first, ' the nature of the industry and of the work performed by the pilots resulted in the necessity or desirability to provide for the public holidays listed in s.7A(1) of the Holidays Act by allowing those public holidays as part of the overall leave allocation'. That is we say by allowing those holidays as public holidays on which the employees do not work. Again the same comment in para.15 on page 39, 'the agreement reached in relation to the provision of public holidays under the Holidays Act still represents agreement between Air New Zealand and NZALPA on the public holidays in s.44(1) of the Holidays Act are provided for as part of the pilots' overall leave allocation referred to in clause 16 of the Agreement', so again acknowledging that the arrangements include the possibility of rostering on the specified days in 44(1), public holidays are provided for. And then to resolve any confusion as to what that actually meant, we need to go back to volume 2 of the case to the submissions made on behalf of the pilots or the Union in the Employment Court at page 248 of volume 2 and then go forward to 251 at para.15. 'In the present case the CEA did provide for public holidays to be taken on days other than those specified in S.7(A)(2)'. They were to be recognised as included in a pilot's annual leave allocation. And again at para.37 'in this regard the plaintiff says that the intention of the parties in agreeing to public holidays being included in the annual leave allocation amounts only an agreement in terms of s.7A(1) of the Holidays Act'. Now I say it once that that was a mis-reference to 7A(1) and there's a letter at page 256 of the case in which Mr McCabe helpfully clarifies that he really meant to refer to 7A(2). So going back to 37, it cannot be more plain in our submission 'the plaintiff says that the intention of the parties in agreeing to public holidays being included in the annual leave allocation amounts only to an agreement in terms of s7A(2) of the Holidays Act', and that was the agreement which substituted or transferred leave from the stated days to a day agreed by the employer, which is exactly what we say is the case under s.44(2). Now whether or not Your Honours feel able to confirm that position, which is essentially we say a question of fact

Elias CJ How is it actually before us? I'm just looking for the questions on appeal.

Toogood Well it is before Your Honours in respect of question (c)

Elias CJ Hold on, I'm getting confused about the position. Well it's an entirely derivative question isn't it?

Toogood Yes it is, and I

Elias CJ It isn't a sort of wider inquiry as to the effect of the agreement

Toogood Our position Your Honour is

Elias CJ For myself I should just flag that I see a very powerful argument that the supervening legislation in fact requires not only a specific day but the agreement of the employee which can't be obtained under the pre-existing employment mechanism at all. I mean which is why I was asking you yesterday about the transitional arrangements, but they don't deal with this sort of thing at all do they? Because the policy of the 2003 Act does include that work-life balance is redolent with identification of days of family significance and religious and cultural observance, and seems to contemplate that an employee can't be required to transfer the entitlement under s.44(1).

Toogood No I don't argue that the employee can be required to do that.

Elias CJ I thought you were suggesting that the pilots under the existing employment contract would have to negotiate in good faith to transfer their entitlement.

Toogood No, what we say is that for the reasons which I've just discussed, the provisions of the CEA as explained in the agreed facts and in the submissions presented to the Employment Court, amount to an agreement which was under s.7A of the old Act but of exactly the same effect to s.44(2); in other words the transfer of the public holiday to another day - we say that is an agreement. In the light of the Employment Court's finding which is we concede is likely now to be endorsed, which is that the day must be specified, or I beg your pardon, identified, or capable of identification. The party's intention to conclude an agreement of that kind is not quite complete but it can be completed without doing violence to the arrangement once the party's actually addressed the issue of identification. There's no reason just because this agreement pre-dates the legislation, why it can't be held to be compliant particularly

Elias CJ Well I think that may well have to be an argument for another day.

Toogood And that's why I'm going to suggest that so far as question (c) is concerned Your Honours may prefer to remit that to the Employment Court for determination. Once Your Honours have said a s.44(2) agreement has to have these characteristics then it will be a question of fact for the Employment Court as to whether or not, that is the case.

Elias CJ Well wouldn't it rather be that (c) is not reached because of the answers given to the earlier questions and then it's for you to institute proceedings on the point that you want to see

Toogood Well it won't be for us, it will be for the pilots I suspect to initiate proceedings.

Elias CJ Maybe.

Toogood But I suppose my suggestion is for the convenience of the parties; there is provision in the Employment Relations Act for matters to be remitted to the Employment Court

Tipping J Well we have power under our Act to remit to any Court in New Zealand any question.

Toogood Well absolutely, so with respect rather than require the parties to start again, we've got everything there. From the employers' point of view we're comfortable with the prospect of going back to the Employment Court once the legal framework is established for a determination as to whether or not this agreement fits within the framework. We say it does; we say that was what was conceded, but I accept it's not something that this Court may consider itself able to do, either because of jurisdiction or because it's just not deciding questions of fact.

Tipping J If we can properly decide it Mr Toogood. Presumably everybody would prefer that to be done. I mean there's no magic in sending it back to the Employment Court per se is there?

Toogood No, in terms of Air New Zealand's preference it would depend very much on the answer to this. But yes, I think from everybody's point of view

Tipping J Well if you get the right answer you'd like us to decide it but if we're going to give you the wrong answer you'd rather someone else decided it?

Toogood Absolutely Sir, but I think this is longstanding litigation. It would be nice to think that it could be brought to an end soon but that may not be realistic because there are other

Tipping J Are you suggesting really that if we have any difficulties that we can't properly deal with, this would be a suitable mechanism?

Toogood Yes, and in fact that's just what the Court of Appeal did. It determined the answers and we say didn't get it quite right, but we say that it determined the answers and then remitted the issues to the Employment Court for resolution, and that seems with respect to be a practical way of approaching the factual issues.

Elias CJ Well except it's not just a factual issue.

Toogood Oh well no, but Your Honours will deal with the legal aspects one hopes by determining just what the ingredients if you like of a valid 44(2) agreement are, and that's A and B of those questions really.

Tipping J Is the question really at what point do you have to have specificity?

Toogood Yes.

Tipping J It's as simple as that.

Toogood Yes. Well there has to be an agreement and that has to be a whole agreement

Tipping J Ultimately there has to be an identifiable day otherwise the whole system is a nonsense.

Toogood Well we accept that there are very good reasons why you would require identification, or the means of identification, in the s.44(2) agreement.

Tipping J Well the holiday records have ultimately to show don't they what day was taken?

Toogood Yes, and you need to be sure that s.44(3) is observed and so on. That's really why the concession's been made.

Tipping J Well very rightly I would think.

Toogood That we

Tipping J But sooner or later Mr Toogood you apply the concession you admit, and very rightly in my view, that there has to be a specificity. The only issue is at what stage?

Toogood Yes, and can it be done in this case in two bites and we say yes, there's no reason in principle why an agreement of any kind can't be comprised in a number of different documents

Tipping J As long as you ultimately get agreement you're right, you're okay, on an identified day

Toogood Yes

Tipping J That's all that's required?

Toogood Yes.

Tipping J Yes, I understand entirely your point.

Toogood Yes and whether or not this agreement is an agreement under 44(2) which complies with all of those requirements may be better determined by the Employment Court.

Anderson J Do you say it doesn't necessarily have to be ascertained before the otherwise public holiday?

Toogood I do, and I'd say

Anderson J But it has to be ascertained within the course of 12 months?

Toogood Yes, in my submission yes, 44(3) would suggest that.

Anderson J But whenever you take an alternative day you identify a day.

Toogood Yes.

Anderson J So what's the difference?

Toogood But not necessarily at the time. The employee has 12 months to determine.

Anderson J Yes but you said a minute ago as I understood you, it didn't matter under the 44(2) arrangement whether it was ascertained before or after the day

Toogood I do say that.

Anderson J Well what's the difference then between that an alternative day?

Toogood Well the difference is that 44(2) does not require identification before the public holiday, the specified public holiday, it requires identification at some point, and our view is within the 12 months.

Anderson J So what happens if you don't agree on the exchange day but you agree to work on a public holiday? You get an alternative day.

Toogood Well Your Honour, and that's my point, that the parties are obliged to agree. There's a requirement to agree.

Anderson J But whether you agree by saying 'we're going to agree it's an exchange day or we're going to agree it's an alternative day, is a different outcome. On one you get

Toogood Well it depends on whether or not it's a 44(2) agreement. If it's not a 44(2) agreement the Act provides the mechanism.

Anderson J I understand that but even under 44(2) the parties would have to agree what the exchange day is because it's all done by agreement.

Toogood I accept that and I haven't

Anderson J And on an alternative day they have to agree.

Toogood No, the employee determines.

Anderson J Unless if they can't agree.

Toogood If they can't agree the employee determines. If the employee doesn't determine within 12 months the employer may determine, and after 12 months the employee may request a cash-in arrangement.

Tipping J And that's different from 44(2)

Toogood Absolutely.

Tipping J In your submission?

Toogood Yes.

Tipping J It has that fundamental difference?

Toogood Yes.

Anderson J Suppose I come along and say I want to take Yom Kippur. If it doesn't suit the boss, the boss will say no.

Toogood Yes, and what's wrong with that?

Anderson J And why is he going to say yes later?

Toogood Well what's

Anderson J What's the practical difference?

Toogood Because once Christmas Day has passed the employee and paid time and a half and gets an alternative holiday, the employee can say I'll take it on Yom Kippur, thanks very much.

Anderson J And the boss says no.

Toogood He can't, he can't Sir, under 56 the employee has the absolute right to determine the day on which he will take, or she will take, the alternative

holiday. So the Yom Kippur example is a very good example of why you wouldn't even bother with 44(2). The employee would work Christmas Day, not give a toss, get paid time and a half, take Yom Kippur as a

Anderson J Sorry you say he can do that?

Toogood Yes

Anderson J So why would he agree to an exchange day then?

Toogood He wouldn't, that's my point Sir. 44(2) wouldn't come into it in those circumstances.

Anderson J Well what's the sense in of having it?

Toogood Because 44(2) has an entirely different concept, that is where the employee wants to treat Christmas Day as having no significance whatsoever; work not get paid time and a half, but take Yom Kippur as a day of special significance.

Elias CJ And is required to work on it.

Toogood I emphasise it is so, and this again I go back to the examples. It is so rare, it would be so rare for an employee to initiate a 44(2) arrangement that I would doesn't need to be overly concerned.

Elias CJ But you're suggesting, I must be getting this wrong, because you're suggesting that the employment contract you have can be perfected to make it a 44(2) agreement

Toogood Yes.

Elias CJ So that wouldn't be so rare.

Toogood No not in this particular case because of the almost unique arrangements these parties have entered into.

Elias CJ Well I should say that for my part if you are seeking some guidance from this Court on the subsequent matter which you say is simply a fact, I would need convincing that an agreement under s.7A complies with 44(2).

Toogood Well then we'll have to go back and revisit what differences there are if any between s.7A(2) and what it provided and what 44(2) provides.

Elias CJ Well I'd be obliged if you could do that briefly because if the change in the emphasis of your submission, because there in 7A(1) the employment

contract drives the arrangements between the parties and there is a default position.

Toogood In 7A(2).

Elias CJ Yes. In 44 the holidays are identified and they can only be varied by agreement.

Toogood That's exactly the same as under 7A(2).

Elias CJ Well I wonder whether that is so given the policy of the legislation.

Toogood Well if Your Honour looks at tab 2 in the respondent's bundle

Tipping J This is your comparative, yes

Toogood Yes. In my respectful submission there is absolutely no material difference between 7A(2)

Elias CJ Not in effect

Toogood No, no.

Elias CJ Not in effect in terms of the entitlements but in terms of the requirement of the employee's agreement.

Toogood No. Under 7A(2) 'unless the employment contract otherwise provides, it could only provide that by agreement or a worker and the worker's employer otherwise agree', again an agreement is required, these are the days. When you go to 44, these are the days however in ss.2 and employer and employee may agree whether in an employment or otherwise that any public holiday specified in (1) is to be observed on another day. Now with respect Your Honour there is no material difference at all between those two provisions and I've no doubt that my learned friend Mr Cleary would say when one examines the legislative history the working parties, clause 4.2 I think are the working party's report recommended continuing existing arrangements. There is no difference signalled there in terms of the intention which is 'the statute provides the default provision but the parties can agree otherwise', and we say that an agreement which complied with 7A(2) will comply with 44(2) so long as there is the identification dealt with.

Anderson J Could we just go back a moment to this point we were discussing Mr Toogood. I appreciate the point that if you agree you get certainty as to the day off, if not you lose some certainty. I'd like to look at that in practical terms. You say to me I want you to work in the kitchen on

Christmas Day and I say yes I'll do that, I agree, and now I'm giving you notice pursuant to s.57,ss.2(a)3 that I want my alternative day on Yom Kippur.

Toogood Yes.

Anderson J Now if that doesn't suit you at that time you wouldn't have agreed to an exchange day.

Toogood Yes. Well it's an alternative day, not an exchange day.

Anderson J Sorry, you wouldn't have agreed to a s.44(2) arrangement in those terms.

Toogood No, no.

Anderson J So I'd be taking the chances anyway if in the event that it didn't suit you, so what's the benefit? Just saying I'll do it by s.44(2) instead of saying yes I agree and here's notice under s.57(3).

Toogood I'm not suggesting there is a benefit and our examples indicate that in most cases the alternative holiday's regime will meet the needs of employees.

Anderson J Particularly when the parties must agree and if they can't the employer has to determine it on a day that suits the employee's convenience, not the employer's convenience.

Toogood Yes, the issue will arise if an employee knows that he or she is not working, not required to work on Christmas Day, rostered off on Christmas Day, but knows when Yom Kippur is occurring and knows that the roster will require them to work that day and they say to the boss 'look I'd rather work Christmas Day and have Yom Kippur off'. The employer is perfectly entitled to say no, and the employee is stuck with that, but if the employer agrees then it can be done under 44(2) or it can be done on the basis that the employer who's not rostered to work, works on Christmas Day, gets paid time and a half because it's a public holiday and is given Yom Kippur off on whatever basis can be agreed, so there's no compulsion to resort to 44(2), and because of the requirement for agreement on both sides, the parties are at liberty to say no, I don't want to do it that way, I'll stick with my roster, or you'll stick with your roster. It doesn't suit me to have you taking Yom Kippur off, I'm sorry.

Anderson J I just have a difficulty seeing why any employee would ever do the silly thing and agree it instead of negotiating immediately after it.

Toogood Well Parliament has determined that the Christian view of what's special and important should prevail as a default provision, not the Jewish

provision or the Muslim preference. That is what Parliament has dictated so that there will be many people who are required to take holidays on Christmas Day who may prefer not to and to take them some other time. They have the opportunity to reach agreement with their employer to substitute those arrangements, but the employer is equally free to say no.

Anderson J If the employer didn't want them on that day, the employer wouldn't ask them anyway.

Toogood Right, but I thought Your Honour was predicating an employee initiation of this agreement.

Anderson J Well no, not really, unless the employer wanted them there would never be an agreement.

Toogood No, and it may be that in many cases the work's not available or you know there are any number of reasons why the parties may not consider

Anderson J Well I understand your point, I was just trying to translate it into a real situation really.

Toogood Yes, well we've tried to do that in the examples.

Tipping J Mr Toogood, the fact that you've abandoned the principal argument on the second point, does that mean we're not going to be troubled with the question of the concession that you said was going to be your primary focus this morning? I'm just trying to see where all this is fitting in.

Toogood Well what it means is that if we had continued to pursue our primary argument, we would be saying to Your Honours that the agreement reached in the collective agreement as explained in the agreed facts in the submissions, is complete.

Tipping J Yes.

Toogood Abandoning our primary argument means that the agreement is still intended to be a 44(2) agreement but it's not quite complete because the parties haven't identified it.

Tipping J I understand.

Toogood And we say they can do that outside

Tipping J But does that remove this debate that was going to take place about whether there was a concession and if so what it meant?

Toogood No, no, because my learned friend says well even if there is a requirement on the parties to identify a day, this is not a s.44(2) agreement in any event.

Tipping J I see.

Toogood I anticipate that's what they say. We say that flies in the face of the concessions that they've made in the Court below but that may have to be resolved somewhere else.

Tipping J Right, thank you.

Anderson J Did you say that because questions of interpretation are for the Employment Court?

Toogood I think that really is what it comes down to Sir, yes, and we say that's a perfectly good reason and I'm happy to adopt it, and also because at that stage it is primarily a question of fact. But Your Honour's right, it is a matter for interpretation of what the parties have agreed.

Tipping J So the point might be does this actual agreement constitute a 44(2) agreement?

Toogood Yes. Determined by reference to the principles which Your Honours will

Tipping J Determined as against what we're going to say as the law?

Toogood Yes, yes.

Elias CJ Rather than is it capable of being a s.44(2) agreement?

Toogood Yes, yes. Unless Your Honours have any questions I will finish.

Tipping J No, thank you.

Elias CJ No, thank you. Mr Cleary do you wish to be heard?

Cleary Thank you Your Honours, there are some matters of clarification which I might be able to assist the Court with.

Elias CJ Yes, would you like to come to the lectern?

Cleary Thank you. May it please Your Honours the intervenor takes no issue with the concession made by my friend Mr Toogood. Its main role here is to assist the Court in terms of the history of legislation but also to reinforce the point just made by my friend that there is in any event no material difference between the old regime and the new, albeit that the new regime

is perhaps is more express in its purpose sections of what the Act is all about. We say the landmark decision, if any, was *Telecom*, which in effect said you can't alienate your public holidays, you must have 11 holidays per year and they must be days on pay if they're otherwise working days. That was the landmark decision, which granted each and every employee in New Zealand 11 whole paid holidays. Now the 2003 Act carries that on and the question really for this Court is whether there is any difference between s.44(2) and s.7A(2).

Tipping J But the time and a half point

Cleary Yes.

Tipping J Mr Toogood's argument basically said that s.50, which says you must be paid time and a half for working on a public holiday, it is not applicable if there's been this exchange because the original day ceases to be a defined public holiday. I think I have his point precisely. Now is there any other way in which the plain terms of s.50 can be read down or otherwise re-interpreted other than through this definitional approach? I didn't understand Mr Toogood to be arguing for any other way, now do you argue for any other way?

Cleary No, we say there is only one regime, that is the Holidays Act 2003, and in terms of the question before you, sub part 3, public holiday, and the only way you will ever have to pay time and a half is if the employee is required to work, and we're talking about otherwise working days, required to work under s.47; time and a half is triggered; an alternative holiday is triggered, and the alternative holiday regime

Tipping J You're going well beyond what I was inviting. I'm not complaining but I'm just saying you have said no, there is no other reasoning that it takes you out of the plain terms of s.50 other than the definitional reason. I just want to get that absolutely clear in my mind.

Cleary Yes.

Tipping J Thank you, but expand or whatever, I just wanted an answer to that point.

Cleary Just in terms of the definitional approach, Mr Toogood covered all the areas that were set out in our submission but there was one

Tipping J I'm not inviting you to just repeat him, I'm just saying is there anything new that you can add on that issue?

Cleary Well could I suggest Sir the avoidance of doubt that there are several aspects that might reinforce the Court's view on their definitional aspect

that alternative holidays are a separate beast from those days under s.44(2) and s.3, the definition section, before I turn to that if the Court could recognise that s.43(3) which is linked with s.44(2) in terms of it being what Air New Zealand call a 'break' on an employer's ability to require employees to work and produce their otherwise entitlements. 44(3) talks about paid public holidays. Now paid public holidays are not defined but it is referred to in the definition section. First of all which is s.5 under Holiday, so under this Act, holiday means either a paid holiday is an annual holiday provided in sub-part 1 or a paid public holiday from sub-part 3.

Tipping J How does that help on this definition point?

Cleary Because if we're talking about how alternative holidays are to be treated differently in the sense that s.50 is the only way that an alternative holiday is to be triggered

Tipping J But you're relying on the fact that alternative holidays are in para.B of the definition, so that they're are a different beat

Cleary Outside

Tipping J Yes I understand that point, I fully understand that point.

Cleary And in that sense alternative holidays, and I'll come to Justice Anderson's query because it can be exemplified for instance this year which is where Waitangi Day fell, Tuesday the 6th February, and following my friend's suggestion that there is a notion such as the great kiwi long weekend many employees one would imagine would want to take the Monday as the holiday rather than have to come back to work, work the Monday and then have the public holiday off. Now in that instance it's open we say for employees and employers to agree under 44(2) to agree that the Monday the 5th of February is the public holiday that that is to be taken off as a day off work by the employee and then they start the working week on Tuesday the 6th February.

Tipping J And they don't have to be paid time and a half on the Monday?

Cleary Yes, and that is the critical reason why 44(2) in the sense of a consensual agreement relates to a bargain. It's a deal between employers and employees to arrive at a convenient outcome that wouldn't otherwise be possible under the Act and if we were to adopt the alternative holiday regime for that scenario, the employer must be duty-bound to pay time and a half on the Tuesday following my friend's argument

Tipping J Is your best definitional point, and I'm not trying to be facetious here, the definition of public holiday?

Cleary Yes.

Tipping J It's as simple as that isn't it? But that's your best point on why these days cease to be public holidays if there's this 44(2) arrangement?

Cleary Yes, and it's a whole reading of s.44 itself and the history does help in this aspect but we also say that the word 'observed' occurs and there was some discussion yesterday and Justice Tipping raised the point 'why isn't there simply a carry-over from the word 'observed' in s.44(1), and there is. The word 'observed' is used in s.44(1) in terms of the Anniversary Day, and it's also used in terms of when the Queen's Birthday has to be taken, and we suggest that it would be straining the legislation to say that the meaning in s.44(2) is different and it means simply a nominal transfer.

McGrath J But we are in 44(2) speaking of observed by the employee, whereas it's just simply observed in 44(1)?

Cleary Yes, yes, and I agree with my friend's proposition that that may in fact relate to a workplace where there is employees staying on who are observing the day and those who are not. We also suggest that a similar concept in s.45, which is the words I think are treated as 'falling on' is very similar to the concept that we're suggesting should apply to 44(2), and the reason that those words weren't used really follows the history of s.45 which is the statutory process of what's called "mondayisation" and in Business New Zealand's bundle at the old Holidays Act, s.9 sets out that process.

Tipping J But there's no consistency in 44(1) of the use of this word 'observe'. Labour Day for example simply says being the fourth Monday in October, it doesn't say observed on the fourth Monday in October.

Cleary Yes well that may be a reference back to the old Holidays Act which stated that Labour Day was the fourth week in October.

Tipping J But you're striving to get this weight on the word 'observed' and with great respect that's an immediate breakdown isn't it?

Cleary I think what it reflects is that throughout sub-part 3 there are different shades of the meaning. The reason I've raised 'observed' is to support my friend's suggestion that it can mean working on a public holiday and that

Tipping J So your client also takes the view that you can observe by working?

Cleary Yes, and if you look at the old s.9 which I've just referred to which is in

Tipping J The old s.9?

Cleary Yes.

McGrath J Where do we find that?

Cleary That would be in Business New Zealand's bundle and I must say that at tab 3 that this Act is a reprint as at 1991, so it doesn't include the amendment made in the terms of the Employment Relations Act. Section 9 is the old Mondayisation of Christmas and New Year. In ss.8, where provisions made for the granting of a holiday, indisputably a day off work for the observance of certain hours of labour, in square brackets, on that holiday. So there's a historical emergence of that word and that was we say followed up by the Court of Appeal in *Barrycourt* which was referred to

McGrath J Justice McKay used the word didn't he?

Cleary Yes.

McGrath J I noticed that.

Cleary Well I can turn to that. It's under respondent's bundle, tab 5, page 160 it's first used, and this is a case where Mr Otter worked Christmas Day but it was mondayised and he in effect didn't get any Christmas holidays, and the question was whether the agreement could in fact contract out of the designated days. At line 15, 'unless the collective employment agreement in the present case otherwise provides the four relevant holidays would be observed on the Saturdays'. That phraseology is repeated at page 163, line 16 'the intention would appear to be to widen the scope for the parties to make their own agreement as to the days to be observed as holidays'.

McGrath J Sorry, what line was that?

Cleary Line 16.

McGrath J Yes.

Cleary The reference there was to the Labour Relations Act, s.173, and that's set out in the last section of Business New Zealand's authority, and this was the so-called special reasons required to transfer a holiday, and we submit that what s.7A(1) or 7A(2) did is to say that special reasons were no longer required. It was between the parties, and the juxta-position of the old 7A and the new s.44(2) we say simply reverses the order.

Tipping J What do you say about the drafting history? You understand the point I'm

Cleary If I could refer the Working Group report and take some issue with my friend's suggestion that it was simply read and more than taken up as the Minister said in a Hansard speech

Tipping J 4 is it, tab 4?

Cleary This is tab 4 of the respondent's bundle. This was following the introduction of the Employment Relations Act with its emphasis on good faith and by part on it resolution of issues that the Government established this group to work out what was wrong with the Act and how to fix it, and we suggest that policy questions aside, most of all the machinery that was suggested by the working group has in effect been replicated in the Act. It has codified much of the

Tipping J I'm referring more specifically to the fact that in Select Committee they took out the 'as agreed' provision from the definitional section and put it into a later subsection. That's the point I'm asking you to address, not the amorphous point of how all this came about.

Cleary I would however just on that point like to mention that at clause 4.2 that my friend mentioned, the group did agree that the status quo should continue. To answer His Honour's point we say there's no rhyme or reason for that change, it simply happened.

Tipping J It's just a presentation or pure drafting.

Cleary It's simply as the Court of Appeal I think suggested, a change from the plural to the singular.

Tipping J But it's more than that; it's a rearrangement within the section as a whole, which appear to take the substitute day out of being definitionally a public holiday.

Cleary If you accept that 44(1) is the sole definition provision, and we don't. We say 44 as a whole constitutes the definition of public holiday, and yes questions are legitimately raised about why that would happen. We don't know. We suspect that there was concern about other provisions

Tipping J Well you can't really give us your suspicions I don't think Mr Cleary. If there's no apparent explanation

Cleary No, there is none.

Tipping J You can submit to us that such and such may be the answer, but your client's suspicions I don't think are all that helpful.

Cleary I would like to mention that in answer to your question might emerge from the report-back by the committee. Essentially it appears that the redraft

Tipping J And can you refer us to a particular passage?

Cleary This is bundle 3 of the respondent's bundle.

Tipping J At page?

Cleary This is page 6, under the heading 'Public Holiday Entitlements'. Bear in mind that part of the rationale behind the new Act was to modernise the legislation and with that went an ambition to modernise the language used and that re-organising a definitional section may have come under that particular ambition, but it is consistent with s.44(3) in the sense that Parliament was aware that it wished to maintain employees' entitlements and if the order was to be juggled around, if I can put it that way, that 44(2) would make more sense rather than being a preamble to being a subsequent subsection. But importantly we say the committee recognised the difference between the alternative holiday regime and a transferred public holiday and it recognises that the Act should be flexible, and it sets out a framework whereby employer and employee may agree to observe the public holidays on alternative days. Now it may be an inapt description in the sense that alternative holidays follow it but certainly in our view distinguishes the two, because a transferred public holiday is an alternative day, it's an alternative public holiday

Anderson J I wonder if your position would have more strength if the exchange day is agreed before the public holiday is worked, because if it's agreed after it's worked, you're no better off than if you just said I'll take my chances, and the advantage to agreeing is that you secure the day. If you don't agree you take your chance on the day but you get time and a half. You may very well get it because it's loaded in favour of the employee but you won't have it secured.

Cleary Yes.

Anderson J But you don't get that advantage if you enter into after you've actually worked the day, because you've already

Cleary No, from the employer's perspective yes it's more certain, but it is after all an agreement and it's in the Act to allow flexibility around public holidays.

Anderson J Well I can see how it would work if it's agreed before the day is actually worked that entitles one otherwise to an alternative day, but I can't see any reason for it afterwards because you can't un-work the day as it were.

Cleary No.

Anderson J You take your chances on whether you'll get it.

Cleary Well it could for instance be an employee who wishes to take some holiday in the future around a date which is uncertain, for instance a wedding which is

Anderson J But it may not suit the employer at the time. I mean if it's uncertain the employer is not likely to agree to it because the employer won't know.

Cleary No, but that assumes

Anderson J But after it's worked it's owed.

Cleary Yes I understand and that does make it more certain that this clause is after-all designed to allow flexibility and if an employer in a good faith working relationship with an employee believes that they're in a position to allow an uncertain day in the future to be taken at their convenience or otherwise, then that is the deal

Anderson J And any agreement afterwards where there is an agreement pursuant to the alternative day arrangements.

Cleary Well it's similar to. The effect is the same, but the statutory regime is different. Now the payment is exactly the same. The *Heinz Watties* case is a prime example where it did seem to work and His Honour raised the point that the employer and the Union were agreeing on an outcome but it

Anderson J To a specific day in advance.

Cleary Yes, well the provision in the collective agreement was for the next successive shift.

Anderson J Well ascertainable day.

Cleary Ascertainable

Anderson J Ascertainable with certainty and it was agreed in advance.

Cleary Yes, yes, but the point I'm drawing to your attention is that it was contested, not among those parties perhaps, but by the Department of Labour, who had issued the opinion and there was a discussion there that exactly on the same lines as my friend is putting forward that the day is simply an alternative holiday, and the Court in its specialist jurisdiction rejected that argument. Interestingly this Court it doesn't appear as bound, like the Court of Appeal, to take into account that particular specialist jurisdiction in the equity and good conscience jurisdiction of that Court, and that may be an omission in the Employment Relations Act, simply because there was no appeal past the Court of Appeal until this Court commenced.

Tipping J We can't construe this Act just on some amorphous basis of equity and good conscience can we Mr Cleary?

Cleary Well the Act does provide that the Court of Appeal must have regard to that specialist jurisdiction

Tipping J But we have to try and work out what Parliament was getting at here, not some touchy, feely of what would be nice.

Anderson J For Mary or anyone.

Cleary I would support that wholeheartedly, but this is simply a matter of statutory interpretation, bearing in mind the history of 44(2) and simply that it is a continuation

Tipping J Well I'm glad we're agreed on that point Mr Cleary.

McGrath J Can you just remind me Mr Cleary, what the statute actually says in relation to respecting the Court of Appeal's – is it an interpretation of collective agreements or is it as to the meaning of legislation?

Cleary Now this is s.216 of the CRA, 'in determining an opinion under s.214 or 218, which refers to reviews, the Court of Appeal must have regard to the special jurisdiction and powers of the Court and the object of this Act and the objects of the relevant parts of this Act, in particular the provisions of s.189, which is the equity and good conscience'.

Blanchard J Well it can't be different for us.

Tipping J No, no.

Cleary I'm not suggesting that it is

Blanchard J We could hardly say the Court of Appeal was wrong because it had legitimately obeyed that dictate.

Cleary Yes. My suggestion is that the Employment Court in *Heinz Watties* was operating under its jurisdiction. It arrived at a pragmatic outcome based on its interpretation of the Act. Simply that parties can agree instead of a public holiday, commencing at 1200 hours, it commences at 0200 hours and that allowed the shift to complete; it allowed everyone to have the day off because

Tipping J That was the precise issue wasn't it, the concept of a day, all the rest of it was obiter.

Cleary Well the rest of it was an assumption that the Act, following the history of the Act, shifted the entitlements under the transfer regime.

Tipping J Yes, yes.

Cleary Now the suggestion is that the Employment Court were aware of that history and followed it. Those are the submissions of Business New Zealand unless there are further questions.

Elias CJ Thank you. Yes Mr Harrison?

Harrison As Your Honours please, I wonder if I can just try and deal with this *Heinz Watties* and the related point and get it out of the way right at the outset? My learned friend Mr Toogood went so far as to submit that the Courts below have found it very easy to accept Air New Zealand's position in relation to Ground A and he also cited *Heinz Watties*. As the exchanges with Mr Cleary I submit reveal, it cannot be said that the Employment Court in either this case or in *Heinz Watties*, was directly faced with the Ground A argument in relation to s.44(2) which I had been advancing in this Court and it was advanced full-on for the first time in the Court of Appeal. It wasn't remotely presented that way I have presented it in the Employment Court, thus it is wrong to attribute any weight to either the Employment Court in this case or *Heinz Watties* and with the greatest of respect, invoking the specialist nature of that jurisdiction in a straight-out statutory interpretation context is futile. Now can I now revisit s.44(2) in the light of the debate which has occurred and in particular there was an exchange involving Your Honour Justice Tipping about the word 'observed' and how it's treated in s.44(1) and (2). Now thinking about this last night I had one of those thoughts where the penny seemed to drop. Now whether you agree that it's dropped or not I'd like to just ultimately agree

Elias CJ Did it seem the same way in the morning?

Harrison Yes, yes, well actually it did rightly or wrongly. I need to develop

Blanchard J Were you awake at the time?

Harrison I knew I was leaving myself totally wide open.

Anderson J A penny for your thoughts then Mr Harrison.

Harrison Yes, thank you. I need to develop this in a series of steps, some of which will be familiar. But I begin with the first point which is that s.44(2) applies on its face both to an employee initiative where the employee wants to work the designated public holiday and to an employer initiative where the employer wants the employee to work the designated public holiday. So it seems to be common ground that it encompasses both of those scenarios.

Elias CJ Do they have to have in contemplation wanting to work the public holiday for a 44(2) agreement?

Harrison The designated public holiday, yes.

Elias CJ Yes, do they have to have that in mind?

Harrison Yes.

Tipping J Not necessarily I would have thought. Very likely but not absolutely necessarily.

Harrison Well I don't quite follow why not.

Elias CJ Well the business may not operate on Christmas Day for example.

Harrison But for people to be wanting to agree under s.44(2)

Elias CJ They might just want to make it quite clear they're not going to be required to work on a particular day of significance to them.

Harrison The agreement is that any public holiday, any designated public holiday is to be observed on another day, so the agreement is one which takes a designated public holiday and deals with it in a way that in effect results in the employee working on the designated public holiday, otherwise why would you have

Tipping J I think the Chief Justice's point, which is the same sort of thought that was occurring to me is they might want the protection of having a substitute day where they can't be made to work without their agreement.

Blanchard J But that pre-supposes that there's an existing agreement that they will work.

Tipping J I with respect agree this is pretty remote but I can conceive a possible situation but I don't it's really going to take us very far.

Anderson J Well then they'd be wanting to alter an existing obligation.

Tipping J Maybe so, but they may want that. Anyway I personally see it as in practical terms they're going to be working on the public holiday.

Harrison Well let's deal with it at a practical level. I mean Air New Zealand's argument is that s.44(2) is available to an employer and it can be utilised to get the employee to an agree to work on a designated public holiday and that's a mechanism for doing that and if that mechanism is used then consequences flow and entitlements do not vest, so just coming back to the point, the possibilities are an employee initiative – that's the Jewish employee scenario – and an employer initiative where the employer wants to work the designated public holiday or holidays.

Elias CJ Why wouldn't the employer use s.47(1)?

Harrison If there's one regime as I have argued, it all falls into place. The reason why the employer will not want to use 47(1) is that if my learned friend is right the employer by that means gets out of the time and a half obligation.

Elias CJ You mean by using the 44(2), yes.

Harrison 44(2), yes. That's why, I mean we've got to face that prospect that if 44(2) is an alternative mechanism for agreeing and it doesn't trigger the entitlements, then employers will seek to use it. I mean that seems to be obvious in my submission, so we come back to the question

Elias CJ Well don't they come to that because of the fairly expansive view you take of 44(2) as opposed to 47?

Harrison If, I'm sorry to be repeating myself, if there is one regime, s.44(2) is simply the empowering provision and when you agree under 44(2) the entitlements vest and flow, then it can be an expansive view because it's the only regime. If there are two regimes, back to what we were saying yesterday, if there are two regimes, then you've got to leave room for both regimes and you narrow 44(2). I'm looking at the moment at the first

question, Ground A, and I'm coming to address the issue of what significance ought to be derived from the use of the word 'observed' in 44(2). At the moment I am just putting that it's common ground that 44(2) is available both when there's employee initiative and when there's an employer initiative, and indeed my learned friend Mr Toogood said that, I think his words were, it would be very rare that 44(2) would involve an employee initiative, and this is my next point, one can say that the vast majority of s.44(2) agreement scenarios will involve an employer initiative and moreover an attempt by employer to have the employee sacrifice his or her interests in respect of the designated public holiday in order to advance the employer's business interests. Now when you have that, the employee being asked to sacrifice the designated public holiday to advance the employer's best interest, that's precisely the point at which this legislation can be expected to operate to disincentives employees having to work to the detriment of work-life balance. You'd expect something to be triggered when an employer is trying to do that, and I'm not talking about unscrupulous employers or anything like that. That spectre has been raised by Mr Toogood, we're simply talking about a self-interested employer seeking to do this. So down to that point, then the next step in the argument is that sub-part 3 and especially s.44(2) must be interpreted against that background which is that under 44(2) it will very often, the vast majority of cases, be an employer initiative. And then in judging that you have to go to the s.6,ss.1 intention of the Act of conferring minimum entitlements with respect to each entitlement provided to an employee by this Act to use the words. So in my submission, and this is the next, I'm coming to the penny dropping, it's wrong

Tipping J It's taking a long time to drop.

Harrison You're waiting for it to drop. It follows

Elias CJ I'm glad it hadn't dropped up to this point.

Harrison Right, well all of this we've been through before in a way, but my submission is with that context for s.44(2), it's wrong to focus on the Jewish employee scenario, which is an employee initiative, and ignore the reality that we'll mainly be dealing with an employer initiative and here's what I hope is the crunch, it will probably fall completely flat, if you interpret the words 'observed by an employee' as akin to celebrated by the employee, that works in the case of an employee initiative. The Jewish employee says I want Yom Kippur and you can say ah ha, the other day is being observed by or celebrated by that employee, but if you take an employer initiative it just does not gel to treat the word 'observed' as akin to celebrated by, because the employee who gives up a designated public holiday to further the employer's interest, can't possibly be said to observe

or celebrate anything on the day in lieu. You give us your designated public holiday; you get a day in lieu; you're not observing anything on the day in lieu. So this indicates in my submission that s.44(2) is not about observance in the sense of

Tipping J Is there a possible step 6 and a possible further penny by saying, and I think this is implicit, but by saying expressly that your argument incorporates the view that it's not only to reward the employee, but it's to disincentives the employer by making it expensive to get people to work on Christmas Day?

Harrison That is certainly part of the submission and I would argue part of the policy of the Act, that was the approach Justice Chambers took that imposing the time and a half and the alternative holiday rights was by way of dis-incentivising the employer, making it more expensive to depart from the idea that work-life balance actually requires you to take a holiday in fact. But my point about 'observes' is that it needs to be interpreted in a way that makes it work for both of those alternative scenarios and in other scenarios, but to place too much weight on it in this context because of the Jewish employee scenario is wrong. So my submission then following on from that is that s.44(2) needs to be interpreted so that it dove-tails with s.56(1) and this is a point I have made before I acknowledge, where that talks about the entitlement to another day's holiday instead of a public holiday. We're really just talking about, and I'm happy with the word, an 'exchange', that's the word that's used in s.43(b) rather than some magical concept of observance in this context. So in my submission s.44(2) should effectively read, taking the language as it sands and then tweaking it 'an employer/employee may agree whether in an employment agreement or otherwise that any public holiday specified in ss.1 is to be exchanged for an alternative holiday'. Or you could say 'is to be exchanged

Blanchard J Which would then contrast with the use of the word 'transfer' in the heading of 45.

Harrison Yes well I see 45 as a stand-alone provision that

Blanchard J But it is an indication that the legislature was capable of thinking about the idea of transferring a public holiday, but they didn't use that language in 44(2).

Harrison That's correct, and the must be treated language, must be treated as falling, that is a true deeming of a transferred day to be a public holiday. So that supports the one regime approach and in my submission although it does a little bit of minor violence to the wording of s.44(2), it certainly does less violence than my learned friend's argument that you can observe a designated public holiday while working on it. Now can I just deal as part

of that with the exchanges with my learned friend Mr Clearly about the public holiday that falls on a Tuesday and then there is an agreement in effect to move it to the Monday and how sensible that would be and why would the employer agree to pay time and a half for the employee who then works on the public holiday, Tuesday. Now as regards that, to say that that is within the contemplation of s.44(2) and that the time and a half doesn't bite seems eminently sensible but it is tantamount to saying that the employer and employee can contract out of the time and a half for working on a designated public holiday, and the moment you open that door you have a whole lot of other implications, so that allowing s.44 to be a contracting-out device simply because there is one practical illustration there is in my submission wrong. Now that said it is another thing entirely to take a scenario where the employer and the employee say let's move the Tuesday public holiday to the Monday and we will agree that you will not get the time and a half on the Tuesday. Now if the employee expressly and properly waived the right to the time and a half, that's where I submit that the good faith obligation would preclude the employee later turning around and saying I claim time and a half. There's no need to go to good faith in the Employment Relations Act because as I remind you, and this is in the appellant's bundle, the provision, page 19, under the Holidays Act when dealing with each other under this Act, employer/employee must deal with each other in good faith. Now one of my gripes has been that on the Air New Zealand argument a s.44(2) simply as to an exchange will have the effect that the employee contracts out of time and a half and alternative holiday without expressly doing so, without actually saying 'yes I agree to give up my time and a half if you simply do a swap'. That follows whether the employee understands that consequent or not. Now that is an interpretation to be avoided in my submission, but equally I have no problem with the probably rare scenario where the employee expressly agrees to give up time and a half for example in that scenario and then is told 'well you can't turn around and go back on your work because there's a good faith obligation that prevents you'. That's how to deal with that scenario in my submissions.

McGrath J So good faith obligations can provide de facto waivers of entitlements under the statute, is that what you're saying?

Harrison Yes, and it would be a fraud on the statute to for someone to agree openly and at arms-length in that situation to turn around and claim the statutory entitlement. That's my submission.

McGrath J Sounds as though it might be fraught with future situations of controversy.

Harrison I doubt it with respect in practice. I mean it's a common-sense thing to say in a small business shift the Tuesday to the Monday and let's have a

long weekend and how often would an employee then turn around and try and stab his or her employer in the back that way.

McGrath J I agree that might be so because it's only when people insist on legal rights that they get determined and enforced, but I think it's a different thing to say that the Acts could face provisions contemplate waivers of legal entitlements.

Harrison Well whether it's going to be put that way or there's simply going to be a defence based on absence of good faith – I mean we talk about the Employment Court as a Specialist Court

McGrath J Equity and good conscience is it again?

Harrison The Employment Court would give a claim by an employee along those lines a very short shrift I think I can assure Your Honours. So my point is again, like the Jewish employee scenario one should not be beguiled by those kinds of issues into interpreting s.44(2) in a way that enables the statutory entitlements which Parliament plainly intended, minimum entitlements not to be contracted out, to be removed.

Elias CJ Mr Harrison I don't want to hurry you but I would just like an indication – you'll be a little while yet? We should take the adjournment now?

Harrison Yes thank you, I will be a little longer.

Elias CJ Yes, thank you.

11.34am Court Adjourned
11.59am Court Resumed

Elias CJ Yes Mr Harrison.

Harrison Yes, thank you Your Honours. I'm about to move off Ground A and turn to Grounds B and C, but just one final point before I do that. My learned friend has repeatedly submitted that on the Air New Zealand interpretation a s.44(2) agreement merely postpones the entitlements, it doesn't remove them and in my respectful submission that is a Jesuitical argument. If we take the Mary scenario, if Mary works on Christmas Day she misses out on time and a half for Christmas Day for good. If the arrangement works as it's supposed to and Mary then takes the exchange day off she also misses out on alternative holiday status and entitlements for the day she has taken off, so the entitlements are not merely postponed in relation to the designated public holiday, Christmas Day on which she works

Tipping J But there's no time and a half on either day.

Harrison Well that's right, that's the point. Well focusing on time and a half which is the easiest argument, yes it's not postponed. If the arrangement works as it's supposed to and she takes the exchange day off she misses out.

Elias CJ And she's not required to work on the exchange day.

Harrison Oh she's not required to work on the exchange day.

Elias CJ Yes, yes. If she'd taken the designated day she wouldn't be entitled to time and a half, she wouldn't be working. So I mean that's the equivalence that Mr Toogood was talking about.

Harrison Well if she takes Christmas Day off and it would otherwise be a working day for her, she gets a paid day off. If it wouldn't otherwise be a working day then she merely gets the day off which is what she would like to have had, like everyone else. But I mean that may be relatively benign and if that happens she's like every other employee basically whose employer doesn't want them to work on a public holiday. It's when she has to work the Christmas Day that the entitlements are lost and of course that's the whole point at issue. Now moving on to

Elias CJ If she has agreed to an exchange.

Harrison Well yes, if the Air New Zealand view is right. If my argument is right then if she does agree to that then the entitlements are there for her. Now the position as regards Grounds B and C and the concessions that have now been made. As I understand the position Air New Zealand basically reverts to, and I could be wrong, reverts to the majority position that the other day must be either identified or identifiable but argues that it can be identified or identifiable ex-post facto, and it's that latter argument that I would oppose. The issue for convenience, and it may be quicker, the issue was addressed by my learned friend in his written submissions and I responded at para.26 of our reply submissions, outline of submissions in reply, page 12, para.26. Rather than reinvent the wheel I'll just take Your Honours through that. I recite the submission from my learned friend's submissions and then I go on to argue that 'the submission's based on a mis-interpretation of the wording of s.44(2). While it's true that what the majority called an exchange of agreement can be made in an employment agreement or otherwise, this cannot mean that an exchange agreement which fails to satisfy 44(2) can be entered into by means of an employment agreement in the hope or assumption that the parties may later informally agree on when the exchange day is to be observed', and I'll come back to the rest of it, but the point is that where in an

employment agreement or otherwise is still directed to the achievement of an agreement that qualifies with whatever test or standard is involved in s.44(2), and if the interpretation is yes, there are two regimes, s.44(2) is one of those regimes, but it had limited scope and because of the scope it needs to be specific exchange one day for another and that is the definition of what qualifies a 44(2) agreement. The 'or otherwise' doesn't mean postpone a decision on whether it qualifies to see whether the parties can agree to agree further down the track.

Tipping J So the agreement has to be before the public holiday in question falls? That's the point is it?

Harrison I'm attracted to that but the argument doesn't need to stand or fall on that.

Tipping J Well I just want to know exactly what your argument is. You talk about ex-post facto. I thought you were submitting that you had to have the agreement before the primary day, before the clock strikes, so to speak.

Harrison Well really in practical terms yes that would happen.

Tipping J Well what is your argument?

Harrison Well, one of the things that my learned friend's argument does not face up to is the point I raised earlier

Tipping J Mr Harrison sorry to press you but is it not possible to give a simple yes or no answer to whether this agreement referred to in 44(2) must pre-date the beginning of the day that's going to be substituted for? Are you arguing for that or are you not?

Harrison Yes.

Tipping J You are?

Harrison Yes.

Anderson J It's implied from the use of the word 'is to be' isn't it?

Harrison Yes

Anderson J Not 'shall have been'?

Harrison Yes, yes, but what I'm saying also as a matter of interpretation of this provision, wherever the dividing line is drawn, so we are in 44(2) territory, and let's say the dividing line it's got to be another specific day. That has to be part and parcel of the agreement for the exchange. No part of it can

be left till later and the words 'or otherwise' simply mean where you agree hollis bolus is either in an employment agreement or can be separate therefrom, but it doesn't involve any temporal division of the process of agreeing.

Elias CJ Because otherwise it's simply an alternative day.

Harrison Yes, it would have to be treated that way even under the alternative hypothesis of two regimes.

McGrath J So it's right out of the roster system isn't it? It's right out of the roster system.

Harrison Yes well that's my next point in para.26. The roster system can't possibly be regarded as taking care of that because contrary to the impression that may have been given, the pilot applies for leave or may expression not to be rostered, but Air New Zealand ultimately decides that question and that is plain from – I hope I don't have to take you through chapter and verse – but that's plain from the entire contract and as you'd expect the way a rostering system ultimately.

McGrath J It's the nature of the roster system. It's a unilateral decision isn't it?

Harrison What it has to be. You've got hundreds of pilots. They've got to be slotted in and at the end of the day a computer does it by and large and

McGrath J Is that according to some concept of seniority do you know or is it

Harrison It is a system under which seniority is given some weighting but not the dominant weighting, would that be fair Mr Thompson?

McGrath J No that's all I need to know that it's got some place in it, yes.

Harrison Yes it has some place in it.

Tipping J And when you fly on Christmas Day you don't know on that day what your exchange day is going to be, is that the ultimate point?

Harrison Yes you do not know at that stage and once more ultimately the employee dictate it either.

Tipping J No, no.

Harrison You do not know and you cannot ultimately dictate it.

Tipping J It hasn't been determined by agreement at the time you fly on Christmas Day has it?

Harrison Nor under this collective agreement is it ultimately a matter for determination by agreement. You get to bid for or apply for leave in the hopes that you get Yom Kippur, but ultimately you have no right to insist on agreement that it will be.

Elias CJ So the submission we've heard that the agreement is incomplete as a s.44(2) agreement, the agreement is not incomplete in its own terms, it simply doesn't comply with s.44(2)?

Harrison That would be my submission.

Elias CJ And the power is permitted under s.47? The power to direct the employee. It's a power in the employment contract which is being exercised.

Harrison Yes, yes Your Honour, and indeed I'm going to come on now to the suggestion that there's something left to be remitted to the Employment Court and secondly the alleged concession about the nature of the agreement, and in my submission both those points are completely without substance. Now can I just go to the question of the concession, the alleged concession? Yesterday when I got a little agitated and there was an aside to my learned friend, it was because he claimed that the concession by ALPA that could be spelled out from the agreed statement of facts

Elias CJ I haven't looked at the agreed statement of facts. Where do you find it?

Harrison Well my learned friend took Your Honours to it this morning.

Elias CJ Oh did he? I must have been behind.

Tipping J The penny was still airborne Mr Harrison.

Harrison Yes, yes. The agreed statement of facts is at volume 2 of the case and it starts at page 248 – sorry, I'm wrong there. So it's page 37 and following. Now

Tipping J In volume?

Harrison In volume 1 of the case.

Tipping J Volume 1.

Elias CJ Ah yes. Actually I did put a tag on it.

Harrison Yes, now in broad terms it is claimed that ALPA has conceded that the clause in the agreement, in clause 16, has the effect of transferring public holidays into the overall days of leave in the collective agreement, and what I objected to was the proposition that there was a concession that there was a transfer of public holidays – in other words a deeming of them, and if we go to clause 14, and I took Your Honours to it yesterday, I submitted that there's no way that the relevant part of clause 14, sorry 16, which is set out at page 39 of the case in clause 12 of the agreed statement, there's no way

Blanchard J Wait a minute that's the fourth paragraph number you've given us. Which one are we looking at?

Harrison Para.12.

Blanchard J 12?

Harrison Para.12 of the agreed statement of facts on page 39 and it's clause 16 of the collective agreement set out in para.12 there. I argued yesterday there's no way that can be treated as amounting to an exchange of public holiday entitlements for alternative days in terms of 44(2). What my learned friend is trying to say is well whether or not that be so, you've conceded that it is a transfer or exchange by virtue of this agreed statement of facts, and on behalf of ALPA I take exception to that

Elias CJ But Mr Toogood didn't really develop this. I just want to be sure that that is the paragraph he was referring to.

Harrison Not just the paragraph, it's the whole – the paragraphs he relied were paras.15 and 22, but he was arguing that ALPA had conceded that there was a true transfer element in the collective agreement provision.

Elias CJ Well that's really not being maintained anymore is it? Doesn't that go with the

Harrison It is being maintained Your Honour. My learned friend is maintaining it. So he's saying in effect the argument says well whatever the true effect of s.16 of the collective agreement ALPA has conceded that it has this effect and we rely on the concession. Now that's what I'm seeking to address, and I'm submitting that there is no concession. That all that the agreed statement of facts does, starting with clause 10 on page 38, is recite the agreement, para.10. Para.11 acknowledges that the nature of the industry resulted in a historic necessity to provide for the 1981 Act Public Holidays by allowing those holidays as part of the overall leave application. It doesn't say they are there by exchanged or transferred

Tipping J I don't read this as saying that we agree that what the agreement is a 44(2) animal.

Harrison Well that's precisely my point. My learned friend says we've conceded it and what I'm objecting to is, with the greatest of respect, twisting this statements of facts into something else.

Tipping J Ignoring the pejorative Mr Harrison, if his argument is that you have conceded whatever your agreement provides for, it's a 44(2) animal. I don't think it is a concession to that effect.

Harrison Well thank you. If Your Honour is

Tipping J But that's just me. I'm just trying to identify precisely what it is that you've supposed to have conceded. Now if the argument is you've conceded that in law this is a 44(2) animal, (a) we wouldn't be bound by it, and (b) I'm not at all convinced that you have.

Harrison Well thank you Your Honour. What I'm submitting forcefully

Tipping J If that is the tenor of the alleged concession.

Harrison That as I understand it is the tenor of the alleged concession.

Toogood And I did refer Your Honours to the submissions, which clarify that precisely.

Tipping J Yes.

Blanchard J Where was that?

Harrison That's in volume 2 of the case on appeal.

Anderson J Page 251, para.15 and 254, para.37.

Harrison Yes, and I think it's mainly page 254, para.37, where with the correction that is referring to 7A(2) that the plaintiff is saying that historic intention of the parties in agreeing to public holidays being included amounts only to an agreement in terms of the now repealed section. So again to try and treat that as a concession regarding the impact of 44(2) is precisely what Air New Zealand during discussions over this issue was at pains not to concede and indeed the reason for our concern is that there was correspondence.

Tipping J Well when you did this agreement s.44(2) didn't exist.

Harrison Well when we did the statement of facts, so I wasn't involved at that point, s.44(2) didn't exist, but whether the arrangement could conceivably be characterised as within s.44(2) in retrospect was precisely the matter in dispute and we're now being told that we conceded it and that even if s.16 of the collective agreement says white, we conceded black, that's the point I'm disputing, and I think I've spent enough time on it. Now the other point was my learned friend said this that there's still something to be remitted to the Employment Court and that was as I noted him 'send it back to the Court to determine whether or not this agreement fits within the framework of s.44(2)'. Now in short my submission is, and I'll come to why, that that issue has raised judicata between the parties and the position of what gets sent back to the Employment Court has already been determined by the Court of Appeal. Can I just take Your Honours, and this won't take long, to volume 1 of the case on appeal at page

Tipping J Was res judicata not the subject of appeal, is that the point?

Harrison Yes that's correct, yes. And certainly we are heading back to the Employment Court but what we're going to determine is the subject of the Court of Appeal judgment, and I'll come to it. But first go to the Employment Court judgment at volume 1 of the case, page 54 at para.60. The Court said 'we accept that as the rosters are presently organised. At 57 they refer to the key provision of the agreement and then 60 'we accept that as the rosters are presently organised, there may be only a slim change of a pilot actually working on a transferred public holiday. But should this occur, then pilots are entitled to time and a half and an alternate day if they work on a specified day of observance of the public holiday. Under the present employment agreement there is no way of confirming whether this has happened or not'. Now on our argument the true issue for determination that remains as the question whether individual pilots have worked on a designated public holiday, not a transferred one, but then the Court went on at para.79, page 56, having set out the requirements of the transitional provision

Tipping J Paragraph what, 60.

Harrison Sorry, para.69, page 56.

Tipping J 69.

Harrison 69. Sorry Your Honour if I mis-stated that. Page 56, 69. Having held that the case this fall within the transitional provisions, a finding which was not appealed against, 'clause 16 does not comply with all of these requirements'. 70, 'finally because clause 16 does not allow for the payment of time and a half and alternative day's holiday in the event etc'. The agreement does not comply with s.50 and the transitional provisions

of s.51 do not apply'. Now the Employment Court had, although it came to a clear conclusion about non-compliance on its interpretation of s.44(2) which required an identified or identifiable day, it did not say what was then to happen, and ALPA cross-appealed really rather pro-forma to say it ought to be sent back to the Employment Court for determination of questions of relief we'd won if the appeal by Air New Zealand failed, you went back to determine relief only and at page 73 of volume 1 of the case, para.50, the Court of Appeal dealt with the Union's cross-appeal. That was 'did the Employment Court err in failing to grant relief specified in all or any of para 3.1 – 3.4'. In those paragraphs and that the order's sort of set out, it was agreed at the hearing that if we gave a 'no' answer to the two questions we should remit the case so that the issue raised on the cross-appeal can be dealt with and the case was remitted. So that's the basis on which the case goes back to the Employment Court to determine relief, and I with respect that is the res judicata and I don't accept the Court can remit the case back to determine any other issues in relation to this collective agreement being issues which have already in fact been disposed of.

Tipping J So if the Employment Court was right in its statement at para.70, and that assumes you succeed in this Court, then the only outstanding issue is the consequences of its being right?

Harrison Yes, except it doesn't assume that we succeed in this Court. If we lose on Ground A, all of that still stands.

Tipping J I see, yes, it's not contingent?

Harrison No it's not contingent.

Tipping J It would arise even if you lose in this Court?

Harrison That's correct, that order still stands.

Tipping J Right.

Elias CJ Because you're really appealing the reasoning rather than the result in this case?

Harrison Yes, the Ground A reasoning, and as was noted by Justice Chambers, the difference is that if we're right on Ground A, then an employer such as Air New Zealand can never ask the pilots to contract our of their time and a half.

Tipping J I'd overlooked that dimension of the case which is somewhat unusual that you appealed even though you won.

Harrison Yes.

Blanchard J Yes, you got leave on that ground really because it would have arisen anyway

Tipping J Yes.

Blanchard J So I'm not so sure that res judicata would apply here.

Harrison Well it's a question of

Blanchard J That just seems to me to be taking advantage of the situation. Well you wouldn't normally have been allowed to appeal, but you were because it was inevitably going to arise.

Harrison What Air New Zealand sought to appeal was the Employment Court's finding that the collective agreement did not comply with s.44(2) because it did not effect a true exchange and they sought to appeal that on the grounds of error of law, not the Court's actual findings about an interpretation of the collective agreement provision. They said it's wrong to say that an element of exchange and identifiability is part of 44(2). That interpretation of 44(2) was applied by the Employment Court to reach the ultimate conclusion. Air New Zealand took the error of law which was all it could have taken, not the factual conclusion or the interpretation conclusion, sought to appeal that, lost in the Court of Appeal; has cross-appealed here. No problem with all of that. If the error of law is not made out, that is still the remaining feather that my learned friend tries to fly with, it's not possible to re-open those factual and interpretative conclusions. In that sense it is a res judicata in my submission.

Elias CJ Well is it really, I mean is right to describe it as res judicata? Isn't it rather that the matter has been determined. Well there's no appeal before us. There's nothing that we're seized of. I'm not sure that it's necessary to invoke res judicata.

Harrison No, only it doesn't have to fit into the confines of that doctrine.

Tipping J Well that's why I said to you it's res judicata in the sense that it's not subject to appeal.

Harrison Yes but in plain parlance we have a judgment in our favour on the very question that my learned friend says ought to be remitted to the Employment Court and we have an order of the Court of Appeal that says precisely what is to go back to the Employment Court and that has not

been appealed – that's it in a nutshell. Call it what you like, that's the point.

Elias CJ So what you said that you however do still have to go back to the Employment Court, what's that on?

Harrison On remedies.

Elias CJ Oh on remedies.

Tipping J On the fact that you weren't paid time and a half when you should have been?

Harrison Yes, and each affected pilot goes back to the Employment and says I worked on Christmas Day 2005, and that's one, and I worked on Labour Day 2006, and that's another

Tipping J Is this remission back to the Employment Court just as a safeguard, because presumably the parties should be able to work this out? If the Court says they should have been paid at time and a half at whatever days they did work on that are public holidays, or without prejudice to whether that's right, surely it's just a matter of arithmetic isn't it, complicated and difficult though it might be?

Harrison The parties should be able to work it out

Tipping J So it's a fall-back remission?

Harrison Yes, whether these parties will work it out is another question entirely.

Tipping J Alright.

Anderson J You just pop up on the computer and see,

Harrison I believe it's quite straightforward, but I don't want to say more than that things aren't always straightforward

Elias CJ Well at least you're not inviting us to calculate it.

Tipping J But we're not going to do it.

Harrison Oh, well that was going to be my next submission that perhaps the Chief Justice could delegate

Elias CJ Well it would have to be delegated.

Tipping J Remitted to the Chief Justice as a master.

Harrison Alright, I think that if I may just have a moment Your Honours, I think that's about it. Yes unless Your Honours have any questions of me, that completes the submissions for my client.

Elias CJ Thank you. Well we'll take time counsel to consider our decision. Thank you very much for your assistance. It's been a difficult and most interesting case, thank you.

12.31pm Court adjourned.