IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2014] NZEmpC 74
CRC 23/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND ALUMINIUM SMELTERS LIMITED Plaintiff
AND	ANDREW WELLER and 63 others Defendants

Hearing: 9-10 December 2013
Heard at Invercargill

Appearances: P R Jagose and R M Dixon, counsel for the plaintiff
G Lloyd, counsel for the defendants

Judgment: 16 May 2014

JUDGMENT OF JUDGE A A COUCH

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[1] New Zealand Aluminium Smelters Ltd (NZAS) operates the aluminium smelter at Tiwai Point, near Bluff. The 64 defendants are employees of NZAS who work at the smelter. The names of the 64 defendants are in the attached schedule.

[2] In the early 1990s, the defendants' work pattern changed from 8 hour shifts to 12 hour shifts. Sometime later a dispute arose about how holidays in lieu of statutory holidays were to be accrued and accounted for. NZAS calculates holiday entitlements in hours and was crediting employees with 8 hours for each day in lieu. When a holiday was taken, the employee's leave balance was debited by the number of hours he would otherwise have worked. The effect of this practice was that, if an employee wished to have a holiday on a day on which he would otherwise work a 12 hour shift, the equivalent of 1½ days in lieu was required. The defendants claimed

that each day in lieu was a whole holiday regardless of the number of hours which might otherwise be worked.

[3] The Employment Relations Authority determined the dispute in favour of the defendants.[1] NZAS challenged the whole of the determination and the matter proceeded before the Court in a hearing de novo.

Background and sequence of events

[4] The aluminium smelter operated by NZAS is a large operation which employs many hundreds of staff. The key process carried out at the plant is the smelting of aluminium using electricity. This is a continuous process. Accordingly, the plant must operate continuously. This requires many of the staff to do shift work.

[5] The plant was opened in 1971. For many years, staff were employed on terms contained in collective documents negotiated by unions. The last of these documents was a composite agreement between NZAS and three unions, registered in early 1991. These documents provided for 8 hour working days and hourly rates of pay with penal rates for overtime. Shifts were organised to align with these provisions. Each day, three 8 hours shifts were worked. Individual employees worked a four week roster with seven days on, two days off rotating between day, afternoon and night shifts. This was known as "Roster 1".

[6] During the 1980s, some employees called for a change to 12 hour shifts. The perceived benefits to employees included a better balance between work and personal life including, in particular, a reduction in the ill effects of night shift work. While the collective agreement remained in effect, these calls went unanswered by NZAS and were not supported by the unions.

[7] There were a number of shift workers who were excluded from coverage by the collective agreement. These were mainly supervisors. During the late 1980s, these staff were engaged on individual employment agreements based on a salary and a shift allowance. After the Employment Contracts Act 1991 came into force in

[1] *Weller v New Zealand Aluminium Smelters Ltd* [2013] NZERA Christchurch 75.

May 1991, NZAS moved quickly to offer similarly structured individual employment contracts to all shift workers. The large majority of staff accepted that offer and the contracts came into effect in September 1991.

[8] Those initial employment contracts were all in the same form, referred to in the proceeding as "Version 1". Employees received a salary, paid monthly. In each case, this was supplemented by a shift allowance, the amount of which varied according to the particular roster governing the pattern of shifts worked by the employee. These payments were agreed to be for all work done by the employee, including overtime.

[9] Each employment contract specified the roster initially applicable to the employee but provided that "rosters may be varied to suit the needs of the business."

[10] Annual holidays and statutory holidays[2] were provided for in the following clause:

> ANNUAL LEAVE
>
> The basic annual leave provision for monthly paid staff on daywork is at the rate of four weeks per annum which becomes due each year on the anniversary of your date of appointment. This leave must be taken in the twelve months after it becomes due unless deferred by special approval of management.
>
> Statutory holidays are additional to annual leave for staff on daywork.
>
> Alternatively, the annual leave provision for monthly paid staff on a shift roster that involves working statutory holidays, is at the rate of either 20 paid days leave per annum for a 20 shift per four weeks roster, or 21 paid days leave per annum for a 21 shift per four week roster. Additionally, shift staff as above shall accrue a days leave in lieu of a statutory holiday as it occurs.

[11] It was common ground that the defendants whose employment contracts were in Version 1 were on a shift roster that involved working statutory holidays. Accordingly, their entitlement to annual holidays and statutory holidays was that set out in the final paragraph of this clause.

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[2] The term "statutory holidays" is used in this judgment rather than "public holidays" when referring to events prior to 2003. That is because it was the terminology used by the parties at the time and Mr Jagose submitted it was not synonymous with "public holidays".

[12] When those individual employment contracts took effect, staff were working the 8 hour shift pattern of Roster 1. The way in which the new holidays provisions were operated was explained by Barry Simmonds, who had been in the role of Specialist Human Resources at the plant since 1989. He said that holiday entitlements were recorded in days and that statutory holidays were treated as additional annual holidays. Thus, on the occasion of each statutory holiday, employees were credited with an additional day's annual holiday.

[13] When 12 hour shifts were first suggested, the principal objection by management was the potential increase in wage costs. Under the collective agreement, the final four hours of each shift would have had to be paid for at overtime rates. The move from wages with overtime to annual salaries for most shift workers largely overcame that obstacle. While senior management took a conservative view, they allowed the suggestion of 12 hour shifts to be investigated. A working party was established to explore the options. Meetings with staff and, in some cases, their partners, were held to discuss the perceived advantages and disadvantages. Various possibilities for a roster incorporating 12 hour shifts were investigated.

[14] Later in 1992,[3] a trial was conducted in the reconstruction department of the plant involving about 40 shift workers. An eight week roster was used with four days on and four days off, alternating between blocks of four days and four nights. This became known as "Roster 2". This trial was successful.

[15] Management then proposed a plant-wide trial of the same roster for 12 months. A letter dated 23 February 1993 was sent to all shift work staff. This included the following passage:

> Because it would be such a major change it is felt that at least 75% of employees working Roster 1 would need to be in favour of the change to allow the trial to proceed.

[3] None of the many witnesses was able to say with confidence when this trial began but it was probably mid-1992.

[16] There was no clear evidence about how employees' response to the proposal was collected but several witnesses said that about 90 percent of shift workers were in favour of the trial. The plant wide trial began in May 1993.

[17] That wider trial showed that Roster 2 was generally acceptable across the plant. In March 1995, Mr Simmonds wrote to all shift workers inviting them to say whether they supported Roster 2 being retained permanently. Again the method of ascertaining staff views was unclear but it was said that 92 percent were in favour. Following that expression of opinion, Roster 2 has remained in place since.

[18] Sometime after 1992, NZAS switched from recording holiday entitlements in days to recording them in hours. It was unclear when this occurred but, in a letter to the union written on behalf of NZAS by its solicitors in April 1997, it was stated "NZAS decided that leave entitlements would be converted to hourly equivalents on Shift Roster 2 and time absent deducted accordingly." In the context of the letter in which this was said, it appears the change occurred in 1992 or 1993.

[19] This change from days to hours was given effect by transferring all existing entitlements on the basis that one day equals eight hours. This rate was then used for all future accruals. One of the effects was that an employee on Roster 2 was credited with 8 hours leave for each statutory holiday but, if he wished to take a day's holiday on what would otherwise have been a working day, his leave balance was debited by 12 hours. In 1997, a member of staff challenged this practice by pursuing a personal grievance. Through its solicitors, NZAS defended its position and it does not appear that the matter was the subject of a decision by the Employment Tribunal or the Court.

[20] In 1997, NZAS changed the wording of the holidays clause in its standard form individual employment contract. Two sentences were added. The final paragraph, with the additional sentences highlighted, became:

> Alternatively, the annual leave provision for monthly paid staff on a shift roster that involves working statutory holidays, is at the rate of either 20 paid days leave per annum for a 20-shift per four week roster, or 21 paid days leave per annum for a 21-shift per four week roster. **For a 12-hour shift roster 21 equivalent eight-hour paid days leave per annum applies.**

> Additionally, shift staff as above shall accrue a days leave in lieu of a statutory holiday as it occurs. **Shift staff are required to work statutory holidays when these fall on a rostered work day.**

[21] This form of individual employment contract was known as "Version 2".

[22] In 2000, NZAS made further changes to its standard form of individual employment contract but did not change the holidays clause. This form of contract was known as "Version 3".

[23] The coming into force of the Holidays Act 2003 required NZAS to alter several aspects of the holidays provisions of its employment agreement in order to comply with the new statutory requirements. The annual holidays and public holidays provisions became:

> **Annual Leave** — The basic annual leave provision for monthly paid staff on day work is at the rate of four weeks per annum which becomes due each year on the anniversary of your date of appointment. This leave must be taken in the twelve months after it becomes due unless deferred by special approval of management.
>
> The annual leave for monthly paid staff on a shift roster is
>
> - 20 paid 8 hour days leave per annum for a 20 8-hour shift per four-week roster.
> - 21 paid 8 hour days leave per annum for a 21 8-hour shift per four-week roster.
> - 21 paid equivalent 8 hour days leave per annum for a 14 12-hour shift per four-week roster.
>
> **Statutory holidays** — Statutory holidays are additional to annual leave. Shift staff rostered to work on a statutory holiday will be credited with an alternative day for any time worked on a rostered day. The alternative day may be used as leave.
>
> Where staff are required to work on a statutory holiday they are paid time and a half for time worked on a statutory holiday.

[24] This form of individual employment agreement was introduced in 2004 and was known as "Version 4".

[25] In April 2004, NZAS sent a letter to all shift workers setting out the changes it proposed to make to the way it dealt with holidays under the new legislation. This letter included the following paragraph:

> Guaranteed Minimum Annual Entitlement for Alternative Days
>
> While on shift, at calendar year end you will be made up, if necessary, to the current 88 hour statutory holiday leave credit (now Alternative Days). The guaranteed 88 hour Alternative Day entitlement will be reduced by 8 hours, however, for each rostered on Statutory Holiday taken as annual leave, as noted in (4) above, this now has its own benefit of no leave deduction. The makeup is the difference between Alternative Days accrued during the year and the present entitlement, and will be credited as Alternative Days cashable.

[26] Witnesses said that reading this letter was the first time many employees realised that NZAS had been implementing the statutory holidays provisions of their employment contracts by crediting them with 88 hours leave. It was this realisation which led to the dispute now before the Court.

Issues

[27] The core issue is the interpretation and application of the statutory holidays provisions of each version of the employment contract or employment agreement. As they are identical in Versions 2 and 3, those two versions are considered together.

Principles of contractual interpretation

[28] There was no dispute about the principles to be applied in construing employment agreements. They are the principles applicable to the construction of contracts generally but with due regard for the special nature of employment relationships. The leading decision on contractual interpretation is *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[4] All the members of the Supreme Court in that case recognised that the primary object of contractual interpretation is to identify the meaning intended by the parties when the contract was formed. They went on to discuss how that task might be carried out and the materials which might properly be considered in doing so.

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[4] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

[29] In their individual judgments, the members of the Court endorsed the importance of context in the construction of particular contractual provisions. Tipping J put it this way:[5]

> The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. ... To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds.

[30] The Judge went on to say:[6]

> Context is always a necessary ingredient in ascertaining meaning. You cannot claim to have identified the intended meaning without reference to context. Hence it is always permissible to go outside the written words for the purpose of identifying the context in which the contract was made and its objective purpose. While there are no necessary preconditions which must be satisfied before going outside the words of the contract, the exercise is and remains one of interpretation. Subject to the private dictionary and estoppel exceptions to be mentioned below, it is fundamental that words can never be *construed* as having a meaning they cannot reasonably bear. This is an important control on the raising of implausible interpretation arguments. Furthermore, the plainer the words, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say.

[31] McGrath J referred to Lord Hoffman's five principles of contractual interpretation:[7]

> ... In summary, Lord Hoffman said that interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.

[32] I acknowledge Mr Jagose's submission that this summary was adopted by the Court of Appeal in the context of construing an employment agreement.[8] That must

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[5] At [19].
[6] At [23].
[7] At [61] citing *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 WLR 896 (HL) at 912-913 per Lord Hoffmann.

however, be put into the context of McGrath J's judgment in *Vector Gas*. In discussing these principles, McGrath J noted that they had been reinforced by the subsequent decision of the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd* but sounded a warning about departing too readily from the plain meaning of the words used:[9]

> Plain and unambiguous ordinary meanings can be displaced by context and background although, as is also emphasised in *Chartbrook*, there must be a strong case to persuade the court that something has gone wrong with the contractual language.

Case for the defendants

[33] The case for the defendants was relatively simple. In Version 1 of the employment contracts, the key sentence in debate in this case is that highlighted below:

> Alternatively, the annual leave provision for monthly paid staff on a shift roster that involves working statutory holidays, is at the rate of either 20 paid days leave per annum for a 20 shift per four weeks roster, or 21 paid days leave per annum for a 21 shift per four week roster. **Additionally, shift staff as above shall accrue a days leave in lieu of a statutory holiday as it occurs.**

[34] Mr Lloyd submitted that the meaning of the words used is plain and unambiguous. The expression "shift staff as above" refers to "monthly paid staff on a shift roster that involves working statutory holidays". Rather than being allowed to enjoy each statutory holiday at the time, those staff have their leave balance increased by one day each time a statutory holiday occurs.

[35] In Mr Lloyd's submission, a "day" is a full day. It is not 8 hours or 12 hours. Accordingly, he submitted that the benefit conferred on employees under Version 1 of the employment contract was a full day's holiday in respect of each of the 11 statutory holidays. That benefit accrued progressively throughout the year as the "statutory holidays", being the days listed in s 7A(2) of the Holidays Act 1981, occurred.

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[8] *Silver Fern Farms Ltd v New Zealand Meatworkers and Related Trades Union Inc* [2010] NZCA 317, [2010] ERNZ 317 at [36].

[9] *Vector Gas*, above n 4, at [66] citing *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101 at [14]-[15].

[36] The defendants say that NZAS has not met its obligation to provide those holidays. The practice of NZAS has been to accrue 8 hours' leave for each statutory holiday but to deduct 12 hours from the leave balance of an employee taking a holiday on what would otherwise be a working day. Thus, the benefit to employees of the clause has been an entitlement to 7⅓ whole holidays rather than 11.

Case for the plaintiff

[37] In order to appreciate the plaintiff's case, it is necessary to traverse more of the evidence. One of the main themes of the evidence given by the witnesses for NZAS was that the change to 12 hour shifts had occurred on the understanding that it would not increase NZAS's costs. Evidence was given of meetings with staff and documents provided to staff by management in which it was said that the change would only occur if there was no disadvantage to staff and no additional cost to NZAS. Witnesses for the defendants agreed that broad statements to this effect had been made. It was also common ground that focus groups, "brainstorming sessions" and other meetings with staff had been held to discuss the likely advantages and disadvantages of moving to 12 hour shifts. When the views of staff were sought in what was described as a "referendum", a paper was distributed setting out "points to be considered". This included calculations of annual leave and sick leave showing that 1½ days' entitlement would be required if the employee was to be absent for a 12 hour shift.[10]

[38] Focussing first on the wording of the disputed clause, Mr Jagose drew a distinction between "statutory holidays" and "public holidays". He characterised a "statutory holiday" as a "holiday granted by statute" and submitted that, on this interpretation, the only holidays granted by statute are those which would otherwise be working days for the worker concerned.

[39] Turning to "public holidays", Mr Jagose noted that the operative text of s 7A of the Holidays Act 1981 did not use that term and referred instead to "whole

[10] This document was written by Mr McDonald some two or three years prior to the 12 hour shift trial and before staff had become employed on the form of employment contract in question.

holidays". He submitted that it was not until the passage of the Holidays Act 2003 that "public holidays" were defined.

[40] Based on this analysis, Mr Jagose submitted that, for the purposes of the clause in dispute, a "statutory holiday" only occurred when it fell on a day which would otherwise be a working day for the employee. The implication of this was that most employees would not be entitled to 11 statutory holidays as they would not be rostered to work on all of the days specified in s 7A(2). In Mr Jagose's submission, any of those specified days on which the employee was not rostered to work was not a "statutory holiday". Rather, he said, it was "just the underlying or foundation public holiday."

[41] Mr Jagose then submitted that the expression "in lieu" in the disputed clause referred only to "statutory holidays" as he had characterised them. Thus, employees only accrued leave if the day in question fell on a day which would otherwise be a working day for the employee. Otherwise, they had a day free from work, a "holiday", on the day itself.

[42] There is a fundamental flaw in this argument which is apparent on a reading of s 7A:

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

[43] Section 7A(1) required every employment contract to provide for "the grant to the worker in each year of not less than 11 whole holidays". Even on Mr Jagose's analysis, those were "statutory holidays". They were holidays which the statute required to be granted. The qualified obligation of payment is separate from the unqualified obligation to grant the holidays. Thus, the 11 days were holidays required by the statute to be granted regardless of whether they fell on what may have otherwise been a working day for the employee and therefore regardless of whether the employee had a statutory right to be paid for the day. Section 7A(2) lists what might be called the default days on which those holidays are to be observed. It does so, however, with the proviso that parties to employment contracts may agree to observe the 11 whole holidays required by subs (1) on alternative days.

[44] What the parties in this case agreed in Version 1 of the individual employment contract was that, "in lieu" of each of the 11 holidays required under s 7A(1) and nominally occurring on the days listed in s 7A(2), employees would be granted a day's leave. That day's leave could be taken on a day agreed by the parties, thereby satisfying the proviso to s 7A(2).

[45] This interpretation accords with legislative history and common parlance. Section 7A was inserted into the Holidays Act 1981 by an amendment in 1991 timed to coincide with the introduction of the Employment Contracts Act 1991. It made the provision of holidays to observe religious and cultural events universal for all employees. Section 7A was, however, the re-enactment of a longstanding statutory provision, previously only required to be reflected in awards and registered collective agreements. That history may be traced back through s 173 of the Labour Relations Act 1987 and s 95 of the Industrial Relations Act 1973 to a 1965 amendment to the Industrial Conciliation and Arbitration Act 1954. In all of those previous enactments, the heading of the section was simply "Holidays". As a result, holidays granted in accordance with those provisions were generally known as "statutory holidays".

[46] Consistent with that practice, the last composite industrial agreement made with NZAS provided for what we now call statutory holidays under the heading "Holidays". This was followed by cl 12 which began by declaring that the 11 days

now listed in s 7A(2) were to be "recognised paid holidays" and throughout the rest of what was quite a long clause, referred to those days as "statutory holidays".

[47] Mr Jagose sought to call in aid other aspects of the last composite agreement. He referred to cl 2(b)(xiii) of the agreement which provided:

> (xiii) When a holiday allowed to day workers under Clause 12 of the Agreement falls on a shift worker's rostered day off he shall be paid an ordinary day's wage in lieu of such holiday provided that time paid for under this clause shall not be counted as time worked when computing overtime.

[48] Mr Jagose drew a comparison between this paragraph and the disputed provision of the Version 1 contract. He noted that this earlier provision stated specifically what the employee was to be paid "in lieu" of and submitted that the absence of such explicit drafting supported the proposition that the day's leave referred to in the Version 1 clause must be the "statutory holiday". That conclusion would seem to be self evident from the disputed clause itself. It refers to a day's leave "in lieu of a statutory holiday". That is entirely clear. The issue is not what the holiday is in lieu of but rather the meaning of the term "statutory holiday".

[49] Next, Mr Jagose focussed on the word "additionally" in the clause. He noted that it appeared in the clause headed "Annual Leave" and submitted that it meant leave in lieu of statutory holidays was to be treated as additional annual leave. While this is a possible interpretation, another is more likely. The word "additionally" separates the "statutory holiday" leave from annual leave and makes it clear that statutory holiday leave is not subsumed into annual leave. This is consistent with s 7A(1) which speaks of holidays on pay "in addition to annual holidays".

[50] Turning to the context in which the employment contracts between the parties were entered into, Mr Jagose made detailed submissions based on the evidence adduced. He relied on the proposition that, prior to the introduction of 12 hour shifts, leave entitlements were accrued in hours on the basis of 8 hours per day. This was the assumption made by several of NZAS's witnesses.

[51] An exception was Mr Simmonds. As I have noted earlier, he had been in the role of Specialist Human Resources for NZAS at the plant since 1989. He was the

only witness with direct personal knowledge of how remuneration and leave was managed by NZAS. In the course of cross-examination, Mr Simmonds was shown a pay advice slip from June 1992. This recorded the worker's leave balance in days. Mr Simmonds agreed that was so. He also agreed that leave days accrued in lieu of statutory holidays were included in the "annual leave" balance on the slip. Mr Simmonds was unable to recall when NZAS changed its system of recording from days to hours but he was able to say that, when shift workers transferred to individual employment contracts, their leave in lieu of statutory holidays would have been recorded in days. That was consistent with the letter written on behalf of NZAS in 1997 which indicated that NZAS changed its method of recording from days to hours in 1992 or 1993.

[52] I find as a fact that this was so. Prior to the individual employment contracts being entered into and for more than a year afterwards, NZAS recorded leave in days. This included the leave accrued in lieu of statutory holidays. It was only in after the first trial of 12 hour shifts in the reconstruction department had begun that NZAS changed its method of recording and accounting for leave from days to hours.

[53] Mr Jagose also advanced an argument based on the discussions between NZAS and staff prior to and during the trials of the 12 hour shifts. He submitted that NZAS's insistence that it would only introduce 12 hour shifts if that did not increase costs can be relied on as part of the context in which the disputed clause is to be construed. He suggested that it leads to the conclusion that days in lieu of statutory holidays should be treated as "8 hour days". His submission rested on three propositions.

[54] The first of these was that, following the introduction of the 12 hour shifts, the language of the disputed clause did not fit the reality of the workplace. The 12 hour shifts operate on an 8 week cycle whereas the first part of the clause relating to shift workers refers to "four week rosters". That is undoubtedly correct but that is only an issue in the first sentence of the clause dealing with annual holidays. To make practical sense, that sentence may well need to be interpreted in a manner inconsistent with the specific words used. But that does not justify any change in the meaning to be attributed to the second sentence of clause dealing with leave in lieu

of statutory holidays. While the second sentence is expressed to apply to shift workers who work on statutory holidays, its meaning and application does not turn on the nature of the shift pattern worked. It follows that the change in shift pattern did not introduce any ambiguity into this second part of the clause.

[55] Mr Jagose's second proposition was that, given the discussion which had taken place about the introduction of 12 hour shifts, neither NZAS nor the defendants could be attributed with any intention to introduce "a 12 hour day's leave on account of each statutory holiday". The difficulty with this proposition is that this is not what the defendants claim. They claim to be entitled to a day's leave, not any particular number of hours.

[56] This submission on behalf of NZAS brings into sharp focus the difficulty with much of NZAS's case. The holidays provisions of Version 1 of the employment contract were expressed in weeks and days. That was appropriate. Those are the units of time which had been used in the legislation for generations and which continue to be used. After the employment contracts were entered into, NZAS unilaterally changed to recording and accounting for leave in hours. There is no evidence that such a change was ever agreed to by its employees. While it may have been convenient to NZAS to make this change, such a unilateral action cannot and did not change the meaning of the employment contracts which had already been agreed.

[57] The third aspect of Mr Jagose's submission was that "The resolution is that the accrual of 'days leave' remains as it was initially calculated – as an accrual of an additional 8 hours leave for each day worked." This proposition cannot be sustained. First, it is plain from the disputed clause itself that the parties did not agree to "8 hours' leave". They agreed to "a days leave". Secondly, I have found as a fact that NZAS did initially accrue and account for leave in days, not hours. Thirdly, as I have also concluded earlier, a day's leave is to be accrued for each of the 11 holidays which s 7A(1) of the Holidays Act 1981 required to be granted, not just those on which the employee worked.

[58] Although it was not explicitly advanced as a submission by Mr Jagose, the overall thrust of the case for NZAS, and much of its evidence, was in support of the proposition that, because NZAS said it would only change to 12 hour shifts if there was no additional cost, the employment contracts it has with its employees should be interpreted in a way which achieves that. There are numerous difficulties with that proposition.

[59] NZAS entered into an individual employment contract with each of its employees. Just as mutual agreement was required to form those contracts, mutual agreement would have been required to vary them. There was no suggestion or evidence that NZAS ever proposed an amendment to the "Annual Leave" clause of the Version 1 contract and certainly no evidence that any of the employees expressly agreed to a variation.

[60] It cannot reasonably be said that the employee parties to the Version 1 contracts agreed to a change by implication. There was no evidence that NZAS expressly made the change to 12 hour shifts conditional on any variation of the individual employment contracts. As noted earlier, the "Hours of Work" clause of the contract provided that "rosters may be varied to suit the needs of the business." Mr Jagose submitted that this authorised NZAS to change the hours within a roster but not the roster itself. Having regard to the words used, I do not accept that is right but, even if it were correct and each employee's agreement to the change from Roster 1 to Roster 2 was required, that has nothing to do with the leave provisions.

[61] A lot of evidence was given about the basis on which NZAS agreed to trial 12 hour shifts and then to adopt them indefinitely. It was generally agreed that NZAS was concerned that the change should not result in any additional cost to its business. The witnesses were far from consistent, however, in their evidence about the breadth of the cost base and how any effect was to be measured. The most senior member of management who gave evidence was Tom Campbell. He was Metal Products Manager at the time of the 12 hour shift trials. Later, he became General Manager Operations, the most senior executive role at the plant. Mr Campbell said that support from the board of NZAS for the initial trial was gained on the basis that "neither the trial nor any eventual roll out of 12 hour shifts should carry any

additional cost to the company." He said that the company's agreement to extend the trial to the whole plant was on the same basis. He then said that the "clear understanding" which existed around 1993 was "no disadvantage and no extra cost". When these broad expressions were explored with him, Mr Campbell said that "no disadvantage" meant no reduction in income or conditions for the staff and that "no additional cost" focussed on accident rates and productivity. Earlier, however, he had said that the "no disadvantage, no cost test applied to everything associated with the change."

[62] Some witnesses suggested that there was a specific focus on wage and salary costs but others said that any concern was for the overall cost to NZAS including such things as the cost of laundry, showers, staff buses, travelling time, sick leave, accident compensation and lost time in shift changes. Other potential costs such as staff morale and training of new staff were also mentioned.

[63] From the evidence, it is doubtful that NZAS ever had a clear concept of what was meant by extra cost. If it did, that concept was never clearly articulated. It was also apparent from the evidence of Mr Campbell that it was never measured. In his evidence-in-chief he said: "There was never any universal cost and benefit analysis of the impact of 12 hour shifts." In answer to questions in cross examination, he said "There was no cost benefit analysis" and "I never saw any dollar for dollar analysis."

[64] On the evidence adduced, it is impossible to reach any firm conclusion about what NZAS regarded as the essential criteria for its agreement to the change to 12 hour shifts. It is equally impossible for the Court to carry out any form of cost benefit analysis. On any view of it, however, the evidence fell well short of providing a basis for a submission that the employment contracts had been varied by implication.

[65] Much reliance was also placed by the witnesses on what they called referenda. The evidence was that each shift worker was sent a letter "gauging interest" in changing to 12 hour shifts and seeking the employee's "opinion". The only significance said to be attached to the replies was that NZAS felt at least 75 percent of shift workers would need to support the change before it would agree to

implementing it. There was no suggestion that expressing support for the change would result in a change to the employment contracts and there was no evidence of which particular employees did support it. I conclude that, while these expressions of opinion assisted NZAS in making its decision to proceed with a plant wide trial and to make the change to Roster 2 permanent, they had no effect on the interpretation to be placed on the individual employment contracts of shift workers.

Version 1

[66] In the discussion above, I have dealt exclusively with the interpretation to be given to Version 1 of the individual employment contract NZAS entered into with staff in September 1991.

[67] I conclude that there is no reason to depart from the plain meaning of the words used in the sentence "Additionally, shift staff as above shall accrue a days leave in lieu of a statutory holiday as it occurs." The only aspect of that sentence not so far discussed is the meaning of the final words "as it occurs". This defines when each day's leave in lieu of statutory holidays shall accrue. As it is clear that the purpose of this sentence as a whole was to discharge the obligations under s 7A of the Holidays Act 1981, the logical inference is that it is a reference to the days described in s 7A(2).

[68] Returning to the meaning of the sentence as a whole, a day's leave means freedom from any obligation to work for a whole day with no loss of salary. Such leave is to be accrued and accounted for in days. On each of the days specified in s 7A(2) of the Holidays Act 1981, one day's leave is to be added to the employee's account. When the employee uses that leave to take a holiday, one day's leave is to be deducted from the employee's account for each day of absence, regardless of the number of hours the employee might otherwise have worked.

[69] This meaning is consistent with the employment contract as a whole, with applicable legislation and with the parties' conduct, both before and after the individual employment contracts were agreed. The evidence of subsequent events does not establish a mutual intention to depart from that interpretation.

Versions 2 and 3

[70] As noted earlier, the difference between Version 1 and Versions 2 and 3 is that two sentences were added to the clause in dispute. They are highlighted here:

> Alternatively, the annual leave provision for monthly paid staff on a shift roster that involves working statutory holidays, is at the rate of either 20 paid days leave per annum for a 20-shift per four week roster, or 21 paid days leave per annum for a 21-shift: per four week roster. **For a 12 hour shift roster 21 equivalent eight-hour paid days leave per annum applies.** Additionally, shift staff as above shall accrue a days leave in lieu of a statutory holiday as it occurs. **Shift staff are required to work statutory holidays when these fall on a rostered work day.**

[71] The final sentence is of no moment in this case. The issue is whether the addition of the sentence defining annual holidays for 12 hour shift workers as "eight-hour paid days" affects the interpretation of the subsequent provision for statutory holidays. In my view, it does not. The use of the word "additionally" separates the statutory holiday provisions of the clause from the annual holiday provisions. It is also significant that, when NZAS decided to change the clause, the only change made to the statutory holidays provision was to add the final sentence.

[72] I conclude that the statutory holiday provisions of Versions 2 and 3 of the individual employment contract are to be interpreted and applied in the same way as those in Version 1

Version 4

[73] The Version 4 individual agreement was significantly changed from earlier documents. The statutory holiday provision became a standalone clause:

> **Public holidays** Public holidays are additional to annual leave. Shift staff rostered to work on a public holiday will be credited with an alternative day for any time worked on a rostered day. The alternative day may be used as leave.
>
> Where staff are required to work on a public holiday they are paid time and a half for time worked on a public holiday.

[74] The plain meaning of the words used in this clause is clear. It marks a significant departure from the earlier provisions in which shift staff received a day's

leave whether or not they worked on a statutory holiday (now public holiday). This clause gives effect to the requirements of the public holidays provisions of the Holidays Act 2003. An employee who works on a public holiday receives an alternative holiday. Employees do not receive additional holidays for public holidays on which they do not work.

[75] The only point which must be made clear is that the entitlement is to "an alternative day". That must be construed as a whole day. Thus, for each public holiday on which an employee does any work, the employee is entitled to another whole holiday.

Mr Frisby

[76] One of the documents before the Court was the following undated memorandum:

> 12 HOUR SHIFTS
>
> As you have been informed, a twelve hour shift roster is currently being trialled in the plant. The trial commenced on 19 May 1993 for a period of 12 months.
>
> The days referred to in this contract are eight hour days.
>
> The 12 hour shift trial does not change your overall leave entitlements.

[77] Mr Simmonds gave evidence that this document was attached to contracts offered to employees commencing their employment with NZAS during the plant wide trial of 12 hour shifts. In answer to an oral question from Mr Jagose, Mr Simmonds then identified the defendant, Mr Frisby as one of the people who had this document attached to his contract.

[78] Mr Frisby was present in court when this evidence was given. As the evidence identifying him was not in Mr Simmond's brief, I gave Mr Lloyd an opportunity to take instructions from Mr Frisby and leave to call him as a witness if he wished. Mr Frisby did not give evidence.

[79] Mr Jagose submitted that, if the dispute about Version 1 was decided in the defendants' favour, Mr Frisby was in a different position because he had received this document. While I see the force in that submission, I am not persuaded that Mr Frisby should be disentitled. The evidence given by Mr Simmonds on this point was very limited. In answer to questions from Mr Jagose, he said that Mr Frisby had this memorandum attached to his contract. He did not say when it was attached or by whom. The contract was not produced, nor did Mr Simmonds say whether Mr Frisby had accepted the contents of the memorandum. On that evidence, I cannot be satisfied that Mr Frisby entered into his employment contract with NZAS subject to that memorandum.

Consequences

[80] In the hearing before the Court, both parties confined their cases to the issues of interpretation of the defendants' terms of employment. Other than the brief mention of Mr Frisby, no evidence was presented about the potential entitlement of the defendants individually. The schedule of defendants provided to the Authority did list the defendants under headings indicating which form of employment contract or agreement they were said to be party to but, as no evidence of that was adduced, the categories have been removed from the schedule attached to this decision.

[81] The parties should now attempt to resolve the individual entitlements of the defendants based on the interpretations provided in this decision. Leave is reserved for any party to refer issues which cannot be resolved back to the Court for decision. That may include issues about what the terms of employment of a particular defendant were and issues about the quantum of any benefit a defendant may be entitled to as a result of this decision.

Costs

[82] The conclusions I have reached differ somewhat from those reached by the Authority but are similarly beneficial to the defendants. Unless there have been offers made of which I am unaware, costs should follow the event and be awarded to the defendants. If costs cannot be agreed, Mr Lloyd should file and serve a

memorandum within 30 working days after the date of this decision. Mr Jagose will then have 20 working days in which to respond.

A A Couch
Judge

Signed at 2.45 pm on 16 May 2014.

Schedule of Defendants

Andrew Weller
Peter Impelmans
Peter Mills
Bill Irvine
Ross Gamble
Brian Hibbs
Russell Croft
Brian Moss
Stan Glass
Bruce Colvin
Bruce Fraser
Steve Muir
Claude Gemmell
Stuart Styles
Cliff Dobbie
Tony Mortimer
Colin Hilton
Wally Durham
Trevor Ballantine
Craig Hamilton
Colin Cameron
David Campbell
David Edwards
Andy Kevern
Garth Meuli
Douglas Wisely
John McEwan
Frank Padget
Hank Oosterbroek
Lindsay Nichol
Ian McLean
Jim Easson
John Reynolds
Jim Malcolm
Allan Todd
John Herring
Alan Mackie
Mark Weller
Philip Kwok
Martin McAtear
Jim Sinclair
Carl Tiplady
Russell Frisby
Phil Evans
David Goessi
David Howe
Ian Ballam
Jeff Leask
Morris Lindsay
Owen Evans
Roger Ward
Wynton Lawson
Colin Mataira
Stuart Marshall
Brendon Bone
George Davison
Aaron Smith
Daniel Roberts
Ian Longman
Jason Wheal
Joshua Walker
Michael Lindsay
Paul Brown
Chris McDonald