IN THE EMPLOYMENT COURT
AUCKLAND

AC 34/06
ARC 9/06

	IN THE MATTER OF	a dispute removed from the Employment Relations Authority
	BETWEEN	NEW ZEALAND ENGINEERING PRINTING AND MANUFACTURING UNION INC Plaintiff
	AND	ACI OPERATIONS NEW ZEALAND LTD Defendant

Hearing: 14 March 2006
(Heard at Auckland)

Court: Chief Judge G L Colgan
Judge B S Travis
Judge A A Couch

Appearances: Garry Pollak and Helen White, Counsel for Plaintiff
Christopher Toogood QC and Don MacKinnon, Counsel for Defendant
Ross Wilson, Advocate for New Zealand Council of Trade Unions
Tim Cleary, Counsel for Business New Zealand

Judgment: 29 June 2006

Judgment of the Full Court

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[1] This case raises two separate and unrelated issues about the interpretation and application of provisions of the Holidays Act 2003.

[2] The first issue is the effect of the Holidays Act 2003 on the interpretation of sick leave provisions contained in the collective employment agreement between the parties which were agreed prior to the Act coming into force and which are inconsistent with the Act.

[3] The second issue is who decides when alternative holidays in lieu of public holidays will be taken. This involves the interpretation of sections 57 and 58 of the Holidays Act 2003.

Background

[4] The defendant operates a factory making glass containers. The glass furnaces which are at the heart of this process must be operated continuously. It is a business which does not close and constantly requires staff to be working. Some staff work regular 8 hour days. Many other staff work rotating shifts to ensure 24 hour a day coverage.

[5] For some years, the defendant operated 8 hour shifts at the factory. In 2003, the defendant entered into a collective employment agreement with the plaintiff which provided for 12 hour shifts on a four days on, four days off rotating basis. This agreement came into effect on 1 March 2003 for a period of 3 years. At the time this agreement was negotiated and settled, the statute governing holidays was the Holidays Act 1981. The agreement contained detailed provisions relating to holidays which were drafted in light of that Act.

[6] On 1 April 2004 the Holidays Act 2003 came into effect. The provisions of this new Act are significantly different to those of the 1981 Act. This gave rise to discussions and correspondence between the plaintiff and the defendant about the effect of the change in legislation. That dialogue crystallised into two distinct disputes which we shall call the "sick leave dispute" and the "alternative holiday dispute".

The sick leave dispute

[7] The dispute about sick leave applies solely to staff who work 12 hour shifts.

[8] The collective agreement contained detailed provisions relating to sick leave, what is called "domestic leave" and for bereavement leave. In essence, those provisions were:

(a) "sick leave" – five days per year for sickness of the employee;

(b) "domestic leave" – three days per year for sickness of the employee's spouse or dependent child plus the ability to take additional leave for this purpose offset against the employee's sick leave;

(c) "bereavement leave" – up to three days on the occasion of each bereavement.

[9] For staff working 12 hour shifts, the collective agreement varied those leave entitlements. Clause 8H(vi) provided:

> *Reapportionment of Approved Leaves*
>
> *Sick leave (previously 5 days/5x8hours/40hours) shall be applied as 4 days/4/12hours/48hours*
>
> *Domestic Leave & Bereavement Leave (previously 3 days/3x8hour/24 hours) shall be applied as 2 days/2x 12hours/24 hours*

[10] The parties apparently believed that these entitlements satisfied the requirements of s30A of the Holidays Act 1981 which provided:

> ***30A Entitlement to special leave***
>
> *(1) Every worker who works for any one employer for more than 6 months shall be entitled in each ensuing period of 12 months for which that worker works for that employer, to a minimum of 5 days special leave in accordance with the provisions of this section.*
>
> *(2) Special leave under this section may be taken only when –*
> *(a) The worker is sick; or*
> *(b) The spouse or de facto partner (whether of the same or a different sex) of the worker is sick; or*
> *(c) A dependent child or dependent parent of the worker or of the spouse or de facto partner (whether of the same or different sex) of the worker is sick; or*
> *(d) The worker suffers a bereavement.*

[11] The provisions of the Holidays Act 2003 relating to sick leave are:

> ***65 Sick leave***
>
> *(1) An employee may take sick leave if—*
> *(a) the employee is sick or injured; or*
> *(b) the employee's spouse or partner is sick or injured; or*
> *(c) a person who depends on the employee for care is sick or injured.*
>
> *(2) An employee is entitled to 5 days' sick leave for each of the 12-month periods specified in section 63(2).*

Case for the plaintiff on the sick leave issue

[12] The case for the plaintiff is that the effect of the 2003 Act was to make it mandatory for employers to allow a minimum of five days paid leave per year for sickness or injury, either of the employee or of one of the other persons described in s65(1). The agreement provides for only four days sick leave and this must be increased to five to meet the minimum requirements of the legislation.

[13] In addition, the plaintiff says that the separate provision in the collective agreement of two days domestic leave must be maintained. Thus, the plaintiff says

that the change in legislation requires the defendant to allow a total of seven days leave per year for the purposes defined in s65(1) of the 2003 Act.

Case for the defendant on the sick leave issue

[14] The case for the defendant is that s30A of the 1981 Act dealt jointly with "sick leave" and "domestic leave" as forms of "special leave" and that the collective agreement ought to be regarded in the same way. On this basis, the defendant says that the collective agreement provided a total of six days leave to 12 hour shift workers for personal sickness or the sickness of a spouse or child.

[15] The defendant says that this combined entitlement under the collective agreement should be translated under the 2003 Act into an entitlement to six days' leave for any of the purposes provided for in s65(1).

Submissions of interveners

[16] For the New Zealand Council of Trade Unions, Mr Wilson provided us with copies of documents showing the origins of the 2003 Act and its development through the legislative process. These were the September 2001 report of the Holidays Act Advisory Group, the Department of Labour report dated 2 October 2003 on the Holidays Bill as it then was and the submission by Business New Zealand to the select committee which considered the bill. Otherwise, Mr Wilson was content to support the plaintiff's submissions on the sick leave issue and made no separate submissions.

[17] For Business New Zealand, Mr Cleary also addressed us on the legislative history of the 2003 Act. He noted the change from a single unified form of leave for personal circumstances in the 1981 Act, being "special leave" under s30A, to two distinct forms of such leave in the 2003 Act, being "sick leave" under s65 and "bereavement leave" under s69.

[18] As to the effect of the 2003 Act on the collective agreement, Mr Cleary's submissions were largely in support of those made by Mr Toogood. In addition, he submitted that, if the plaintiff's position was adopted, the effect would be to grant the employees an additional day's leave entitlement under an existing agreement. Mr Cleary submitted that *"…such an approach may not be consistent with the common law principle of consideration."* as the additional day would be *"… unsupported by consideration and would alter the nature of the bargain made by the parties".*

Discussion and decision

[19] In considering the relationship between the collective agreement and the 2003 Act, an obvious starting point is s6 of the Act which provides:

> ***6 Relationship between Act and employment agreements***
>
> *(1) Each entitlement provided to an employee by this Act is a minimum entitlement.*
>
> *(2) This Act does not prevent an employer from providing an employee with enhanced or additional entitlements (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.*
>
> *(3) However, an employment agreement that excludes, restricts, or reduces an employee's entitlements under this Act—*
> *(a) has no effect to the extent that it does so; but*
> *(b) is not an illegal contract under the Illegal Contracts Act 1970.*

[20] As the collective agreement came into effect during the currency of the 1981 Act, however, the effect of that Act on the sick leave and domestic leave provisions of the collective agreement must be considered first.

[21] Under the 1981 Act, leave for personal circumstances was provided for in s30A and was based on the concept of "special leave". This term was effectively defined by subsection (2) of s30A. It was a day on which leave might be taken for any of the purposes set out in paragraphs (a) to (d) of that subsection. Subsection (1) provided that every worker was entitled to a minimum of five days special leave per year.

[22] The combined effect of these two subsections was that every worker was entitled to have available each year no less than 5 days leave for personal sickness or for the sickness of a spouse or dependent child or for bereavement. Any employment agreement which made fewer than 5 days leave available for any of these purposes did not meet the minimum requirements of the Act.

[23] In providing in clause 8H(vi) that 12 hour shift workers were to have available only 4 days leave for personal sickness, the collective agreement failed to meet the minimum requirements of the 1981 Act.

[24] As to leave for the sickness of a spouse or dependent child, the collective agreement did meet the requirements of the 1981 Act. Although the effect of clause 8H(vi) was that only two days "domestic leave" was available to 12-hour shift workers, this was in the context of the general provisions as to "domestic leave" contained in clause 19 of the collective agreement. Clause 19(a)(iii) provided:

> *Where an employee has unused sick leave entitlement, a further five days per year shall be granted in the manner prescribed in sub-paragraph a) (i) of this clause, with such leave being treated as though it were due to the employee's own sickness and being set off against the employee's own sick leave entitlement.*

[25] Applying clause 8H(vi), the reference in this paragraph to *"a further five days per year"* must be construed in the case of 12 hour shift workers as being a further four days. On that basis, the effect of this paragraph is that, for 12 hour shift workers, a total of six days' leave was available each year for the sickness of a spouse or dependent child. Two of those six days were exclusively for *"domestic leave"* while the other four could be used for personal sickness or as *"domestic leave"*.

[26] The 1981 Act dealt with inconsistencies between its requirements and the provisions of employment contracts in s33, the relevant part of which was:

> ***33 No contracting out***
>
> *(1) Except as otherwise expressly provided by this Act … no contract entered into before or after the commencement of this Act shall have any force or effect to deprive any worker of any right, power, privilege or other benefit provided for by this Act.*

[27] The manner in which this section should be applied was decided by a Full Court in *Gray v Wellington City Mission* [1995] 2 ERNZ 126 where, after deciding that it was not appropriate to apply the Illegal Contracts Act 1970, the Court said at page 133:

> *This is because s33 of the Holidays Act 1981, which prohibits contracting out of the Act, expressly provides that no contract is to have any force or effect to deprive any worker of any benefit provided for by the Act. It follows that a contract which purports to do so can remain on foot so long as it is understood as being modified to the extent necessary to ensure that it does not deprive any worker of any benefit provided for by the Act. The contract operates until it purports to begin to deprive employees of such benefits; such deprivation is then a barrier to any further operation of the contract in that direction.*

[28] In adopting that approach, we must decide what modifications to the collective agreement were necessary and appropriate in order to provide the minimum benefits to employees of the 1981 Act.

[29] As far as the sick leave provisions of the collective agreement are concerned, there are two alternative modifications which would enable it to meet the requirement that five days leave be available for personal sickness of 12 hour shift workers. One is to regard the reference to four days in clause 8H(vi) as meaning five days. The other is to regard five of the six days leave available for sickness as being available for the personal sickness of the employee as well as for the sickness of a spouse or dependent child.

[30] In our view, the most appropriate modification is that which requires least change to the bargain between the parties represented by the collective agreement. On that basis, we find that the applicable modification was the second option set out above, that is to regard five of the six days leave available for sickness as being available for the personal sickness of the employee.

[31] This option requires only that the purpose for which one days' leave for sickness may be taken is extended to included personal sickness. In clause 19(a)(iii) of the collective agreement, the parties have already adopted the principle that the whole of the "sick leave" entitlement may also be used as "domestic leave". This option is applying that principle in reverse but only to the extent of one day. It is also consistent with the scheme of the 1981 Act which provided for a single grant of leave available for a range of purposes.

[32] The alternative option would require an increase in the total amount of leave available to employees for sickness. That would constitute a significantly greater change to the bargain embodied in the collective agreement than a change to the purpose for which one existing day's leave may be used. It would also be trending away from the scheme of the 1981 Act referred to above.

[33] The conclusion we reach on this issue, therefore, is that the "sick leave" and *"domestic leave"* provisions of the collective contract were modified by the 1981 Act so as to make a total of six days leave available to 12 hour shift workers, five of those days being available for personal sickness and all six days available for the sickness of a spouse or dependent child.

[34] Although not necessary to decide the dispute before the Court, we note that the collective agreement also fell short of the special leave requirements of the 1981 Act in other respects. For example, as Mr Toogood acknowledged in his submissions, the range of relationships with the deceased person for whom bereavement leave was available did not meet the requirements of s30A(7).

[35] The modifications to the collective agreement required to make it conform to the minimum requirements of s30A of the 1981 Act must be regarded as having been made by implication from the time the agreement came into effect. Thus, it is the modified form of the collective agreement which must be considered in relation to the minimum requirements of the 2003 Act and on which s6 of that Act operates.

[36] Section 65 of the 2003 Act provides that employees are entitled to a minimum of five days' leave each year for personal sickness or injury or for the sickness to injury of a spouse, a partner or a person who depends on the employee for care.

[37] As far as the number of days leave is concerned, the provisions of the collective agreement, as modified to meet the requirements of the 1981 Act, also meet the minimum requirement of s65 of the 2003 Act. In some other respects, they do not, but the dispute is not concerned with those other issues. We simply note for the benefit of the parties that, where the collective agreement refers to sickness, this must be construed as sickness or injury. Equally, s65 has expanded the range of persons other than the employee whose sickness or injury will permit the taking of sick leave and the collective agreement must be regarded as including the whole of the range contemplated by s65(1)(b) and (c).

[38] Given that the minimum requirement under s65 is five days sick leave and that the collective agreement provides for six days to be available as "sick leave" and "domestic leave", there remains an issue about the purposes for which the sixth day is available to 12-hour shift workers.

[39] The purpose of s6 is to ensure that employees are able to enjoy the minimum benefits of the 2003 Act. This is reinforced by s62 which declares that the purpose of subpart 4 of the Act is to provide all employees with a minimum entitlement to sick leave and bereavement leave. Section 6(3) gives effect to this purpose by declaring any provision of an employment agreement which constrains that minimum entitlement to be of "*no effect to the extent that it does so*". Section 6(2), however, expressly provides that the Act does not prevent an employer from providing an employee with *"enhanced or additional entitlements".*

[40] We construe these provisions in the 2003 Act as having a very similar effect to s33 of the 1981 Act. To the extent that an employment agreement provides for less than the minimum requirements of the Act, its terms must be modified to ensure that those requirements are met. To the extent that an employment agreement provides anything in addition to the minimum requirements of the Act, those enhancing provisions are to be given effect according to their tenor.

[41] On this basis, we find that the sixth day of leave for sickness provided for in the collective agreement should be given effect in accordance with the "domestic leave" provisions of the agreement in clause 19.

Conclusion

[42] Our conclusion on the sick leave issue is that 12 hour shift workers covered by the collective agreement are entitled to a total of six days leave for sickness and injury. Five of those days are available for the purposes set out in s65 of the 2003 Act. The sixth day is available for the purposes set out in clause 19.

The alternative holiday dispute

[43] The second dispute arises out of the alternative holiday provisions of the 2003 Act contained in ss 56 to 58. It is entirely a matter of statutory interpretation and does not turn on any of the provisions of the collective agreement.

[44] Section 56 provides that an employee who works on a public holiday is entitled to an "alternative holiday" if the public holiday falls on a day which would otherwise be a working day for the employee. It also provides that the entitlement to that alternative holiday remains in force until the employee has taken it or it is exchanged for payment.

[45] Section 57 of the Act sets out the basic rules for taking alternative holidays. Subsection (1) provides that it must be taken by the employee on a day that is agreed between the employer and the employee. Subsection (2) then goes on to provide that, if the employer and employee cannot agree, the holiday may be taken *"on a date determined by the employee, taking into account the employer's view as to when it is convenient for the employee to take the day".*

[46] Section 58 adds an important rider to these basic rules. It provides that, where the employee has been entitled to the alternative holiday for 12 months or more and there is no agreement about when the holiday is to be taken, the employee may be required to take the holiday on a date determined by the employer.

[47] Because the glass factory operated by the defendant runs continuously, there is a need for a substantial number of staff to work on every public holiday. Indeed, we were told that it is usual for about half of the defendant's production staff to be required to work on each public holiday. Those who do then become entitled to alternative holidays. Some staff accumulate entitlements to a large number of alternative holidays, many of which subsist for 12 months or more.

[48] This creates effectively two different categories of entitlement to alternative holidays: those which are less than 12 months old and those which are more than 12 months old. The rules for taking those holidays in the first category will be those in s57, that is, in the absence of agreement, the employee decides the date. The rules for taking those holidays in the second category will be those in s58, that is, in the absence of agreement, the employer decides the date.

[49] The defendant has introduced a policy of requiring employees to exercise their rights to take alternative holidays in chronological order from oldest to most recent. Thus, when an employee who has entitlements to alternative holidays in

both categories seeks to take one of them, the defendant regards this as being one of the entitlements subject to s58. The effect is that the date on which the holiday is to be taken must either be agreed by the defendant or, failing agreement, it can be fixed by the defendant. By this means, the defendant can prevent such employees from taking alternative holidays on days which are inconvenient or more expensive.

[50] The question of cost to the defendant associated with alternative holidays arises because s60 requires payment for an alternative holiday to be at the employee's "relevant daily pay" for the day taken. This is based on what the employee would have earned had he or she worked on that day. The wage structure in the collective agreement is such that the rates of pay for a day's work vary considerably according to the day of the week, the nature of shifts being worked and the position of the day in the shift roster. It follows that there is a financial incentive for employees to take alternative holidays on days when their relevant daily pay would be greatest. In many cases, these are weekend days which are also attractive to employees as alternative holidays for social and family reasons.

[51] The plaintiff, on behalf of its members, objects to this practice of the defendant to regard alternative holidays as being taken in chronological order. It says that the practice is unlawful and deprives it members of their statutory rights.

Case for the plaintiff

[52] For the plaintiff, Mr Pollak submitted that ss57 and 58 of the Act constitute a code for dealing with alternative holidays. While accepting that the legislative purpose behind the difference between s57 and s58 was to encourage employees to take alternative holidays promptly, he submitted that the fact that an employee had entitlements to some alternative holidays subject to s58 could not mean the employee was deprived of rights associated with other entitlements subject to s57. As this was the effect of the defendant's practice, he submitted that the practice must be unlawful.

[53] Mr Pollak submitted that the proper interpretation and application of ss57 and 58 was that employees were entitled to stipulate which alternative holiday they wished to take at any particular time and that it was unlawful for the defendant to deny that right.

Case for the defendant

[54] For the defendant, Mr Toogood accepted that the meaning of ss57 and 58 was clear and described the dispute as "a transitional one" relating to a backlog of

entitlements to alternative holidays which had accumulated prior to the 2003 Act coming into force.

[55] Mr Toogood referred us to s3 of the Act which records that one of its purposes is to "promote balance between work and other aspects of employees' lives". He submitted that such a balanced approach to working was enhanced when employees were required to take holidays as soon as reasonably possible after they accrued and that this was best achieved by regarding alternative holidays as being taken in the order in which the entitlements to them arose.

[56] Mr Toogood also urged us to have regard to the financial consequences for the defendant of employees being permitted to choose the days on which longstanding entitlements to alternative holidays were taken. Evidence in support of this argument was given by Mr Woodcock, the defendant's human resources manager. He said in his affidavit that the additional cost to the defendant of employees predominantly taking holidays on those days which attracted higher rates of pay was very substantial.

[57] In advancing his submissions, Mr Toogood acknowledged that he was inviting the Court to adopt an "extra statutory" concept that would place some constraint on the employees' rights under s57. He also accepted that there was nothing in ss56 to 58 which suggested such a constraint should be imposed but submitted that it was supported by logic and common sense.

[58] In response to the plaintiff's argument, Mr Toogood submitted that it would be administratively difficult and expensive for the defendant to maintain the records necessary to keep track of which alternative holiday was being taken by a particular employee at any given time. This was also supported by evidence from Mr Woodcock. Mr Toogood also relied in this regard on s81 of the Act which prescribes the information employers are required to keep relating to holidays and leave. Mr Toogood noted the very detailed list of information required and submitted that the absence from this list of the date on which an employee took an alternative holiday supported the defendant's proposition that such holidays were intended to be taken in the order in which they accrued.

[59] We note here that the evidence provided to us included a copy of an opinion obtained by the defendant from the Department of Labour which supported its position. This clearly influenced the defendant in its stance on this issue but, as it was effectively an opinion on the very issue the Court has to decide, Mr Toogood very properly did not rely on it.

Submissions of the interveners

[60] For the New Zealand Council of Trade Unions, Mr Wilson supplemented the material he had provided us on the history of the 2003 Act with a thoughtful analysis of its final form and the place of ss56 to 61 in the statute as a whole. Mr Wilson submitted that these provisions reflect what he described as "the balancing of interests compromise" inherent in the scheme of the Act. In his submission, the "chronological approach" taken by the defendant would disturb that balance by meeting the employer's needs in a way not contemplated by the Act when the Act itself already enabled employers to manage accumulated alternative holidays through s58. Mr Wilson also supported Mr Pollak's submission that the approach taken by the defendant unlawfully constrained employees from exercising the rights clearly given to them under s57.

[61] For Business New Zealand, Mr Cleary also discussed the origins of ss56 to 61 of the Act and took us through their legislative history. This confirmed to us that the plain words of these sections clearly reflect the legislative intention. While acknowledging that the sections of the Act were silent on the subject of priority as between entitlements to alternative holidays governed by ss57 and 58, Mr Cleary submitted that the chronological approach taken by the defendant would not undermine the balance of employers' and employees' interests inherent in those two sections.

[62] Although it is not recorded in s3, Mr Cleary suggested that one of the intentions of the Act was to "modernise the regulation around granting holidays to employees". He submitted that, if the chronological approach taken by the defendant was not confirmed, this would lead to "an administrative nightmare", an outcome contrary to this intention of the Act.

Discussion and decision

[63] The starting point in discussion of this issue must be s56 which gives rise to employees' rights to alternative holidays and effectively defines the term. Section 56 is framed in terms of individual holidays. This is reflected in ss57 and 58 which are also framed in the same terms.

[64] It is clear to us from this that the proper approach to the statute is on a holiday by holiday basis. The employee's rights and the employer's duties are created separately in respect of each alternative holiday. It follows that the employee's rights in respect of any particular alternative holiday may be exercised without

regard to the rights the employee may have in respect of any other alternative holiday. Each stands alone.

[65] The fundamental difficulty with the case for the defendant is that it relies on viewing an employee's accumulated entitlements to alternative holidays as a group. That is contrary to the scheme of this part of the Act apparent from the plain meaning of the words used. There is nothing in the Act, or in any of materials showing the history of it, to suggest that the legislative intention was other than that apparent from the words used. We must therefore give effect to that meaning.

[66] Based on the plain meaning of the words used, the effect of s57 is that it is a matter for the employee to choose when he or she exercises any particular entitlement to an alternative holiday less than 12 months old. Put another way, when an employee with an entitlement to an alternative holiday which is less then 12 months old chooses to exercise the right to take that holiday, that right is entirely unaffected by the fact that the employee may have entitlements to other alternative holidays, some of which may be more than 12 months old.

[67] Equally, the effect of s58 is that an employer whose employee has an entitlement to an alternative holiday which is more than 12 months old may exercise its right to require the employee to take that holiday regardless of whether the employee may have entitlements to other alternative holidays which may be older or more recent.

[68] A concern expressed by the defendant about this interpretation was that it would be difficult to administer. We do not accept that would be so. Pursuant to s81, the information which every employer is required to keep includes *"the date on which the employee became entitled to an alternative holiday".* What this contemplates is a list kept by the employer recording each such date. Whenever an alternative holiday is taken, it must then be a simple matter to note that fact alongside the record of the particular entitlement being exercised, whether that be by agreement, by the employee under s57 or by the employer under s58.

[69] As to the financial consequences for the defendant of employees exercising their rights under s57 to take alternative holidays on days which attract higher rates of pay, we understand the defendant's concern. Prior to the enactment of the 2003 Act, employers had no power to require employees to take alternative holidays to which they were entitled and were therefore unable to stop employees accumulating such entitlements. Section 58 was included in the Act to deal with that very problem. So, to an extent, was s61 which provides that alternative holidays may be

exchanged for payment. That was what Parliament enacted but nothing more. That being so, it is not for the Court to imply something else into the statute, particularly where that is inconsistent with the plain meaning of it.

[70] We note also that the financial concerns of the defendant actually arise under s57 by virtue of the employee's ultimate right to choose the date on which an alternative holiday will be taken. It follows that any financial relief the defendant might get from the approach it has taken to date would only last until the backlog of entitlements more than 12 months old had been eliminated. If the defendant regards the accumulation of those entitlements to be a problem in itself, the remedy lies in the use of s58 and possibly s61.

[71] We comment also on another issue which arose in the course of argument which was how to deal with the situation where the employee and employer both nominate the same day for the employee to take an alternative holiday but in respect of different entitlements, the employee doing so under s57 and the employer under s58. The answer must depend on which party stipulated the date first. If it was the employee, then it would be the entitlement nominated by the employee which would be exercised and satisfied. If it was the employer, then it would be the entitlement nominated by the employer which would be satisfied.

Conclusion

[72] Our conclusion on the alternative holiday issue is that the practice adopted by the defendant is inconsistent with the 2003 Act and is unlawful. If an employee has more than one entitlement to an alternative holiday, each entitlement may be exercised separately and independently from every other entitlement.

Costs

[73] Costs were not sought by either party. That was appropriate given that the case involved novel issues of interpretation of a statute in the context of a collective employment agreement. In any event, as each party has been successful in one dispute and unsuccessful in the other, it would have been appropriate that they each bear their own costs.

A A Couch
Judge
for the full Court

Judgment signed at 3.30pm on Thursday, 29 June 2006