

UNDER THE HOLIDAYS ACT 2003
BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AT WELLINGTON

NO. WEA 129/04

BETWEEN

**NEW ZEALAND PROFESSIONAL
FIREFIGHTERS UNION**, of P.O. Box
38213, Petone

Applicant

A N D

**THE CHIEF EXECUTIVE NEW
ZEALAND FIRE SERVICE** of P.O.
Box 2133, Wellington

Respondent

AMENDED STATEMENT OF PROBLEM
Dated this 24th day of June 2004

PRESENTED FOR FILING BY:

OAKLEY MORAN
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Firefighters/S.Problem.NZFS.8.4.03.

To: The Employment Relations Authority
And to: The Respondent

1. The problem the Applicant wishes the Authority to resolve is a failure by the Respondent to comply with obligations imposed upon him by the Holidays Act 2003 (the Act).
2. Since filing the original Statement of Problem and in light of the Statement of Reply and Application to Strike Out filed by the Respondent and in order that the Respondent may be more fully, fairly and accurately informed of the nature of the problem, and as a matter of good faith, the Applicant considers it necessary to file this Amended Statement of Problem providing fuller particulars.
3. The facts giving rise to the problem are as follows:
 - 3.1. The Holidays Act 1981 (the Act) came into force on 1 February 1982.
 - 3.2. The Act contained various provisions dealing with the matter of public holidays, including provisions relating to the public holiday rights conferred by Awards and agreements within the meaning of the Industrial Relations Act 1973.
 - 3.3. On 1 April 1991, and while the Labour Relations Act 1987 remained in force, the Applicant entered into a collective agreement with the Respondent's predecessor.
 - 3.4. The Employment Contracts Act 1991 came into force on 15 May 1991.

- 3.5. On the same day the Holidays Amendment Act 1991 came into force.
- 3.6. The Holidays Amendment Act 1991 amended the Holidays Act 1981 by, inter alia, introducing new and generalised public holiday rights, including a new right to an additional paid holiday to employees who work on public holidays.
- 3.7. At the time and at all material times since firefighters have worked public holidays as a matter of course.
- 3.8. Despite the coming into force of the Holidays Amendment Act 1991 in 1991 firefighters received no additional holidays for working on public holidays. The level of holidays received by firefighters before 15 May 1991 remained the same as that after 15 May 1991.
- 3.9. On 14 December 1992 the Employment Court delivered a judgment (*Labour Inspector v Telecom* [1992] 3 ERNZ 993) which held that the effect of the Holidays Amendment Act 1991 was that any employee in New Zealand who worked on a public holiday was entitled to an additional holiday.
- 3.10. The Respondent's predecessor threatened redundancy dismissals and the de-staffing of fire appliances if he had to make additional payments or provide additional days off for staff.
- 3.11. On or around 24 December 1992 the Applicant informed its members, inter alia, that in order to avoid the need for Employment Court action and in order to eliminate the risk of having to [assist the employer] to find \$4,000,000, being the

employer's estimate of the cost, the employer had proposed a clarification in the employment contract which specifically indicated that the provisions of the contract comply with the requirements of the Holidays Act 1981. If that was agreed, the employer would agree to a roll-over of the 1 April 1991 contract.

- 3.12. The parties then entered into a collective employment contract within the meaning of the Employment Contracts Act 1991 effective 24 December 2002 which contained the following provision:

“Annual Leave

- 3.7.1 Except as provided for in Subclause 3.7.1.1 each worker shall be granted annual leave periods without deduction of pay, at the rate of 14 consecutive days (inclusive of Sundays) within each 160 days consecutive days employment.
- (a) The parties to this Agreement agree that the formula of 14 days' leave within each 160 days employment gives each employee annual holidays in excess of the three weeks provided in Section 11 of the Holidays Act 1981.
- (b) The parties further agree that the additional holidays in 3.7.1(a) above, provide compliance with the Holidays Act 1981. Section 7A for work performed on Statutory Holidays prior to, and since, the passing of the Holidays Amendment Act 1991.
- 3.7.1.1 In all other cases, annual leave shall be calculated on a pro-rata basis (ie 14:160).
- 3.7.1.2 Except as otherwise determined by the

Chief Executive/National Commander annual leaves as provided in Subclause 2.7.1 shall be in accordance with the national annual leave roster prescribed by the Chief Executive/National Commander.

...”

- 3.13. The 24 December 1992 CEC continued in force until replaced by a collective employment agreement entered into on 29 June 2001 pursuant to the Employment Relations Act 2000.
- 3.14. During the time that the 1992 CEC set the terms of employment for firefighters, in 1996, a member of the Applicant, Mr Small, commenced proceeding against the Respondent's predecessor in the Employment Court at Auckland about, inter alia, public holiday entitlements.
- 3.15. A further 487 members filed authorities after the proceedings commenced on 7 February 1996.
- 3.16. The Employment Court delivered judgment on 17 May 1996.
- 3.17. In its judgement the Employment Court held (inter alia) that it was not necessary for it to consider whether the Holidays Act 1991 required that an additional day's holiday taken in lieu of a public holiday worked must be taken on a day that would otherwise be a working day.
- 3.18. The Court determined the matter by deciding that the nub of the argument was whether parties to an employment contract were entitled to use prior existing arrangements for annual leave to

satisfy the employer's statutory obligations under the 1991 amendment to the Holidays Act 1981.

- 3.19. The Court decided the matter for the Defendant on the basis that the "totality of the arrangements" in the 1992 agreement satisfy the requirements of the Holidays Act 1981 as amended in 1991.
- 3.20. The matter then proceeded to the Court of Appeal.
- 3.21. The Court of Appeal dismissed Mr Small's appeal on the ground that the matter was a contractual interpretation matter and that it had no jurisdiction.
- 3.22. At around the time of the Court of Appeal decision in 1997 the Applicant and Respondent entered into a prolonged industrial dispute which was initiated by the Respondent's predecessor, Mr Estall, which ended when the 2001 CEA was signed on 29 June 2001.
- 3.23. The 2001 CEA was the first agreement signed since the 1992 agreement was entered into.
- 3.24. For all material purposes the 2001 CEA was identical to the 1992 CEC.
- 3.25. The 2001 CEA was entered into when the Holidays Act 1981 was in force.
- 3.26. In negotiating the 2001 CEA the parties did not consider or

address any issue relating to public holidays.

- 3.27. The 2001 CEA was to expire on 29 June 2003.
- 3.28. The parties began negotiating a replacement CEA before the expiry date of the 2001 CEA.
- 3.29. During the negotiations the Holidays Act 1991 was still in force, but the parties were aware that new holidays legislation had been introduced but was not yet passed into law.
- 3.30. The parties were agreed that all rights afforded by the new Act should be accorded to the Applicant's members. A new term was added to the clause referred to at paragraph 2.12 above. The new term stated:
- “(c) The parties recognise that, at the time that this Agreement came into force, the Government had introduced new legislation governing holidays. When these provisions come into force, the Fire Service will be required to demonstrate compliance with the intent and entitlements of the new legislation.” (emphasis added)
- 3.31. The Holidays Act 2003 (the 2003 Act) was signed by the Governor General on 17 December 2003 and came into force on 1 April 2004.
- 3.32. The 2003 Act contained, inter alia, the following provisions:

- 3.32.1. A provision stating that Christmas Day, Boxing Day, New Year's Day, 2 January, Waitangi Day, Good Friday, Easter Monday, ANZAC Day, Queen's Birthday, Labour Day and the anniversary day would be public holidays (section 44(1)).
- 3.32.2. A provision stating that an employer and employee may agree (whether in an employment agreement or otherwise) that any public holiday specified in the section 44(1) may be observed on another day (section 44(2)).
- 3.32.3. A provision stating that any such agreement must not diminish the total number of paid public holidays available that would otherwise be available to the employee in any year (section 44(3)).
- 3.32.4. A provision stating that an employee is entitled to public holidays and payment for those in accordance with subpart 3 of the Act (section 46(1)).
- 3.32.5. A provision stating that public holidays are in addition to annual holidays that an employee is entitled to under the Act or otherwise (section 46(2)).
- 3.32.6. A provision stating that if a public holiday occurs during an employee's annual holidays it must be treated as a public holiday and not as a part of the employee's annual holidays (section 40(1)).

3.32.7. A provision stating that if a public holiday falls on a day that would otherwise not be a working day for an employee the obligations imposed by section 46 (that is, the obligation to provide public holidays and payment for those) are complied with if the employee does not work on the day or if the employee works and the employer pays the employer time and a half (section 48 and 50).

3.32.8. A provision stating that an employee may be required to work on a public holiday if the public holiday falls on a day which, but for it being a public holiday, would otherwise be a working day for the employee and the employee is required to work on the public holiday under the employee's employment agreement (section 47).

3.32.9. A provision stating that if a public holiday falls on a day that would otherwise be a working day for an employee the obligations imposed by section 46 (that is, the obligation to provide public holidays and payment for those) are complied with if:

3.32.9.1. The employee does not work on the day and the employer pays the employee not less than the relevant daily pay as defined by section 9 of the Act (section 48(2)(a)(i) and (ii) or

3.32.9.2. The employee works in accordance with his or her employment agreement and the employer pays time and a half and the

employer provides the employee with an alternative holiday under section 56 of the Act (section 48(2)(b) (i)-(iii)).

3.32.10.A provision stating that an employee is entitled to an alternative holiday instead of a public holiday if (section 56(1)(a) and (b)):

3.32.10.1. The public holiday falls on a day that would otherwise be a working day for the employee; and.

3.32.10.2. The employee works in accordance with his or her employment agreement on any part of that day.

3.32.11.Provisions which state:

3.32.11.1. The alternative holiday must be taken on a day that would otherwise be a working day for the employee(section 57(1)(b)).

3.32.11.2. The alternative holiday must be taken on a day agreed between the employer and the employee, and failing any such agreement on a date determined by the employee taking into account the employer's view as to when it is convenient to take the holiday (section 57(1)(a); s57(2)(a)).

3.32.12. A provision stating that each entitlement provided to an employee by the Act is a minimum entitlement.

3.33. After the 2003 Act was passed into law but before it came into force the Applicant took legal advice as to whether the Respondent would be in compliance with the 2003 Act.

3.34. By letter to the Applicant dated 29 March 2004 annexed to the original Statement of Problem the Respondent stated its position in detail. For completeness, the material assertions made by the Respondent are set out below, followed by the Applicant's response:

3.34.1. Respondent's statement: "For the purposes of public holidays, the relevant changes to leave entitlements are:

- The express granting of an alternative holiday (day in lieu) when working on a working day that is Anzac Day or Waitangi Day, even where penal rates are paid.
- The mondayising provisions in section 45 of the Holidays Act 2003.

3.34.2. The Applicant's response: There are many new provisions and entitlements in the 2003 Act. For material purposes, the most important is the provision requiring that an employer allow alternative holidays on days that would otherwise be working days. Under the Holidays Act 1981 there was conflicting case law on the

issue of whether a day in lieu must be given and taken on a day that would otherwise be working day: see *Small* which states that the parties under the Holidays Act 1981 could agree to use prior existing leave entitlements (as opposed to days that would otherwise be working days) to satisfy the employer's obligation to provide days in lieu; and to the contrary see *New Zealand Harbour Workers Union v Lyttelton Port Company* [1995] 2 ERNZ 177; *Telecom Networks and Operations Limited v Wevers* [1993] 3 NZLR 425 (CA) (both of which proceed on the implicit assumption that the day in lieu must be granted on a day that would otherwise be a working day); and *Health Waikato Limited v New Zealand Medical Laboratory Workers and Talbot* [1996] 2 ERNZ 33 which explicitly states that "[The day in lieu] must be provided on a day when the employee would otherwise have worked". The matter is now conclusively dealt with by section 57(1)(b) of the 2003 Act.

3.34.3. Respondent's Statement: "The case of *Small v New Zealand Fire Service Commission* AEC 21/96 confirmed that the extended leave complies with statutory entitlements under the Holidays legislation".

3.34.4. Applicant's Response: The *Small* case dealt only with the Holidays Act 1981 and not with "the Holidays legislation". In any event, even if *Small* is correctly decided (which is denied) it is overruled by the Holidays Act 2003 and in particular by section 57(1)(b). Much of the factual basis upon which *Small* was decided (such

basis being common ground before the Employment Court in that case) was erroneous, as is explained below.

3.34.5. Respondent's statement: The CEA entitles the employees to 31.94 days' leave per year (box page 2 of letter). This satisfies the statutory requirement for 3 weeks' leave per year, and for the alternative holidays for public holidays that firefighters work (said by the Respondent to be 5.5 per year).

3.34.6. Applicant's Response: The Respondent's figures are based on fallacious calculations. The same fallacious calculations were presented to the Court in *Small*. The asserted 31.94 days per year leave is based on averaging the amount of leave over a very long period of years. In fact, for most years, only 4 weeks annual leave are provided (equating to 28 days). Three weeks of that is annual leave. The remaining week cannot form the basis for days in lieu because none of the days in the remaining week would otherwise be working days as required by the 2003 Act, but instead are part of a prior existing arrangement for annual leave. In any event the Applicant's position is that to the extent that *Small* suggests that there is no extra provision of one week's leave per annum to compensate for shift work (and the Applicant's position is that *Small* does not fully address that issue), the case is wrongly decided. Further and in any event the average figure of 5.5 public holidays relied upon by the Respondent worked per worker per year is based on the erroneous

assumption that only two shifts work on each public holiday. In fact, there are three, namely, the shift working from 6pm on the day before the holiday to 8am on the of the holiday; the shift working from 8am until 6pm on the day of the holiday; and the shift working from 6pm on the day of the holiday until 8am on the day after the holiday. In fact, some employees work all 11 public holidays in any year as part of their normal roster. Others work 8, 9, or 10. Only a small number work 5.5 or less.

- 3.35. On 30 March 2004 the Respondent sent a memorandum to all staff containing the same erroneous views as were contained in his letter to the Applicant .
- 3.36. By letter dated 31 March 2004 the Applicant expressed its disagreement with the Respondent's views, and invited him to comply with the obligation to demonstrate compliance with the intent and entitlements of the new legislation.
- 3.37. By letter dated 2 April 2004 the Respondent again asserted that he had complied the obligation to demonstrate compliance with the intent and entitlements of the new legislation, and again asserted that he was not in breach of the Holidays Act 2003.
- 3.38. By letter dated 6 April 2003 the Applicant informed the Respondent that he had not complied with its obligations.
- 3.39. The Respondent has not complied with its obligation to demonstrate compliance with the intent and entitlements of the new legislation and, further, is an ongoing breach of the Act.

Particulars of Breaches of Act

- 3.39.1. Pursuant to section 56 of the Act the Respondent is obliged to provide an alternative holiday to each of the Applicant's members who works on any part of a public holiday.
 - 3.39.2. Pursuant to section 57 of the Act the alternative holiday must be taken on a day that would otherwise be a working day for the employee, and is to be taken on a day as agreed between the employer and the employee and if agreement was not reached on a day to be determined by the employee after taking into account the employer's view as to when it is convenient to take the holiday.
 - 3.39.3. The Respondent has failed and/or refused to allow the Applicant's members an alternative holiday as required by section 56 and 57 of the Act.
4. The Applicant seeks the following remedies:
 - 4.1. A compliance order requiring the Respondent to comply with the Act.
 - 4.2. Costs
 5. The parties have attended mediation.
 6. The Applicant relies on the documents attached to the Statement of

Problem.

DATED this 24th day of June, 2004.

Peter Cranney
Solicitor for Applicant

THIS Statement of Problem is filed by Peter Cranney Solicitor for the abovenamed Applicant of the firm of Oakley Moran. The address for service is 1st Floor, Leaders Building, 15 Brandon Street, Wellington.

DOCUMENTS for service on the abovenamed Applicant may be left at that address for service or may be -

- (a) Posted to the solicitor at P.O. Box 241, Wellington; or
- (b) Left for the solicitor at a document exchange for direction to DX SP20003, Wellington; or
- (c) Transmitted to the solicitor by facsimile to (04) 472.6657.

NOTICE TO THE RESPONDENT

1. If you intend to respond to this application, you must, within 14 days after the date of the service of this application on you, lodge 2 copies of a statement in reply with an office of the Employment Relations Authority at Wellington.

2. The term **days** (in paragraph 1 of this notice) does not include any day in the period beginning with 25 December in any year and ending with 5 January in the following year.

3. You will be notified of the place, date, and time at which the Authority will conduct any investigation meeting in respect of this application.

Officer of the Employment Relations Authority:

Date: