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WHEN IS A PUBLIC HOLIDAY NOT A HOLIDAY?

The Holidays Act has always been a topical subject. With Christmas fast approaching, the Supreme Court's recent judgment in *New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated v Air New Zealand Ltd* [2007] NZSC 89 is no exception.

The issue in the case was essentially whether or not providing pilots with 11 additional days' annual leave instead of public holidays met the requirements of the Holidays Act.

The Court of Appeal had earlier held that this was not lawful as, although there were additional 11 days' leave to cover all 11 public holidays each year, there was no ability to determine when a particular annual leave day would be taken as the public holiday it was intended to replace. That Court also held that to meet the requirements of the Holidays Act the replacement leave day had to itself be identifiable, i.e. it could not simply be an additional day's leave to be taken like any other annual leave day. Both sides then appealed that decision to the Supreme Court.

A bench of 5 Supreme Court Justices heard the case in mid-June 2007 and issued their judgments on 14 November 2007. However, in the end they were split 3 to 2 on how to decide the case.

Three (i.e. the majority) held that s.42(2) of the Holidays Act did *not* allow a public holiday to be transferred to another day. This meant that where a pilot worked on a public holiday listed in the Holidays Act, for example, on 25 December, he or she still needed to be paid time and a half (and still needed to receive an alternative holiday), even though the employment agreement provided pilots with the additional 11 days referred to above. Conversely, the 2 remaining Justices determined that s.42(2) did allow such a transfer, as long as the transfer day was sufficiently identifiable so that you could say it was the actual public holiday.

What does this mean for you?

Employers will now need to pay time and a half to employees who work on the public holidays listed in the Holidays Act, even though there may already be what was previously an acceptable transfer agreement covering those days. An alternative holiday will also apply where the public holiday in the Holidays Act was "*otherwise a working day*" for the employee.

On another level, the Supreme Court, as the highest Court in the land, has shown quite nicely how difficult it is to get the Holidays Act "*right*". The case therefore demonstrates the point that where this Act is concerned, there should be no hesitation in seeking advice before acting.

Another holidays issue that often causes confusion is when to observe Christmas Day and Boxing Day. As you may be aware, under the Holidays Act both of those

days are subject to a transfer regime which depends on whether the actual calendar holidays are "*otherwise working days*" for employees. However, this Christmas you are spared the trouble of working out which days might need to be observed differently, as this year both Christmas Day and Boxing Day are on week days.

We wish you and your families all the very best for the holiday season ahead.

Disclaimer – this newsletter is necessarily brief and general in nature. You should seek professional legal advice before taking any action in relation to a matter dealt with in this newsletter.

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