

IN THE SUPREME COURT OF NEW ZEALAND

SC 20/2016  
[2016] NZSC 44

BETWEEN                      NEW ZEALAND ALUMINIUM  
   SMELTERS LTD  
   Applicant

AND                              ANDREW WELLER & OTHERS  
   Respondents

Court:                      Elias CJ, Glazebrook and Arnold JJ

Counsel:                      P R Jagose and R M Dixon for Applicant  
   R E Harrison QC for Respondents

Judgment:                      27 April 2016

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**JUDGMENT OF THE COURT**

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- A        The application for leave to appeal is dismissed.**
- B        Costs of \$2,500 are awarded to the respondents.**
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**REASONS**

[1]     The applicant (NZAS) applies for leave to appeal against a decision of the Court of Appeal<sup>1</sup> which in turn dismissed an appeal against a decision of the Employment Court.<sup>2</sup>

**Background**

[2]     The applicant operates the aluminium smelter at Tiwai Point. The respondents are shift worker employees. The statutory provision relevant to this

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<sup>1</sup>     *New Zealand Aluminium Smelters Ltd v Weller* [2016] NZCA 19 (Wild, Winkelmann and Kós JJ) [*New Zealand Aluminium Smelters Ltd* (CA)].

<sup>2</sup>     *New Zealand Aluminium Smelters Ltd v Weller* [2014] NZEmpC 74 (Judge Couch).

application was s 7A of the Holidays Act 1981. The relevant employment contract made the following provision for annual and statutory holidays:

#### 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 day's leave in lieu of a statutory holiday as it occurs.* [Emphasis added].

#### **Employment Court decision**

[3] Judge Couch in the Employment Court held that, under the contract, the parties had agreed that, in lieu of each of the 11 holidays required under s 7A(1) of the Holidays Act and nominally occurring on the days listed in s 7A(2) of that Act, employees would be granted a day's leave.<sup>3</sup> That day's leave could be taken on a day agreed by the parties, thereby satisfying the proviso to s 7A(2). He went on to say that this interpretation accords with the legislative history and common parlance.<sup>4</sup>

[4] The Judge concluded that there was no reason to depart from the plain meaning of the words used in the last sentence of the clause at issue. He said:

[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.

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<sup>3</sup> At [44].

<sup>4</sup> At [45].

[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.

[5] We note that the Employment Relations Authority in its decision had said that the contractual provision at issue “reflects a reasonably common practice of giving all shift staff 11 days leave in lieu of public holidays, with the entitlement applying irrespective of whether or not the worker would otherwise have worked on each and every public holiday”.<sup>5</sup>

### **Court of Appeal decision**

[6] Leave was granted to the Court of Appeal on the following question:<sup>6</sup>

Did the Employment Court err in law in its interpretation of s 7A of the Holidays Act 1981?

[7] The Court had rejected an application for leave to appeal on the Employment Court's approach to contractual interpretation. It said that the proposed appeal on this aspect does not raise any “questions of principle going beyond the particular terms of the contract”.<sup>7</sup>

[8] In deciding the substantive appeal the Court noted that, under s 214(1) of the Employment Relations Act 2000, there is no appeal from a decision of the Employment Court relating to the construction of an employment agreement.<sup>8</sup> The Court said that it was common ground that, if an employee works on one of the public holidays prescribed in s 7A, he or she will accrue a day's leave in lieu.<sup>9</sup> The issue was whether employees accrue a day's leave for a public holiday that falls on a non-working day.<sup>10</sup> Judge Couch concluded that they do.<sup>11</sup>

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<sup>5</sup> *Andrew Weller & Others v New Zealand Aluminium Smelters Ltd* [2013] NZERA Christchurch 75 at [7].

<sup>6</sup> *New Zealand Aluminium Smelters Ltd v Weller* [2014] NZCA 438 (O'Regan P, Ellen France and Miller JJ).

<sup>7</sup> At [4], citing *Silver Fern Farms Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2009] NZCA 394 at [10]; and see *Secretary for Education v Yates* [2004] 2 ERNZ 313 (CA).

<sup>8</sup> *New Zealand Aluminium Smelters Ltd* (CA), above n 1, at [8].

<sup>9</sup> At [5].

<sup>10</sup> At [6].

<sup>11</sup> At [7].

[9] The Court of Appeal analysed s 7A of the Holidays Act<sup>12</sup> and concluded that nothing said by Judge Couch departed from the correct analysis of s 7A.<sup>13</sup> The Employment Court's conclusion on the accrual of a day's leave on days not worked depended on the interpretation of the contract entered into by the parties and not the statutory provision.<sup>14</sup> This was not a matter admitting appeal under s 214(1).<sup>15</sup>

### **Our assessment**

[10] The proposed appeal to this Court is barred by s 214. While the approach of the Employment Court relied to some extent on the interpretation of s 7A, it remained the interpretation of a particular clause in an employment contract. In any event s 7A has now been replaced,<sup>16</sup> as has the particular contract at issue.

### **Result**

[11] The application for leave to appeal is dismissed.

[12] Costs of \$2,500 are awarded to the respondents.

Solicitors:  
Chapman Tripp, Wellington for Applicant  
E Tū Inc, Wellington for Respondents

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<sup>12</sup> At [37]–[38].

<sup>13</sup> At [40](a).

<sup>14</sup> At [39].

<sup>15</sup> At [40].

<sup>16</sup> The current provisions relating to what are now called public holidays are contained in the Holidays Act 2003.