

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 199  
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| BETWEEN | WENDCO (NZ) LIMITED<br>Applicant   |
| A N D   | A LABOUR INSPECTOR OF<br>THE MINISTRY OF BUSINESS,<br>INNOVATION AND<br>EMPLOYMENT<br>Respondent |

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| Member of Authority:   | Christine Hickey   |
| Representatives:       | Justine Foden, Advocate for the Applicant<br>Geraldine Kelly and Claire English, Counsel for<br>Respondent |
| Investigation Meeting: | 16 June 2016 and 6 July 2017   |
| Submissions Received:  | At the investigation meeting on 6 July 2017 from both<br>parties   |
| Date of Determination: | 15 November 2017   |

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Wendco (NZ) Limited (Wendco) operates 23 restaurants in New Zealand. It is one of the smaller operators in the quick service restaurant sector, commonly known as the fast food sector, in New Zealand. At any one time it has in excess of 500 employees.

[2] This case is the result of Wendco lodging an Objection to the Improvement Notice the Labour Inspector, Kim Baldwin, served on it on 13 October 2015. Ms Baldwin says that the Improvement Notice must still be complied with, although acknowledges that there needs to be some alteration of the timeframes.

[3] Essentially, Ms Baldwin challenged Wendco's method of determining when an employee works on a public holiday whether that day would otherwise have been a working day for that employee. That decision is important because it effects whether or not that employee is entitled to an alternative holiday.

### **Procedural background**

[4] Ms Baldwin became involved because of a complaint that an employee or employees had not received alternative holidays for working on public holidays.

[5] Ms Baldwin examined Wendco's employment records for the Hornby restaurant and interviewed some employees as well as meeting with Danielle Lendich, Wendco's CEO, and Cathy Matthews, Wendco's human resources manager.

[6] Another Labour Inspector undertook an audit of the Paraparaumu restaurant. Based on the Paraparaumu audit and her own enquiries Ms Baldwin concluded that:

it is the roster system together with an employee's notified and approved availability that provide the strongest indicators of whether a day would otherwise be a working day if that employee then works on a public holiday. If an employee is rostered to work on a public holiday this creates a clear expectation for both the employer and employee that the employee will work that day.

On this basis I also concluded that the applicant's approach to assessing an employee's entitlement to alternative holidays when an employee works on a public holiday is too restrictive and that the applicant failed to take into account all of the factors set out in section 12(3) of the Holidays Act 2003.

[7] On 13 October 2015, Ms Baldwin issued an Improvement Notice alleging that Wendco had breached s 56 and s 60 of the Holidays Act 2003 (the HA).

[8] Section 56 provides that an alternative holiday must be provided to an employee who works on a public holiday if that day would otherwise have been a working day for them. Section 60 sets out how those employees should be paid for the alternative holiday.

[9] Under the Improvement Notice, by 11 December 2015 Wendco was required to:

- Conduct a review of public holidays worked by all current and past Hornby and Dunedin employees since opening, and for all other New Zealand restaurants since 1 July 2012.

- When an employee worked on a public holiday Wendco must determine if that day was otherwise a working day taking into account all the factors in s 12 of the HA. Wendco needed to record its reasoning.
- If Wendco determined any day was otherwise a working day it must credit that employee with an alternative holiday, and pay any former employee not already credited with an alternative holiday.
- Conduct a review of all payments made for alternative holidays since 1 July 2012 ensuring payment was made at not less than the employee's relevant daily pay. Calculate and make payments for any arrears owed to current and past employees.<sup>1</sup>

[10] Wendco negotiated with Ms Baldwin that it would undertake a 'test' review of the Dunedin restaurant so that Ms Baldwin could give feedback to Wendco on whether she considered it was correctly identifying whether a public holiday "would otherwise be a working day", taking into account all the factors in s 12(3) of the HA.

[11] Wendco submitted its review of the Dunedin operation to Ms Baldwin on 27 November 2015. It stated that it had applied all the s 12(3) factors. It maintained its view that assessing whether an employee had worked on the same day of the week as the public holiday in the three preceding weeks was the most fair and appropriate way to determine an alternative holiday.

[12] Ms Baldwin responded to Wendco on 30 November 2015 stating she did not consider it had correctly assessed whether a public holiday was otherwise a working day. She maintained her view that the original rosters and the days an employee had made themselves available were the correct way to assess whether a worked public holiday would otherwise have been a working day.

[13] On 3 December 2015, Wendco lodged an Objection to the Improvement Notice in the Authority, at the same time applying for an extension of time to lodge the Objection. Ms Baldwin did not object to the extension, which the Authority granted.

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<sup>1</sup> Wendco agreed with the Labour Inspectorate that it had not been paying its employees appropriately and in line with the law. It has now rectified the way employees are paid for their alternative holidays.

[14] The parties attended an investigation meeting in Christchurch on 16 June 2016. After that I directed that by 27 June 2016:

- Wendco was to provide evidence that it has now set up a system whereby alternative holidays are paid correctly, and proof that all those employees (former and current) who were eligible had been paid correctly.
- Wendco was to indicate how many of its employees were on the new individual employment agreements, how many were on the old individual employment agreements (prior to 1 April 2016), and how many were on the collective employment agreement.
- The Labour Inspector should make submissions on the issue of whether a question or questions of law should be referred to the Employment Court.
- Wendco's submissions on the same issue should be filed a week later.

[15] However, I put those directions into abeyance because the parties indicated that they wished to hold discussions with a view to settling matters.

[16] On 30 September 2016, the parties notified the Authority that they had not been able to settle the matter. However, they agreed the issue of recalculating payment for alternative holidays should await determination of the entitlement issue. They asked for a teleconference to progress matters.

[17] On 1 November 2016, I held a teleconference. In advance of that, Wendco provided the information about how many employees were on each type of employment agreement.

[18] At the teleconference, I asked if the parties were open to sharing with me the content of their discussions after the investigation meeting. The discussions had been held on a without prejudice basis. The Labour Inspectorate did not waive privilege.

[19] We discussed the possibility of removing the case to the Employment Court and I received submissions on that. In the end, I did not remove any question/s of law as the parties did not support such an approach. We agreed to set the matter down again for final submissions. I heard submissions on 6 July 2017.

### **Decision issued outside of three-month period**

[20] I have issued this determination later than the three-month period allowed after the conclusion of the investigation meeting. The Chief of the Authority has decided under s 174C(4) of the Employment Relations Act 2000 (the Act) that exceptional circumstances existed for providing this written determination later than the latest date specified in s 174C(3)(b) of the Act.

### **The issues**

[21] Section 223E of the Employment Relations Act 2000 (the Act) sets out the Authority's function when an employer has lodged an objection to an improvement notice. Under s 223E, I need to:

- determine whether Wendco is failing, or has failed to, comply with s 12 of the Holidays Act 2003; and
- identify the nature and extent of Wendco's failure to comply; and
- identify the nature and extent of any loss suffered by any employee as a result (if that is applicable); and
- confirm, vary or rescind the improvement notice as I see fit.
- in order to determine whether Wendco has failed to comply with s 12 I need to decide whether Wendco's 3-week rule complies with the HA.

### **Relevant facts**

[22] Wendco operates a variable roster system for most of its employees, referred to as crew members. Ms Baldwin agrees with Wendco that this case relates to crew members only. The Improvement Notice did not apply to managers, who at the time of audit had monthly rosters. However, that is not to say that the Labour Inspectorate accepts that the three-day rule can be applied to managers but not crew members.

[23] On public holidays the Wendco outlets are busier and require a larger number of staff to be rostered on than, for example, on any normal Monday. That means that a number of employees will be rostered on a public holiday who may not have been rostered on for that particular day generally as part of their work pattern, at least not in the previous three weeks.

[24] Because of the use of a variable roster, Wendco's crew members' days of work may well vary from week to week. Therefore, it is not always clear whether a worked public holiday would otherwise be a working day for any of those employees.

### **The legislation**

[25] Section 6 of the HA sets out the relationship between the HA and employees' employment agreements, whether individual or collective:

- (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 subpart 5 of Part 2 of the Contract and Commercial Law Act 2017.*

(Emphasis added)

[26] Section 6 means that in any application of s 12 an employer must be careful not to exclude, restrict or reduce an employee's entitlement under the HA.

[27] Section 12 of the HA is titled "determination of what would otherwise be working day" and applies for the purpose of determining employees' entitlements to an alternative holiday.

[28] If it is not clear whether a public holiday on which an employee works would otherwise be a working day section 12 of the Holidays Act 2003 (the HA) sets out how an employer and the employee should proceed with a view to reaching agreement on the matter:

- (1) This section applies for the purpose of determining an employee's entitlements to a public holiday, an alternative holiday, to sick leave, or to bereavement leave.
- (2) *If it is not clear whether a day would otherwise be a working day for the employee, the employer and employee must take into account the factors listed in subsection (3), with a view to reaching agreement on the matter.*
- (3) The factors are -
  - (a) The employee's employment agreement:
  - (b) The employee's work patterns:

- (c) Any other relevant factors, including –
  - (i) whether the employee works for the employer only when work is available:
  - (ii) the employer's rosters or other similar systems:
  - (iii) the reasonable expectations of the employer and the employee that the employee would work on the day concerned.
- (d) Whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick leave or bereavement leave, the employee would have worked on the day concerned.

(Emphasis added)

[29] Section 13 provides that a Labour Inspector can make a determination on what would otherwise be a working day if the employer and employee cannot agree. Ms Baldwin has not used her powers under s 13 in this case.

*The Labour Inspector's approach*

[30] Ms Baldwin considers that there are two main factors that Wendco should use to determine whether a public holiday would otherwise be a working day.

[31] First, Wendco should consider the days of the week the employee indicated they would be available for work at the beginning of their employment, or as amended since.

[32] Secondly, Wendco should consider the rosters as initially drafted by managers for the week in which the public holiday falls.

[33] Using the Labour Inspector's approach, if an employee has made themselves available to work on a Monday, is rostered to work on a public holiday that is a Monday, and does work on that day the employee become eligible to an alternative holiday.

[34] The Labour Inspectorate considers the Wendco IEAs mean the strongest indicators of whether a day would otherwise be a working day are the employee's availability and the roster. Therefore, Ms Baldwin's approach takes into account the employment agreements, as s 23(3)(a) requires, as well as the roster and availability.

[35] Wendco's IEA includes:

- (i) The hours of work are stated to be as per the weekly roster.

- (ii) Crew members agree to work the hours in the weekly rosters, which may be varied from time to time.
- (iii) Clause 11 says an employee's days of work are linked to the roster. Rostered shifts cannot be changed without a manager's permission.
- (iv) Crew members provide days and hours of availability at the beginning of the employment relationship. If an employee wishes to change their availability they need to make a 'change to availability' application which the employer can either approve or decline depending on business needs.

[36] The Labour Inspectorate acknowledges that there may not be any readily discernible pattern for some employees. It also acknowledges that a more individualised approach to assessing whether a public holiday would otherwise be a working day may create difficulties for Wendco. However, it says the existence of variable rosters and lack of a predictable pattern of hours for crew members is controlled by the employer for the benefit of its business.

*Wendco's approach*

[37] Wendco disagrees that Ms Baldwin's approach is a fair or reliable way of identifying what would otherwise have been a working day.

[38] Wendco says the purpose of the s 12 enquiry is to establish whether the public holiday was a normal working day. It refers to the introduction of the Holidays Bill 2003 into the House, when the then Minister of Labour, the Honourable Margaret Wilson stated:

If a [public] holiday falls on a day the employee would normally work and the employee does work, ... the bill provides for an alternative paid day off ...

[39] First, it says crew members are not rostered on each day they have made themselves available. Therefore, an employee's expressed availability cannot be a predominant factor. In addition, Wendco did not keep a record of the original and unamended availability notifications for employees between 2012 and 2015.

[40] Secondly, it says that a large number of roster changes are made at the behest of employees every week so that the days and shifts employees work in that week are



not necessarily the same as those originally rostered by Wendco. Therefore, the original roster cannot be relied on as a predominant factor either. In addition, Wendco did not keep original rosters between 2012 and 2015 but overwrote them when changes were made. It now keeps copies of the rosters as originally set out by the managers.

[41] Instead, Wendco has used a simple test for a number of years to decide whether a public holiday would otherwise have been a working day for its employees. It looks at an employee's work pattern over the three weeks prior to the public holiday worked. If an employee has worked at any time on the same day in each of preceding three weeks Wendco considers s/he is entitled to an alternative holiday.

[42] Wendco says its invariable three-week rule practice accords with how other similar competing restaurant chains deal with assessing whether an employee is entitled to an alternative holiday. For example, in McDonald's Restaurants (NZ) Limited's collective employment agreement (CEA) with Unite Union clause 4.1 states:

The "three week rule" is used to decide whether a particular day you worked would "otherwise be a working day" for you. That means if you have worked on any part of a particular day of the week in all of the previous three weeks, then that day of the week is deemed to be a working day for you. For this purpose, any authorised leave on one of those days shall count as a day worked.

[43] At the 6 July 2017 investigation meeting Wendco provided the text of a proposed amendment of the McDonalds/Unite CEA. That amendment would mean, that if an employee had worked on the relevant day of the week for three out of the previous five weeks and then worked on a public holiday, that day would be deemed an ordinary working day.

[44] The three-week rule was not contained in Wendco's IEAs prior to 1 April 2016. However, Wendco says its practice was widely known by its employees, so much so, that it amounts to an implied term of the employment agreements entered into prior to 1 April 2016. In fact, Ms Lendich and Ms Matthews assumed the three-week rule was the correct, legally-compliant practice, until the Labour Inspectorate became involved.

[45] Wendco has included the three-week test in its individual employment agreements since 1 April 2016:

... you will receive an alternative holiday if you have worked on the same day in the three preceding weeks.

[46] It has used a slightly different wording since 1 September 2016:

You will also be entitled to an alternative holiday if you have worked on the same calendar day in the three preceding weeks.

[47] The three-week test is not included in Wendco's CEA with Unite Union.

[48] Wendco argues that by utilising the three-week rule, especially when it is explicitly set out in a written employment agreement, employees have agreed with Wendco how to determine whether a worked public holiday would have otherwise been a working day. In other words, with the application of the three-week rule, it is always clear to an employee and to Wendco whether any worked public holiday would otherwise have been a working day for that employee. Therefore, no other s 12(3) factors need to be taken into account.

#### **What does case law say?**

[49] There is no case law on precisely the issue involved in these proceedings. However, below I set out the applicable cases.

[50] In *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union*<sup>2</sup> the Court of Appeal considered how to determine whether a day would otherwise be a working day. It held that it:

was an intensely practical question. In the first instance, employers and employees have to try to agree on the answer; s 12(2). And the factors they are bound to take into account are very open-ended and flexible; s 12(3). If they cannot agree, then a Labour Inspector can determine the matter for them; s 13. His or her decision is binding (s 79), except to the extent that the authority "makes its own determination on the matter".

[51] In *Tranzit Coachlines Wairarapa Limited v Morgan*<sup>3</sup>, a Full Bench of the Employment Court set out the following:

[21]... this Court, in *Progressive Meats Ltd v Meat & Related Trades Workers Union of Aotearoa Inc*<sup>4</sup>, considered s 12. In view of the fact that in that case it was not clear whether the public holiday (Queen's Birthday) would otherwise have been a working day for the workers in question the Court embarked on a consideration of the relevant factors in s 12(3). On the primary principle, the Court stated:

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<sup>2</sup> [2006] ERNZ 1109.

<sup>3</sup> [2013] ERNZ 638.

<sup>4</sup> (2008) 5 NZELR 219.

[36] Whether the Queen's Birthday holiday in June 2004 would otherwise have been a working day for the relevant employee is essentially a question of fact in each case.

[22] These decisions were applied by Judge Shaw in this Court in *BW Murdoch Ltd v Horn*.<sup>5</sup> In that decision the conclusion reached on the issue of whether the public holiday would otherwise have been a working holiday for the worker was as follows:

[59] The public holiday for Easter Friday is not as clear cut. The working pattern for the entire 19 weeks shows he did not work consistently every Friday. However, s 12(3)(iii) refers to the expectation that the employee would work "on the day concerned". This indicates that the statute intends that each public holiday has to be looked at separately in the light of the work patterns around it.

[23] These authorities confirm the approach the Court is to take in considering the matter. It is to be in the light of the circumstances presented in each particular case. It may well be that the Court is easily able to reach a conclusion as to whether or not the day in question would otherwise have been a working day for the employee involved. If that is not the case then a formulaic approach adopting the criteria specified in s 12(2) and (3) of the Holidays Act is to be adopted.<sup>6</sup>

*How should Wendco interpret the HA?*

[52] I agree with Wendco that the purpose of s 12 is to use the s 12(3) factors to agree on whether the public holiday would have been a 'normal' day of work for an employee.

[53] Section 12 establishes that if it is not clear whether a public holiday would otherwise have been a working day, for *each* public holiday an employee works the employer and that employee must seek to agree by considering the factors in s 12(3), as well as other relevant factors.

[54] The cases have established that this inquiry is an intensely practical one. It requires an agreement between the employer and employee for each public holiday OR an application of the facts of each employee's situation to the particular public holiday, taking into account the s 12(3) factors.

[55] The very fact that Wendco considered it needed to use the three-week test for each of its assessments of whether a public holiday is otherwise a working day means

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<sup>5</sup> [2008] ERNZ 38. I note in this case Judge Shaw looked at the entire history of employment to resolve which public holidays would otherwise have been working days.

<sup>6</sup> Above footnote 4, pp 645 and 646.

that Wendco considers “it is not clear” whether any of the public holidays on which crew members work would otherwise be working days.

[56] Wendco argues that in applying the three-week test it has considered all of the s 12(3) factors but that they are not all relevant to its employees, whereas by considering the three-week rule it is considering the employee’s work patterns, under s 12(3)(b), which is the most relevant factor.

[57] In practice, the three-week factor is programmed into Wendco’s payroll system and is applied automatically.

[58] The three-week rule is a pragmatic one that suits Wendco precisely because it means that it does not have to consider the circumstances of each employee who worked on each public holiday. Wendco argues that to do so would be too expensive and may lead to it deciding to close on public holidays, or to charging a surcharge on public holidays. Those are not considerations I need to take into account.

[59] I consider that the three-week rule will, in some cases, work to restrict or reduce employees’ entitlement to an alternative day after working on a public holiday.

[60] For example, an examination of an employee’s work patterns back three months may show the employee worked 9/12 Mondays, before working on the public holiday Monday. However, what if the employee did not work the previous three Mondays, for whatever reason, maybe they were simply not rostered on, or were sick? The three-week rule would work to disentitle them to an alternative holiday, when an assessment of their work patterns over a longer period would entitle them to an alternative holiday. Indeed, targeted rostering could mean none of the employees rostered on for working on a public holiday Monday had worked the previous three Mondays. Therefore, no alternative holidays, with their consequent pay implications, would be accrued.

[61] I am not suggesting that Wendco’s corporate motivation for using the three-week rule has been limiting its public holiday payroll by limiting employees’ entitlements to an alternative holiday. However, it is certainly possible that individual managers in individual restaurants could have used it that way in the past and could do so in the future if the rule is allowed to stand.

[62] For some employees the three-week rule may act to disentitle them to an alternative day if a broader assessment was taken in line with how the courts have interpreted s 12.

[63] Section 6 of the HA means the three-week rule cannot be an implied term of the employment agreements between Wendco and its staff to the extent that it works to restrict or disentitle employees to an alternative holiday.

[64] Section 6 also renders the clause incorporating the three-week rule into individual employment agreements of no effect to the extent that it works to restrict or disentitle employees to an alternative holiday.

[65] The legislation requires Wendco to undertake a genuine assessment of at least the factors set out in s 12(3) of the HA, and possible other relevant factors. I note that Judge Shaw, in *Murdoch v Labour Inspector*<sup>7</sup> examined Mr Hoonkop's entire work history of 19 weeks to determine whether Easter Friday was otherwise a working day for Mr Hoonkop. She particularly stated that:

The statute intends that each public holiday has to be looked at separately in the light of the work patterns around it.<sup>8</sup>

[66] To properly comply with the HA, Wendco must consider all the s 12(3) factors. I accept that in the case of the crew members on variable rosters their work patterns may be the deciding factor.

[67] However, a useful view of an employee's work history for s 12 purposes must be considerably longer than the preceding three weeks, unless the employee has only worked those three weeks. Where an employee has worked for three months or more, I consider it would be sensible to assess the period of at least three months, or their full work history if they worked for less than three months.

[68] As part of Wendco's submissions, it asked what percentage of, for example, Mondays, an employee would have to have worked for it to be clear that their work pattern means the public holiday in question would otherwise have been a working day for them. I do not think that I can give a one-size-fits-all answer to that question, although for some employees the answer may be that it is clear that they worked more

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<sup>7</sup> Footnote 5, above.

<sup>8</sup> At paragraph [59].

than 50% of the same day of the week in the preceding three to six months and so should be entitled to an alternative holiday.

[69] However, I will use an example to illustrate why a more than 50% assessment does not always produce the correct answer. For my example, I use a public holiday that falls on a Monday and an employee who has worked at least a six-month period prior to that public holiday. This employee has not worked the majority of the preceding 25 or 26 Mondays. However, they have worked on the preceding eight Mondays. In that case, it is likely that the employee had a reasonable expectation that they would work on the 9<sup>th</sup> Monday that happens to be a public holiday. In that case, it is likely that for that employee, whether they were originally rostered for that day or not, the public holiday Monday on which they work was otherwise a working day for them.

[70] An example of when the three-week rule may disentitle an employee to an alternative holiday is where a new employee, of say only three weeks post-training, has worked on the public holiday but only on two out of the preceding three weeks on that day. A blanket three-week rule rigidly applied would disentitle this employee when the use of discretion, along with considering their availability, may see them entitled to an alternative holiday.

[71] Wendco cannot apply a blanket approach to crew members on variable rosters because that is not an individually applied approach for each employee. An individual employee approach is simply part of the price Wendco pays for the benefit of the convenience it gains by using variable rosters.

[72] In addition, Wendco's approach does not take into account what the reasonable expectations of the employer and the employee were that the employee would work on the day concerned. It is not open to Wendco to argue that the three-week rule sets the reasonable expectations for it and its employees. That is because it has been a rule set by Wendco and its industry competitors completely outside of any consideration of individual employees and s 12 factors as they apply to those employees. The three-week rule cannot define the limits of a "reasonable expectation" simply because it is the preferred practice of fast food sector employers.

[73] However, I am not satisfied that Ms Baldwin's original approach was correct when applied to the crew members' situation either. I consider that Ms Baldwin's

approach gave undue prominence to the matter of the weekly roster and the daily availability, which are only two of the relevant factors under s 12(3)(c)(ii).

[74] Wendco gives an example of what it says is wrong with Ms Baldwin's approach. Ms Baldwin's approach suggests that a public holiday Monday will otherwise be a working day for an employee so long as:

- they indicated their availability to work on the particular day of the week the public holiday will be on, and
- they are rostered to work on the public holiday, and
- actually work on that day.

[75] I accept that there is a problem with that approach. For example, although an employee may have indicated their availability to work on Mondays, in fact, for the preceding six months they may not have been rostered on to work any Monday. Therefore, Mondays may well not be a normal, or otherwise an ordinary working, day for that employee.

[76] The examples I have given make it clear that the three-week rule cannot stand. The correct approach is for Wendco to adopt a formulaic approach for each employee using the criteria in s 12(2) and s 12(3) for each public holiday, despite that being a more time consuming and expensive exercise for Wendco. I agree with the Labour Inspector that each assessment must be genuine and made in good faith.

[77] I also I agree with the submission made on behalf of the Labour Inspector that the factors in s 12(3) that are relevant to Wendco's assessment for each employee include:

- (i) The employment agreement.
- (ii) The rosters, where available.
- (iii) The availability provisions, where available.
- (iv) The actual work patterns.

[78] I accept that in some cases the work patterns may be the most decisive factor determining whether the public holiday was otherwise a working day. However, I

disagree with the Labour Inspector that it is necessary to examine a full twelve month history. Instead, a minimum of three months, up to a maximum of six months, is a reasonable consideration of each employee's work pattern.

## **Orders**

[79] Under s 223E of the Employment Relations Act 2000 I determine that Wendco (NZ) Limited:

- (i) has failed and is failing to comply with s 56 of the Holidays Act 2003 because it has not provided all employees with an alternative holiday when they have worked on a public holiday that would otherwise be a working day.
- (ii) has failed and is failing to comply with s 60 of the Holidays Act 2003 because it has not paid all employees for any alternative holidays they became entitled to during their employment but had not taken when their employment ended.
- (iii) must conduct a review of the public holidays worked by all past and current employees of the Hornby<sup>9</sup> and Dunedin restaurants since they opened. For the other restaurants throughout New Zealand conduct a review of all public holidays worked by all current and past employees that have occurred since 1 July 2012.
- (iv) must determine where any employee has worked on a public holiday, if that public holiday would otherwise have been a working day for that employee taking into account all the relevant factors in s 12 of the Holidays Act 2003, bearing in mind this determination.
- (v) must, for each of the employees, record the reasoning used to decide if the public holiday would otherwise have been a working day.
- (vi) credit each employee with an alternative holiday if the public holiday was found to be otherwise a working day for that employee. If the employee is no longer employed Wendco must make payment for the alternative day to that employee instead, under s 60 of the Holidays Act 2003.

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<sup>9</sup> The original Improvement Notice referred to the "Christchurch restaurant". The Hornby restaurant was the only Christchurch restaurant at that time.



- (vii) must keep evidence of attempts to contact past employees for the purpose of making such payments, if it has not been possible to make payment to them.
- (viii) provide evidence of the above steps, including copies of the reviews with the reasoning for every decision, copies of holiday and leave records for current employees showing amended leave balances and evidence of payments made to former employees or attempts to contact them for the purpose of making payments, to Ms Baldwin **by a date to be agreed between Ms Baldwin and Wendco, or set by the Authority after hearing from both parties.**

### Costs

[81] I reserve costs. The parties should seek to agree costs between them. Otherwise, I will determine costs based on an application by the Labour Inspector to be made after the Authority has fully disposed of this matter. That is, costs can only be applied for 28 days after the issuing of the final determination. That allows for the possibility the Authority may need to set a date or dates for compliance.



Christine Hickey  
Member of the Employment Relations Authority

