



a regular newsletter for clients of  
mcphail gibson & zwart ltd

ISSUE  
297

December 2019

## Tis the Season to be Jolly

### Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

Given the proximity of Christmas it is timely to look at two recent Employment Court determinations, one dealing with the transfer of public holidays and the other a dismissal which occurred by text following the 2017 – 2018 Christmas – New Year holiday period.

**Allied Investments Limited v. Colin Flowers** involved a challenge to the Employment Court of an Employment Relations Authority determination, which involved the interpretation and application of a contractual provision dealing with the attempted transfer of public holidays in accordance with the Holidays Act 2003.

The employee concerned was engaged as a security officer who worked rostered night shifts and was required from time to time to either start or finish a shift on a public holiday.

The applicable individual employment agreement included the following provisions:

#### **“Transfer of a Public Holiday Clause**

*The Employer and Employee agree to transfer the public holiday to accommodate the Employers operational hours. The transfer of a public holiday will occur either when the shift starts on the public holiday and transfers into the non-public holiday or when the shift starts on a non-public holiday and moves into a public holiday.*

#### **Example**

*Public Holiday on a Monday: Work shift Monday 7am to 7pm and Monday 7pm to Tuesday 7am may be treated as the 24hrs of Public Holiday period. Further information on this can be found at: [www.legislation.govt.nz/act/public/2008](http://www.legislation.govt.nz/act/public/2008).*

The public holiday transfer policy further provided:

#### **“Public Holiday Transfer**

*As per the Holidays Amendment Act 2008 and the transfer clause in your employment contract Public holidays will be treated as applying from the start of your shift on a public holiday until the end of a shift whether during or after a public holiday.*

#### **Example**

*If your shift starts at 10pm on a Sunday and ends at 6am on a Monday and the Monday is a public holiday then the public holiday will not apply. If your shift starts on a Monday at 10pm and the Monday is a public holiday and it finishes at 6am on the Tuesday and the Tuesday is not a public holiday then you will be paid as if the public holiday ended at 6am on the Tuesday.”*

Due to the nature of the employee’s roster pattern the situation arose where the employee worked part of his shift on a public holiday but he did not get paid T1/2 for the time worked on the public holiday and did not get an alternative holiday. This was due to the transfer provision in the individual employment agreement which effectively transferred the observance of the public holiday to the next shift. Consequently when the employee’s shift pattern was such that he did not work that next shift, he did not receive the benefits of working on the public holiday. However there was of course many occasions when the employee received the benefits of the public holiday and in some instances a greater benefit than what he would have received had the public holiday not been transferred.

In determining the validity of the transfer provision, the Employment Court referred to the examples provided for in s.44 of the Holidays Act for the transfer of parts of the public holiday as follows:

#### **“Example**

*An employee is to work from 10 pm on 24 April to 6 am on Anzac Day and from 10 pm on Anzac Day to 6 am on 26 April.*

*The employer and employee can agree to treat 10 pm to midnight on Anzac Day as not part of a public holiday in exchange for treating a period of 24 hours that finishes on Anzac Day as a public holiday. Just when the 24-hour period starts before or finishes after a work period is a matter for the parties to agree on. For instance, they could agree that it runs from midday on 24 April to midday on Anzac Day.”*

## Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Raewyn Gibson, Peter Zwart** or **Dean Kilpatrick**.

## Contact Details:

Level 2  
71 Cambridge Terrace  
PO Box 892, Christchurch  
Tel (03) 365 2345  
Fax (03) 365 2347  
[www.mgz.co.nz](http://www.mgz.co.nz)

**Raewyn Gibson**  
E: [raewyn@mgz.co.nz](mailto:raewyn@mgz.co.nz)  
M: 0274 387 802

**Peter Zwart**  
E: [peter@mgz.co.nz](mailto:peter@mgz.co.nz)  
M: 0274 367 757

**Dean Kilpatrick**  
E: [dean@mgz.co.nz](mailto:dean@mgz.co.nz)  
M: 027 279 1353

The Employment Court summarised the case presented by Allied Investments to the effect that the employment agreement complied with the Holidays Act to the extent that on each occasion when the employee's shift commenced on a public holiday, that holiday was transferred to the next day.

There was agreement between the parties that the way the roster operated led to occasions when the employee received more than his statutory entitlement and that there were also occasions when he received less than the requirements of the Holidays Act. In this regard the Employment Court held that *"The Act does not contemplate the type of "evening out" referred to by Allied Investments; either the transfer agreement complies with the Act on each occasion when it is said to apply, or it does not."*

The Employment Court held that the requirements of s.44 of the Holidays Act were not met because there were occasions that due to the employee's roster, he did not work the shift to which the public holiday had been transferred. The Court also noted the contractual provision did not address what happens when public holidays fall on consecutive days, for example 25/26 December and 1/2 January.

It is clear from this decision that clauses dealing with the transfer of part of a public holiday require careful drafting to ensure that the somewhat complex issues raised in this determination are adequately dealt with.

The other Employment Court determination **Thorne v. Rolton** [2019] NZEmpC 171, involved a personal grievance claim of unjustified dismissal. As you will appreciate there is a degree of complexity associated with an employee who had been dismissed for not returning to work from an annual holiday on 8 January 2018, the date on which his employer considered had been agreed for the resumption of work after the Christmas break.

The employer challenged the decision of the Employment Relations Authority which held that the employee had been unjustifiably dismissed.

In this case there was conflicting evidence as to whether it was agreed that the employee would return to work on 8 January 2018 or whether as the employee asserted, that he had the choice of returning to work on either 8 or 15 January 2018. The employee stated that he had advised his employer he would return on 15 January 2018, unless his money ran out earlier.

Unfortunately, there was no written record of any agreement as to the duration of the employee's leave.

Ultimately the employee did not return to work on 8 January 2018 and after several attempts to contact the employee on 8 January 2018 were unsuccessful, the employer sent the employee a text message dismissing the employee and giving two weeks' notice from 8 January 2018.

The employee did not read the text and returned to work 15 January 2018 and after what the Employment Court referred to as *"a very brief meeting first thing in the morning"* the employer handed the employee a note dismissing him. The note recorded the employment agreement having been terminated from 8 January 2018 for the employee's failure to return to work.

The Employment Court determined that the decision which it reached that the employee was unjustifiably dismissed did not *"turn on the date on which"* the employee was due to return to work. In this regard the Employment Court held:

*"[24] Mr Thorne's decision to dismiss Mr Rolton does not satisfy ss 103A(3)(a), (b) or (c) of the Act and the dismissal was unjustified. It is difficult to imagine any dismissal being less satisfactorily carried out than this one. Mr Thorne made no effort to investigate his concerns about Mr Rolton's absence. Mr Thorne's concerns were not raised with Mr Rolton in any way before his dismissal. Compounding that problem, and obviously in the absence of concerns being raised, there was no opportunity for a response."*

Clearly what appears to be the complete lack of any process followed by the employer before sending the text dismissing the employee, resulted in the Employment Court decision that the dismissal was unjustified. Before reaching any decision to dismiss we would urge you to seek advice from MGZ.



## Christmas Shutdown

Our office will be unattended from midday on Friday 20 December 2019 until Wednesday 8 January 2020.

If you require assistance during this time please contact us on the following numbers:

Dean	027 279 1353
Raewyn	0274 387 802
Peter	0274 367 757