IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 141
EMPC 285/2021

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	E TŪ INCORPORATED First Plaintiff
AND	JENNY MOONEY Second Plaintiff
AND	NICHOLAS GODFREY Third Plaintiff
AND	VINCENT KASK Fourth Plaintiff
AND	CARTER HOLT HARVEY LVL LIMITED Defendant
AND	BUSINESS NEW ZEALAND Intervener
AND	NEW ZEALAND COUNCIL OF TRADE UNIONS Intervener

Hearing:	4-6 April 2022 (Heard at Auckland)
Court:	Judge J C Holden Judge Kathryn Beck Judge B A Corkill
Appearances:	P Cranney and E Griffin, counsel for plaintiffs J Miles QC, E Coats and S J Moore, counsel for defendant P Kiely and S Worthy, counsel for Business New Zealand S R Mitchell and G Iddamalgoda, counsel for New Zealand Council of Trade Unions
Judgment:	15 August 2022

JUDGMENT OF THE FULL COURT

[1] This case arises in the context of the nationwide lockdown that occurred in March and April 2020.

[2] Carter Holt Harvey LVL Ltd (Carter Holt LVL) is a company in the Carter Holt Harvey Group of companies (the CHH Group). It operates a manufacturing plant at Marsden Point that transforms logs into finished products. Ms Mooney, Mr Godfrey and Mr Kask (the individual plaintiffs) were employed there at the time of the lockdown, and were members of E Tū Inc (E Tū), the first plaintiff. At the relevant time, approximately 130, or half the workforce at Carter Holt LVL, were members of E Tū.

[3] On 23 March 2020, Mr Kesha, the Chief Executive Officer of the CHH Group, advised the employees at Carter Holt LVL, including the individual plaintiffs, that they would need to take eight days leave from Thursday 9 April to Wednesday 22 April 2020, being during the third and fourth weeks of the nationwide lockdown, starting with annual leave.

[4] The principal issue for the Court is whether the Holidays Act 2003 enabled Carter Holt LVL to require that of the individual plaintiffs. There is a subsidiary issue as to whether E Tū has standing to be a party to these proceedings. A second subsidiary issue was contemplated, being what orders or remedies are available to the Court, should it find Carter Holt LVL acted in breach of the Holidays Act. However, E Tū and the individual plaintiffs only seek a declaration with respect to the principal issue at this stage.

The lockdown begins

[5] On 23 March 2020 at 1.30 pm, the Prime Minister announced that New Zealand was going into an Alert Level 3 lockdown immediately and would go into a strict, Alert Level 4 lockdown from 1.30 pm on Wednesday 25 March 2020.

The Government's Alert Level framework was very new, having only been announced during an address to the nation by the Prime Minister on Saturday 21 March 2020.

[6] New Zealanders will have vivid memories of the days immediately following the Prime Minister's announcement on 23 March 2020. They commenced with people across the country busily arranging their affairs to prepare for the Alert Level 4 lockdown. The week ended with silent cities and empty workplaces.[1]

[7] At Carter Holt LVL it was no different. Mr Haldane, who was the Site Manager, and Mr Kask, who worked in quality control and the glue room at the plant, both gave compelling evidence of the pressure Carter Holt LVL was under to get the plant into a safe state to close down.

[8] Decisions also had to be made about what was to happen to the workforce during the lockdown. Those decisions were not made at Carter Holt LVL itself, but, consistent with the preferred approach of the CHH Group, were made centrally, for all companies in the CHH Group. It was Mr Kesha who made the decision to advise Carter Holt LVL employees that they needed to take leave during Alert Level 4.

[9] Mr Kesha and his colleagues were operating under a tight timeframe. The decisions being made in relation to employees were in the context of other decisions being made with respect to Carter Holt LVL, in particular:

(a) how Carter Holt LVL would safely operate at Alert Level 3 before Alert Level 4 began, to ensure that it complied with the Alert Level 3 requirements that had taken immediate effect;

(b) how to best manage the impact of Alert Level 4 on Carter Holt LVL's commitments to customers and clients; and

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[1] At around 8 pm on the evening of 23 March 2020, it was reported that Alert Level 4 would be pushed back and commence from 11.59 pm on 25 March 2020. The change in time largely reflected the difficulties people were having in travelling to the places they needed to be for the duration of the lockdown.

(c) how to shut down Carter Holt LVL's Marsden Point site before Alert Level 4 began, while protecting health and safety, avoiding property damage, and ensuring business continuity to the greatest possible extent.

[10] Mr Kesha also gave evidence of the need for each company in the CHH Group to immediately consider its financial situation and attempt to forecast how it would ensure the company's ongoing viability during Alert Level 4. The CHH Group recognised that Carter Holt LVL was not an "essential business" for the purposes of the lockdown, meaning it would not be able to operate. It would incur significant costs for that period in relation to matters such as staffing, and property and equipment it leases, despite not operating its business or generating revenue.

[11] In that context, almost all of the employees at Carter Holt LVL, including the individual plaintiffs, would not be able to attend at work.

[12] At that stage, there was no certainty regarding Government financial support that might be available to Carter Holt LVL during Alert Level 4, although some indication had been given that there would be a wage subsidy.

[13] The CHH Group wanted to ensure employees had clarity and certainty about the intended approach to their pay during Alert Level 4, and it wanted to do that prior to the lockdown. The CHH Group considered what it saw as the various options available and determined it was reasonable that employees who were not required to perform work be treated as being on paid leave over Alert Level 4. From the CHH Group's perspective, they were able to spend Alert Level 4 how they saw fit; they were not required to answer to Carter Holt LVL as to how they spent their time. It was also relevant that Carter Holt LVL needed to ensure its viability as a business, particularly as there was no certainty about how long the lockdown would last.

[14] In those circumstances, the CHH Group considered the most appropriate response was to pay employees in full, but with them using some paid leave entitlements. That decision was reached at a telephone meeting Mr Kesha convened with key CHH Group business managers at around 3 pm on 23 March 2020. At that

meeting, Mr Kesha explained CHH Group's intended approach to support employees over Alert Level 4, namely that:

(a) From 26 March 2020, employees would be paid in accordance with their employment agreement up to and including 8 April 2020.

(b) From 9 to 22 April 2020, employees would need to take eight days' leave, which would be taken from their annual holiday entitlement in the first instance, followed by other types of leave that might apply to that employee. The remaining days within that period were public holidays, which would be paid in accordance with the Holidays Act.

[15] That approach was confirmed and, at around 4 pm on 23 March 2020, a conference call with Human Resources representatives from across the CHH Group was convened. During that call, the Human Resources representatives, including Ms Hirst, Carter Holt LVL's Senior Human Resources Advisor, were briefed on the approach that would be taken with regards to employees' pay and leave during Alert Level 4.

[16] At 4.59 pm on 23 March 2020, an announcement was emailed to the Carter Holt LVL employees who had work email addresses. That included Mr Kask and may have included Ms Mooney. It did not include Mr Godfrey. The emailed announcement sent out on behalf of Mr Kesha said:

> It has been announced that the level 4 lockdown will be in place for four weeks, returning to work on 23 April 2020. We appreciate not being able to work may cause financial pressure. Carter Holt Harvey will support you during this period as follows:
>
> - You will be paid in accordance with your employment agreement with CHH up to and including 8 April 2020.
> - Taking into account the Easter break, you will need to take 8 days leave from Thursday 9 April to Wednesday 22 April 2020.
> - This leave can be taken in the following order:

- Annual Leave
- Accrued Annual Leave
- Entitled Long Service Leave
- Alternate Days
- Unpaid Leave

[17] For employees who did not have a work email address, an instant message was sent using software called WhosOnLocation that could send brief mass texts. This was a new and largely untested communication method for Carter Holt LVL; before this occasion it was trialled for health and safety functions. Ms Mooney received such a message, which read:

> Lockdown 4 wks RTW 23/04 Normal pay up to 08/04 From 09/04 leave in following order – A/L. Accrued A/L. Entitled Long Service. Alt Days. Email [email address] for details if you will run out of leave. Other updates as we learn. we will be in touch. STAY SAFE. Look after yourselves & family. Fraser

[18] Several copies of the emailed announcement were also pinned on Carter Holt LVL noticeboards. Mr Godfrey gave evidence that he understood the situation after he was called into his manager's office and provided with a piece of paper outlining it, the inference being that the piece of paper was a printout of the email from Mr Kesha.

[19] Mr Kask, who was a union delegate, forwarded the email notice to Ms Tothill, at 7 am on Tuesday 24 March 2020. Ms Tothill was employed by E Tū as an organiser in Northland. E Tū had not received any direct communication from the CHH Group or Carter Holt LVL about the proposed approach. At 4.35 pm on 24 March 2020, Ms Tothill emailed Ms Hirst as follows:

> Hi Katie
> Vince has provided the confirmed CHH position below.
>
> E tu's position is that no worker should suffer a loss of income as a result of COVID19. Workers will also need their leave for sickness, rest and recreation for when they return to work.
> We are asking employers to pay now and sort out what ever subsidies and obligations there may be later, particularly for workers forced home for 4 weeks isolation.
> As you know this forced isolation is a strategy to contain this virus which will benefit every New Zealander.

I note the employer has acknowledged their obligation to pay the 14 days notice required under the Holidays Act with a forced closure.

However we believe more can be done by the employer.

Firstly, CHH LVL will now qualify for the COVID19 Leave package as all workers (unless able to work from home or part of delivery of essential services) are now isolating in accordance with a Ministry of Health and Government directive with effect from tomorrow night. Information attached. The cap on this package has been lifted indicating how determined this current Government is to ensure the well being of workers and the success that this period of isolation will contribute to containing this virus. This subsidy is currently available for 8 weeks, must be reapplied for every two weeks and be then paid to workers.
Workers are not required to use their leave first, nor should they.

Secondly, I note CHH LVL have an obligation under 6.3 of the Collective Agreement to pay the equivalent of the minimum wage which will be $18.90 on 1.4.20.
I believe with the support of the Government subsidy CHH LVL have the ability to top this up without workers having to use their leave provisions at all.

I appreciate there has been little opportunity to arrange payments or consult, however we do have the opportunity to retrospectively and remotely deal with this.

Regards
Annie

[20] No response was received from Ms Hirst or anyone else at Carter Holt LVL or the wider CHH Group.

[21] On 30 March 2020, Ms Tothill again emailed Ms Hirst. She said:

Hi Katie

Further to my earlier email on related matters.
E tū Union has made our position clear to the employer.
To reiterate:
It is E tū Union's position that members unable to work from home and who are forced into isolation, should be paid in full for the duration of this level 4 Covid 19 response period without the need to access their existing leave entitlements.
We have asked employers to commit to this position and then utilise the Government funding in accordance with the stated criteria for that funding.

The current position of CHH LVL would necessitate a variation to our Collective Agreements. Variations have not been raised or agreed at this stage. Any members facing a loss of pay during the 4 week isolation period should not be forced to access their leave entitlements to make up for any shortfall

> We understand the position taken and that these are very unusual times with important matters to consider which change on a daily basis.
>
> However, until CHH LVL can demonstrate this sort of variation is essential to secure jobs and the business into the future, and we know what support the employer has secured with Government funding the employer has not placed E tū Union in a position to recommend a Variation to the Collective Agreement.
>
> Please keep us informed of changes in your position as they develop.
>
> Regards
> Annie

[22] That email also received no response.

[23] Carter Holt LVL applied for and was granted a wage subsidy, confirmed on 7 April 2020. This meant Carter Holt LVL received subsidy payments equivalent to:

(a) $585.80 per week for each full-time employee; and

(b) $350 per week for each part-time employee.

[24] On 9 April 2020, Ms Tothill asked Ms Hirst whether Carter Holt LVL had its application for a COVID-19 wage subsidy processed and granted and Ms Hirst responded on 14 April 2020 that she was "awaiting confirmation from Head Office as this was handled centrally" but that she had seen from the Work and Income website that the CHH Group had applied for and been granted the wage subsidy.

[25] Ms Tothill confirmed E Tū's position the same day, expressing concern that Carter Holt LVL had made no effort to engage with E Tū on the matter since before the commencement of the Level 4 lockdown and saying that it would be seeking reinstatement of any leave debited during the lockdown. She noted that other employers had continued to consult and communicate with E Tū and its members during the lockdown and questioned why that had not been the case with Carter Holt LVL.

[26] That email elicited a substantive response from Ms Hirst confirming that Carter Holt LVL had received the wage subsidy, maintaining that Carter Holt LVL had acted

in accordance with the conditions of the wage subsidy, and noting that Carter Holt LVL had paid employees for the first two weeks of the lockdown and then asked them to take the remaining two weeks of the lockdown as paid leave. Ms Hirst concludes her email "[w]e have been communicating with all our employees through a variety of text messages, phone calls and emails during the lockdown period, and [Carter Holt LVL] will continue to do so as we plan our return to the site."

[27] There was a further email exchange the following day, 15 April 2020. Again, Ms Tothill challenged Carter Holt LVL's actions and expressed concern about the lack of engagement with E Tū. Ms Hirst maintained that Carter Holt LVL had acted in accordance with the Holidays Act and the collective agreement, and had communicated to its employees. She said "We have been responsive to your communications. There is no bad faith on our part."

[28] There also were emails sent on behalf of Mr Kesha to employees with work email addresses, including Mr Kask. In one, sent on 2 April 2020, Mr Kesha notes that some employees would have preferred not to take paid leave over the second two weeks of the lockdown and some had asked whether the CHH Group could require that. Mr Kesha said "Under the Holidays Act employers are permitted to give employees 14 days' notice to take annual leave, which we did on 23 March. It was necessary for us to take this step as part of our plan to help manage through this uncertain and challenging time."

[29] As the lockdown continued, employees were asked to complete health and safety training modules in contemplation of their return to work. There were eight modules sent from 14 April 2020. They were quite short, with Ms Hirst's estimate for the time required for each one to be approximately five minutes. About 80 per cent of staff completed modules without further prompting and Ms Hirst attempted to contact the other 20 per cent by telephone to follow up with them.

[30] The Alert Level 4 lockdown ultimately was extended by five days, ending on Monday 27 April 2020; employees were paid their usual wages for the period of the extension, without any deduction from their leave entitlements. Work resumed from 28 April 2020.

[31] Mr Kask and Mr Godfrey had their annual leave entitlements reduced by eight days and 5.42 days respectively. Ms Mooney had no annual leave entitlement at that time, but four days' leave was debited as annual leave taken in advance.

[32] The individual plaintiffs stayed home during the lockdown. Mr Kask says it felt like being on home detention, and that he was still being asked questions about the job, and reporting to Carter Holt LVL. Ms Mooney was away on holiday when the lockdown was announced and returned home for the lockdown.

[33] Approximately a month after the plant reopened, Carter Holt LVL made about 70 per cent of its workforce redundant. Mr Godfrey was one of those made redundant.

The Holidays Act

[34] The primary issue of whether the approach of Carter Holt LVL was in accordance with the Holidays Act involves consideration of the requirements of ss 18 and 19 of that Act:

> **18 Taking of annual holidays**
>
> (1) An employer must allow an employee to take annual holidays within 12 months after the date on which the employee's entitlement to the holidays arose.
>
> (2) If an employee elects to do so, the employer must allow the employee to take at least 2 weeks of his or her annual holidays entitlement in a continuous period.
>
> (3) When annual holidays are to be taken by the employee is to be agreed between the employer and employee.
>
> (4) An employer must not unreasonably withhold consent to an employee's request to take annual holidays.
>
> **19 When employee may be required to take annual holidays**
>
> (1) An employer may require an employee to take annual holidays if—
>
> (a) the employer and employee are unable to reach agreement under section 18(3) as to when the employee will take his or her annual holidays; or
>
> (b) section 32 (which relates to closedown periods) applies.
>
> (2) If subsection (1) applies, an employer must give the employee not less than 14 days' notice of the requirement to take the annual holidays.

[35] Other sections of the Holidays Act also are relevant:

> **3 Purpose**
>
> The purpose of this Act is to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to—
>
> (a) annual holidays to provide the opportunity for rest and recreation:
>
> …
>
> …
>
> **15 Purpose of this subpart**
>
> The purpose of this subpart is to—
>
> (a) provide all employees with a minimum of 4 weeks' annual holidays to be paid at the time the holidays are taken; and
>
> (b) enable an employee to request that up to 1 week of his or her annual holidays entitlement be paid out; and
>
> (c) require employers to pay employees at the end of their employment for annual holidays not taken or paid out; and
>
> (d) enable employers to manage their businesses, taking into account the annual holiday entitlements of their employees.
>
> …
>
> **73 Employer and employee obligations under Act**
>
> (1) When dealing with each other under this Act, an employer and employee must deal with each other in good faith.
>
> …

The submissions before us

[36] These proceedings were removed to the Court by the Employment Relations Authority (the Authority) pursuant to s 178 of the Employment Relations Act 2000 (the Act). The Authority concluded that important questions of law were likely to arise in the matter other than incidentally.[2]

[37] The proceedings engage issues relating to the ability of an employer to require their employees to utilise annual holiday entitlements during the period of lockdown.

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2 *E Tū v Carter Holt Harvey LVL Ltd* [2021] NZERA 366 (Member Arthur).

Chief Judge Inglis considered that, in those circumstances, the proceedings ought to be drawn to the attention of the New Zealand Council of Trade Unions (NZCTU) and Business New Zealand to enable them to apply for leave to intervene, if they considered that to be appropriate. Both NZCTU and Business New Zealand applied for, and were granted, leave to appear and make submissions.

[38] In summary, on the principal issue, E Tū and the individual plaintiffs note that the ability for an employer to require an employee to take annual holidays under s 19(1)(a) of the Holidays Act only comes into play "if … the employer and the employee are unable to reach agreement under section 18(3)". They say that s 18(3) imposes communication obligations on both the employer and the employee. To reach agreement, E Tū and the individual plaintiffs submit that the initiating party must propose, not determine, the dates of annual holidays; then if they are not accepted, there must be an attempt to resolve the issue. They note that s 73 requires the employer and the employee to deal with each other in good faith. If agreement is not reached, the employer must give a minimum of 14 days' notice of "the requirement" to take the annual holidays. E Tū and the individual plaintiffs say the combined effect of ss 18(3) and 19(1) is to prohibit the imposition of annual holiday dates without the agreement of the employee, and to provide a game breaker if agreement is unable to be reached.

[39] Here, E Tū and the individual plaintiffs say there was no inability to reach agreement in the s 18(3) sense, so no right to give notice under s 19(2). Further, E Tū and the individual plaintiffs say, the email communication did not give notice of "the requirement to take annual holidays"; it said employees "will need to take 8 days leave" with the type of leave not being specified and the email going on to state that "this leave <u>can</u> be taken in the following order", being annual leave, accrued annual leave, entitled long service leave, alternative days and unpaid leave.

[40] E Tū and the individual plaintiffs say further that, even if s 19 is interpreted as widely as the defendant claims, the defendant is wrong when it says objectively in all of the circumstances at the time, it was unable to reach agreement with its employees on the timing of annual holidays. They point to the high response rate to the health and safety training modules.

[41] On the standing issue, E Tū and the individual plaintiffs say E Tū and Carter Holt LVL were in an employment relationship;[3] they had a disagreement (an employment relationship problem) about the employer allegedly not complying with holiday rights of members. They say, in those circumstances, E Tū has standing.

[42] The remedy sought by E Tū and the individual plaintiffs is a determination that the annual holiday balances of the second, third and fourth plaintiffs are understated. E Tū and the individual plaintiffs say that the seeking of a "determination" is synonymous with seeking a "declaration". Mr Cranney, counsel for E Tū and the individual plaintiffs, confirmed that was all that was sought at this stage. We do not, therefore, address the submissions concerning the availability of further remedies, at this stage, other than to note the submissions made before us.

[43] In summary, on the principal issue, Carter Holt LVL says that the Holidays Act does not impose any specific process obligation on an employer before it reaches an assessment that it is unable to reach agreement under s 18(3).

[44] It says s 19(1)(a) applies where an employer does not have the means or capacity to reach agreement under s 18(3).

[45] It says the employer's assessment has to be reached in good faith[4] but may be based on:

(a) its experience with the workforce;

(b) what is practically open to it in the time available before it considers that the holidays should begin and the relevant circumstances; and

(c) its commercial decision-making.

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3 Employment Relations Act 2000, s 4(2)(b).

4 Here, meaning good faith in the sense of observing mutual obligations of trust, confidence and fair dealing which connotes openness, honesty and an absence of ulterior motive: *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 239 (CA) at [55]. In that context, Carter Holt LVL says it was required in the circumstances to make an urgent "good faith judgement call" taking into account the needs of both employees and the business. It referred also to the Holidays Act 2003, s 15(d).

[46] Once the employer has reached that assessment, Carter Holt LVL says the employer can then require the employee to take annual leave with no less than 14 days' notice pursuant to s 19(2). Here, Carter Holt LVL reached its assessment that, in the circumstances, it was unable to reach agreement taking into account:

(a) its understanding of its workforce and history of consultation, which it says included a strong culture of employees not engaging in written work-related communications, especially outside work hours;

(b) the significant practical constraints – the time available between the Prime Minister's announcement and the commencement of Alert Level 4, the communication options available, the health and safety considerations involved in shutting down its operations during Alert Level 3, and the shift arrangements;

(c) its commercial judgement – and in particular:

(i) its key value of providing employees with certainty, clarity and consistency before Alert Level 4 began; and

(ii) its commercial decision to pay some of the Alert Level 4 period in full as ordinary wages, and for some of the period to be treated as leave.

[47] Accordingly, in the rare and exceptional circumstances at the time, Carter Holt LVL says, on any objective assessment of the circumstances, Carter Holt LVL was unable to reach agreement under s 18(3) with the individual plaintiffs on the timing of annual holidays; there simply was no time or capacity for Carter Holt LVL to do so prior to Carter Holt LVL's business closing on 25 March 2020.

[48] Carter Holt LVL does not dispute that the Court has jurisdiction to consider the substantive issue. It says, however, that while E Tū may represent its members in relation to any matter involving the members' collective interests as employees, and, if authorised, in relation to a member's individual rights, it has no direct interest in

individual annual holiday entitlements, which is the substantive issue. Carter Holt LVL says this means E Tū has no standing.

[49] Carter Holt LVL also submits that the determination sought is not available in the circumstances; it does not follow that a failure by Carter Holt LVL to comply with either s 18 or s 19 of the Holidays Act would lead to a determination that the employees' annual leave balances were understated or that they could be reinstated. It says the employees took annual leave. Should the Court find that Carter Holt LVL had not complied with the requirements of the Holidays Act, Carter Holt LVL says the correct determination would solely be that Carter Holt LVL "did not comply with section 19(1)(a) of the Holidays Act 2003".

[50] The NZCTU agreed with the approach of E Tū and the individual plaintiffs but then commented further. In summary, its first point was that in circumstances where the employees did not have an opportunity for rest and recreation but were only able to leave their homes in very restricted circumstances, they could not be said to be taking annual holidays in terms of the Holidays Act.

[51] The NZCTU also submitted that, as a matter of good faith, decisions around payment of employees during lockdown required Carter Holt LVL to comply with its agreed obligations under the wage subsidy, including that it signed a declaration saying "[y]ou will only use the subsidy for the purposes of paying your named employees ordinary wages and salary….". The NZCTU submitted that "ordinary wages", as defined in the declaration, did not include using the subsidy to pay holiday pay. Having obtained the wage subsidy for its employees, reducing leave balances by treating the time from 9 until 22 April as annual holidays, was therefore not in accordance with good faith.

[52] Business New Zealand's submissions in support of Carter Holt LVL's position included that the requirement for being able to give notice to an employee that they must take annual holidays where the employer and employee are unable to reach agreement has to be interpreted in light of the purpose of s 19 of the Holidays Act,

which is to permit employers to require the taking of annual holidays to manage their business and to ensure employees have rest and recreation.[5]

[53] Business New Zealand also agrees that the employer's actions in this case have to be assessed in light of the extraordinary circumstances that existed in March 2020. Business New Zealand submits that a practical approach should be taken, recognising those circumstances.

[54] Business New Zealand agrees with Carter Holt LVL's submission that there is no ability for the Court to order the reinstatement of annual holidays to an employee's annual holiday balance. Business New Zealand further says that to do so would result in employees having had the benefit of payment for an annual holiday and the time off work, but retaining the entitlement to those same holidays.

Several issues arise

[55] The issues we need to determine are:

(a) whether E Tū has standing as a party in these proceedings;

(b) whether Carter Holt LVL could require the individual plaintiffs to take annual holidays at the time in question;

(c) whether the communications to the individual plaintiffs were "notice" under s 19(2) of the Holidays Act;

(d) whether the individual plaintiffs' time off work could be "annual holidays" given the constraints on activities that applied during Alert Level 4; and

(e) whether the position is affected by Carter Holt LVL receiving the wage subsidy for the individual plaintiffs.

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5 Holidays Act 2003, s 15(d).

E Tū does not have standing as a party

[56] As noted, E Tū is in a good faith relationship with Carter Holt LVL. They are both parties to the applicable collective agreement.

[57] E Tū is entitled to bring what was historically called a "dispute of rights" about the interpretation, application or operation of that collective agreement.[6] The two cases E Tū relies on here are examples of this.[7] However, this case is not a dispute of rights.

[58] Further, E Tū can, of course, represent its members in discussions with Carter Holt LVL, and an E Tū official or employee, can appear for them before the Court.[8] That does not elevate E Tū to having standing in relation to the claim that has been made. The rights that E Tū and the individual plaintiffs are seeking to enforce are owed to the individual plaintiffs; E Tū's representation of the members does not extend to it being able to issue proceedings of the nature before us in its own name.[9]

[59] Accordingly, E Tū Inc does not have standing in these proceedings.

What the Holidays Act requires

[60] The purpose of the Holidays Act is to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum leave entitlements.[10] These minimum entitlements include annual holidays, to provide the opportunity for rest and recreation.[11] The purpose of pt 2, subpart 1, dealing with annual holidays, is further elucidated in s 15 to include enabling employers to manage their businesses, taking into account the annual holiday entitlements of their employees.[12]

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6 Employment Relations Act 2000, s 129.

7 *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2007] 2 NZLR 356, [2006] ERNZ 1109 (CA); and *Service and Food Workers Union Nga Ringa Tota v OCS Ltd* [2007] ERNZ 169 (EmpC).

8 Employment Relations Act 2000, s 236.

9 *Service and Food Workers Union Ng Ringa Tota Inc v Spotless Services* EmpC Auckland AC 50/07, 23 August 2007 at [4]; and *Pacific Flight Catering Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2012] NZEmpC 61, [2012] ERNZ 134 at [45] and [47].

10 Holidays Act 2003, s 3.

11 Section 3(a).

12 Section 15(d).

[61] The scheme of s 18 anticipates an employee applying for leave and then the parties attempting to agree, with the employer not unreasonably withholding consent to the employee's request to take annual holidays. Section 18(3) provides that when employees take annual holidays "is to be agreed". However, that has to be read with s 19. Section 19(1)(a) provides that an employer may require an employee to take annual holidays if the employer and the employee are unable to reach agreement under s 18(3). In those circumstances the employer must give the employee not less than 14 days' notice of the requirement to take the annual holidays.[13]

[62] The requirement in s 18(3) that the employer and employee agree to the taking of annual holidays is a change from what was required under the previous legislation, the Holidays Act 1981. Under s 12(2) of that Act,[14] except where the worker's contract of service otherwise provided, the time at which any annual holidays to which the worker had become entitled may be taken "shall be" fixed by the employer "after consultation with the worker" and, in fixing that time, work requirements and the opportunities for rest and recreation available to the worker had to be taken into account.

[63] The more recent requirement for agreement sets a higher standard on the employer. Consultation essentially means proposing an arrangement, and allowing and considering any feedback before making a decision. Agreement is not needed.[15]

[64] The Holidays Act requires an employer and employee to deal with each other in good faith.[16] Under the Act, the parties to all employment relationships must deal with each other in good faith.[17] "Good faith" is a cornerstone concept in employment legislation and the standard applied to employer/employee interactions.[18] The duty of good faith is wider in scope than the implied mutual obligations of trust and confidence. It requires the parties to be active and constructive in establishing and

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13 Section 19(2).

14 As from 15 May 1991, after amendment by s 9 Holidays Amendment Act 1991.

15 *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 674-676, cited with approval in *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477 at [168].

16 Holidays Act 2003, s 73.

17 Employment Relations Act 2000, s 4.

18 *Restaurant Brands Ltd v Gill* [2021] NZEmpC 186 at [50]; *Lyttelton Port Co Ltd v Pender* [2019] NZEmpC 86, [2019] ERNZ 224 at [38].

maintaining a productive employment relationship, and to be responsive and communicative.[19] If a different meaning had been intended in s 73 of the Holidays Act, that would have been included in the Act.

Applying the legislation to the decision

[65] The situation that arose in March 2020 brought with it pressure for all entities and individuals in New Zealand. The Court readily acknowledges that pressure, including for Carter Holt LVL. However, there was no suspension of employee rights or employer obligations. While the CHH Group had priorities and aims when considering what to do about employee leave and pay arrangements, it had to adhere to the legislation. It is understandable that there were commercial imperatives and the desire to reach decisions quickly. The CHH Group also wanted to treat union and non-union employees in the same way, but, of course a fundamental difference between union and non-union employees is that employees who are members of a union have a known representative who, itself, is in a good faith relationship with the employer.[20] This means that Carter Holt LVL and E Tū are required to be active and constructive in maintaining a productive employment relationship, including, among other things, being responsive and communicative.[21] Here, there was a union organiser contacting Carter Holt LVL seeking to discuss leave for employees who were members of E Tū.

[66] Based on previous experience, the CHH Group assumed that employees would be difficult to contact and to engage; attempting to reach agreement would be futile. It is noteworthy that this view was reached in a centralised way. There is no suggestion, for example, that Ms Hirst was involved in the decision-making. She was simply advised of the position being taken by the CHH Group.

[67] There were many staff who had work email addresses, including Mr Kask. Other employees, including Ms Mooney and Mr Godfrey, were contactable through the WhosOnLocation platform, or by text message or phone. Carter Holt LVL made no attempt to use any of these routes to engage with its employees prior to making the

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19 Employment Relations Act 2000, s 4(1A); *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466 at [47]-[50].
20 Employment Relations Act 2000, s 4(2)(b).
21 Section 4(1A)(b).

decision about annual holidays. It clearly could have done so as it communicated the decision through those routes and later contacted employees regarding the health and safety training modules.

[68] Further, not only was there no attempt to engage with the individual plaintiffs, there was no attempt by the CHH Group or Carter Holt LVL to contact, let alone engage with, E Tū. It did not respond to E Tū's emails in a timely way. This is particularly surprising given the number of E Tū members at Carter Holt LVL and the role the union could usefully have performed in representing its members, including in potentially contacting them about the proposed leave arrangements.

[69] The email sent by Ms Tothill on 24 March 2020 was constructive and conciliatory. It acknowledged the difficulty Carter Holt LVL had in making payments or consulting. Carter Holt LVL's failure to reply was not in accordance with its good faith obligation to E Tū to be responsive and communicative.

[70] While it is understandable that the CHH Group wished to communicate the arrangements with employees prior to Alert Level 4 commencing, that was not required. E Tū remained available, and engagement with the union may have facilitated discussion with individual employees. The email Ms Tothill sent on 30 March 2020, again, is constructive. Ms Tothill advised that E Tū understood the position being taken and that these were very unusual times with important matters to consider, which changed on a daily basis. She also noted that the issues could be sorted out after the lockdown commenced.

[71] The desire on the CHH Group's part that all staff be treated the same way does not change the fact that there was a point of contact available for members of E Tū both individually and through their union.

[72] Further, although Carter Holt LVL asserts that even if it had engaged with the individual plaintiffs and E Tū, agreement would not have been able to be reached, that was not inevitable. Although the circumstances may have meant that a more truncated process for attempting to reach agreement was used than would usually be the case, we do not accept that it necessarily follows that, objectively in all of the circumstances

at the time, Carter Holt LVL, in fact, would have been unable to reach agreement with the individual plaintiffs on the timing of annual holidays.

[73] In short, we do not accept that Carter Holt LVL can say it was unable to reach agreement when it made no attempt to do so. Given this conclusion, we do not accept the submission made for Carter Holt LVL that it was, in the circumstances, entitled to exercise management prerogative to require employees to take annual holidays.

[74] Section 19(1)(a) of the Holidays Act did not apply. Carter Holt LVL was not entitled to require Mr Kask, Ms Mooney and Mr Godfrey to take annual holidays from 9 to 22 April 2020. In Ms Mooney's case, s 19 could not apply in any event as she had no annual leave entitlement.

[75] As a result of Carter Holt LVL treating the time in issue as annual holidays, Mr Kask's annual leave entitlement was reduced by eight days; Ms Mooney was recorded as having taken four days in advance of entitlement; in Mr Godfrey's case, the reduction in his leave entitlement impacted on his final pay when his employment ended due to redundancy.

[76] As noted, at this stage, no orders are sought. Leave is reserved for any party to return to the Court if orders are sought.

Sufficient notice given

[77] Although our finding means Carter Holt LVL was not entitled to give the individual plaintiffs notice of the requirement to take annual holidays, we nevertheless address the other issues raised.

[78] Concern about the sufficiency of the notice was not squarely recorded in the statement of claim. Mr Cranney refers to the final paragraph that says, "[n]o agreement was reached, and no lawful notice was given". He notes that Carter Holt LVL responded to that paragraph by saying that its direction was lawful and that it treated the individual plaintiffs fairly and in good faith for the full Alert Level 4 period.

[79] No particular form is required for notice under s 19(2). Here, the emailed notice told employees they "will need to take" leave, and that leave "can be taken" in a particular order.

[80] The email is not perfect; it uses "can be" when what is meant is "must be"; and it does not specify dates for each type of leave (which would have required individualised notices).

[81] The text message is less clear: "from 09/04 leave in following order – …". The message is quite abbreviated.

[82] Nevertheless, the individual plaintiffs knew what was being said. They knew that annual leave would be used first before, if necessary, other leave being taken.

[83] A similar (but not identical) issue arose in *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union*.[22] That case dealt with alternate holidays and the failure to specify which of the "working days" in the 16 days off work at the end of a 160-day roster period were the specific alternative holiday for any public holiday that had been worked in the previous roster period.[23] In that situation, the Court of Appeal said that it did not matter, either to the Fire Service Commission nor to any particular firefighter, which of the working days in the 16-day slot was an alternative day, as opposed to an annual leave day.[24] In the circumstances, the Court found that the arrangements were not in breach of the Holidays Act.[25]

[84] For similar reasons, the notice here was sufficient and, in form, complied with s 19(2) of the Holidays Act.

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22 *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union*, above n 7.
23 At [1]-[2].
24 At [26].
25 Holidays Act 2003, s 57.

No qualitative assessment required for leave to be annual holidays

[85] An argument was made, principally by the NZCTU, that, because of the constraints imposed by Alert Level 4, the employees could not be said to be taking annual holidays in terms of the Holidays Act.

[86] While we acknowledge that one of the purposes of the Holidays Act is to allow employees to take annual holidays to provide the opportunity for rest and recreation,[26] we do not accept that obligates an employer to make a qualitative assessment of whether, in the particular circumstances of an employee, they have been able to fully utilise their annual holidays for that purpose.

[87] The Alert Level 4 lockdown clearly affected different people in different ways. For some people, the period of time at home with their families and with no work obligations would have been seen as beneficial, enabling them to rest and enjoy home-based and local activities; for other people, their preference for any periods of annual holidays would be to go away from their usual residence and/or to participate in activities that were not permitted during the Alert Level 4 lockdown; there also will be people whose circumstances were such that the lockdown period was intense and stressful. From the limited evidence from the individual plaintiffs, it can be seen that being in lockdown was certainly not how they would have chosen to spend their annual holidays.

[88] The requirement that employees and employers endeavour to agree on when annual holidays are to be taken, and the obligation on an employer not to unreasonably withhold consent to an employee's request to take annual holidays, means an employee usually will not be required to take annual holidays at a time that does not suit them. However, s 19(1) clearly envisages situations where an employer may require an employee to take annual holidays at a time that has not been agreed between them.

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[26] Holidays Act 2003, s 3(a).

[89] While the Alert Level 4 lockdown was unique, not dissimilar issues arise when employees are required to take annual holidays during a closedown period.[27] A closedown may occur at a time that does not allow an employee to undertake their preferred rest and recreation (for example, seasonal activities) or may be during a period that does not correspond with other family (for example, during a school term). That does not stop the leave being annual holidays for the purposes of the Holidays Act.

[90] In short, we do not consider that an employer has an obligation to ascertain from its employees what they will be doing during a period of annual holidays and then assess whether that, in fact, constitutes rest and recreation.

Obligations under the Holidays Act do not engage basis for subsidy

[91] If it had been entitled to give notice under s 19(2), there would not be any obligation on Carter Holt LVL to revoke that notice once it was in receipt of the Government wage subsidy. Whether the obligations of an employer in relation to the receipt of the wage subsidy were met when, at the same time, it was reducing its leave liability in respect of its employees, is not a matter for this Court.

Conclusion and costs

[92] In conclusion, we have found that Carter Holt LVL was not entitled to require Mr Kask, Ms Mooney and Mr Godfrey to take annual holidays from 9 to 22 April 2020 pursuant to s 19(1)(a) of the Holidays Act.

[93] The parties agreed that this matter is appropriately allocated category 2B for costs purposes under the Practice Directions Guideline Scale.[28] Those ought to be able to be agreed. If that does not prove possible, the individual plaintiffs may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. Carter Holt LVL is to respond by memorandum filed and served within 14 days

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27 Holidays Act 2003, s 29.

28 "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

thereafter, with any reply from the individual plaintiffs filed and served within a further seven days. Costs then would be determined on the papers.

J C Holden
for the full Court

Judgment signed at 1 pm on 15 August 2022