

# Agreement must first be sought before instructing an employee to take leave, 22 September 2022

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There is scope under the Holidays Act 2003 for an employer to require employees to take annual leave. However, a recent decision of the full bench of the Employment Court demonstrates the matter is not so simple as just giving employees an instruction to take it on 14 days' notice: *E tū Incorporated v Carter Holt Harvey LVL Ltd* [2022] NZEmpC 141.

While the facts giving rise to the case took place in the context of a COVID-19 lockdown, the decision is relevant to other circumstances where employers require employees to take leave. The Court found that Carter Holt Harvey LVL could not require employees to take annual leave without first attempting to reach an agreement with them about taking leave over the March 2020 lockdown period.

E tū, which represented approximately half the employees at the Carter Holt Harvey LVL plant located at Marsden Point in Northland, sought a declaration from the Court that Carter Holt Harvey LVL's action was in breach of the Holidays Act 2003. It also sought the reinstatement of all annual leave, including alternate and lieu days, and long service leave.

This case is important because it examines and reaffirms the employer's obligations under the Holidays Act when requiring employees to take annual leave.

## Background

Carter Holt Harvey LVL is a company in the Carter Holt Harvey group of companies. It operates a manufacturing plant that transforms logs into finished products.

On 21 March 2020, the New Zealand government outlined the Alert Level framework. Then on 23 March 2020 it was announced that an Alert Level 4 lockdown would commence from 1.30 pm on 25 March 2020.

From Carter Holt Harvey LVL's perspective, it felt under pressure to get its plant in a safe state to shut down and decisions had to be made on what would happen with the workforce in the context of those decisions. Carter Holt Harvey LVL had to consider; how it would operate safely in the Alert Level 3 lockdown ensuring it complied with the new legal requirements, how best to manage commitments to customers and how to shut down while protecting health and safety and business continuity. Given this, almost all the employees would not be able to attend work at Alert Level 4.

On 23 March 2020, by an email and an instant message, employees at Carter Holt Harvey LVL were advised that they would receive normal pay until 8 April then need to take 8 days of annual leave from 9 April to 22 April 2020 (taking into account the Easter break). They were told they could take their leave in the following order: annual leave, accrued annual leave, entitled long-service leave, alternate days and unpaid leave. The company did not attempt to reach agreement about the taking of leave before directing it be taken by employees.

The E tū Northland organiser was made aware of the communications and emailed Carter Holt Harvey LVL on 24 March 2020 making the case that there was an obligation under the Collective Agreement to pay the

minimum wage and the Government subsidy should provide a top up without using leave at all. There was no response received to this or to the follow up email of 30 March.

Following the grant of the wage subsidy to Carter Holt Harvey LVL, on 14 April E tū expressed concern over the lack of consultation and communication with E tū and its members. Carter Holt Harvey LVL responded that there was no bad faith on its part and it had complied with the Holidays Act.

Whilst the lockdown continued, employees were sent health and safety training modules to complete from 14 April in contemplation of their return to work. Ultimately, the lockdown was extended by 5 days and the employees were paid their usual wages for this extension. Work resumed on 28 April.

### **Holidays Act 2003**

It is important to understand the purpose of the Holidays Act and the obligations it places on employers.

Section 3 of the Holidays Act relevantly states that the purpose of the 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.”*

Section 18(3) of the Act provides:

*“When annual holidays are to be taken by the employee is to be agreed between the employer and employee.”*

This obligation must be read in conjunction with s 19 which provides that:

*“(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;*

*...*

*(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.”*

Section 73 is also relevant as it provides that when dealing with annual leave

*“an employer and employee must deal with each other in good faith.”*

In summary, the general position is that annual leave should be taken by agreement. Failing that, an employer can direct the taking of leave on 14 days’ notice, but only after attempting to reach agreement first.

### **Applying the Holidays Act**

Carter Holt Harvey LVL’s position was that, based on previous experience, employees would be difficult to contact and to engage in attempting to reach agreement would be futile. The Court noted that this was a centralised decision made by the company alone and without consultation with the union.

However, the Court heard that there were many staff who had work email addresses. Other employees were contactable through an instant message platform, or by text message or phone.

The key points the Court found were:

- Carter Holt Harvey LVL made no attempt to use any of these routes to engage with its employees prior to making the decision about directing 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.
- Carter Holt Harvey LVL made no attempt to engage with the individual plaintiffs, or with E tū.
- Even though the lockdown circumstances may have meant a more truncated process for attempting to reach an agreement, this did not mean agreement was not possible.

The Court did not accept that the company could say it was unable to reach agreement with its employees when it made no attempt to reach agreement in the first place. In those circumstances, the company had not

compiled with s 19 of the Holidays Act. Carter Holt Harvey LVL was not entitled to require annual leave be taken.

The Court also addressed other issues which were raised in this litigation.

### ***Sufficient notice to take leave?***

The Court held no particular form is required for a notice to take leave. Whilst the Court found that the email from the employer was not perfect and the text message less clear, the employees knew what was being said and this was sufficient for the purposes of the Act.

### ***“Annual Leave”?***

One of the criticisms of Carter Holt Harvey LVL’s action was that the employees could not be said to be taking annual leave in lockdown given the employees’ ability to use that leave was highly limited because of Alert Level restrictions.

However, the Court considered there was no obligation on an employer to ascertain what employees would be doing during the annual holiday and whether this did in fact constitute rest and recreation for them.

In summary, the Court found that Carter Holt Harvey LVL was not entitled to require employees to take annual holidays from 9 to 22 April 2020 under s 19 of the Holidays Act.

### **Implications of Decision**

This judgment reminds employers that employment law is not suspended because of a public health emergency or assumptions that an employee may not respond to an employer’s communication. The correct procedure, as set out in the Holidays Act, needs to be followed.

Both employers and employees need to ensure that they deal with each other in good faith as required by the Holidays Act. If the parties are unable to reach agreement after a good faith effort to do so, an employer can then require an employee to take annual holidays at a particular time with 14 days’ notice.