

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 126
ARC 62/08**

IN THE MATTER OF de novo challenge to a determination of the
Employment Relations Authority

BETWEEN EASTERN BAY INDEPENDENT
INDUSTRIAL WORKERS UNION
Plaintiff

AND NORSKE SKOG TASMAN LIMITED
Defendant

Hearing: Following a chambers hearing at 10am on 4 October 2011
(Heard at Auckland)

Counsel: Mr L Yukich, advocate for the plaintiff
Ms K Dunn, counsel for the plaintiff

Judgment: 5 October 2011

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

[1] This chambers hearing was convened to deal with an application Mr Yukich filed on behalf of the plaintiff union seeking a direction from the Court allowing the plaintiff to produce affidavit evidence of historical bargaining over the issue of long service leave. The defendant opposed the request for leave to file further evidence because the matter, until this point, had proceeded on the basis of an agreed statement of facts.

[2] The union's challenge concerns a dispute about annual leave entitlements in an expired collective agreement. The plaintiff union had challenged a determination of the Employment Relations Authority,¹ which found that the plain meaning of the expired collective agreement was that all employees covered by it were entitled to a

¹ AA 251/08, 16 July 2008.

minimum of four weeks' annual holiday and this entitlement was not automatically increased from 1 April 2007 to five weeks as a result of the passing of the Holidays Act 2003.

[3] The first directions conference in this matter was delayed as the parties were awaiting the outcome of the Court of Appeal's decision in *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd*.²

[4] At a directions conference on 4 February 2009 Mr Yukich suggested that the matter could be dealt with on the papers with an agreed statement of facts and an exchange of submissions. The parties later agreed to that course and duly filed an agreed statement of facts and exchanged submissions. Whilst in the course of preparing a judgment, I found the decision of Judge Shaw in *NZ Meatworkers and Related Trades Union Inc v Silver Fern Farms (formerly PPCS)*.³ I issued a minute to the parties enclosing a copy of that decision, which was issued three days after the Court received the plaintiff's submissions in reply. I also advised the parties that the defendant in that case was seeking leave to appeal to the Court of Appeal.

[5] Mr Yukich advised the Court that the plaintiff opposed any further delay but Ms Dunn on behalf of the defendant sought to have my judgment delayed until the Court of Appeal had determined the issue of either leave or substance. I agreed to delay the issue of a judgment until the outcome of the *Silver Fern* case was determined on the basis that the parties would have the opportunity to file further submissions.

[6] On 15 February 2010 I issued a minute recording what had been determined in a telephone conference call that day. The issue was still whether or not the matter should await the outcome of the *Silver Fern* litigation in the Court of Appeal. I advised the parties that, if Mr Yukich required, I would proceed to determine the matter on the papers before the Court of Appeal judgment was available, subject to one aspect which I recorded as follows:

² [2008] NZCA 159, [2008] ERNZ 229.

³ [2009] ERNZ 149.

5. If the matter is to proceed at this stage then Mr Yukich will, within 4 weeks of advising the Court of his intention to proceed on behalf of the plaintiff file and serve any further submissions including submissions on the two most recent cases. He may also decide to file a summary of the evidence of the historical documents that form the background to the current expired collective agreement.

6. Upon service of that material, if it consists only of submissions, the defendant will within 4 weeks, file and serve submissions in reply.

7. If however, the material includes further evidence outside of the agreed statement of facts, or the summary of evidence, then Ms Dunn will advise the Court and Mr Yukich whether the defendant wishes to have the opportunity of reconsidering whether the matter should be dealt with on the papers, whether oral evidence should be called or whether evidence in opposition should be called and, if there is any conflict, how that is to be resolved.

8. If the matter proceeds solely on the basis of an exchange of submissions alone, or if the defendant accepts that a summary of historical material might be filed on behalf of the plaintiff without objection, then, upon the plaintiff receiving the defendant's submissions, the plaintiff will have a further 14 days in which to file and serve submissions strictly in reply.

9. At that point of time the Court will then determine the matter on the papers already filed.

[7] The parties then agreed to adjourn the matter until the Court of Appeal had delivered its decision in the *Silver Fern* case and there would be a further conference for timetabling purposes once that decision was available.

[8] On 23 September 2010, following receipt of the Court of Appeal's decision in *Silver Fern*, I recorded that Ms Dunn had sought the opportunity to file additional submissions. I suggested a timetable for further submissions and expressed the hope that the long standing matter could then be put to rest by a judgment of the Court.

[9] On 24 September, Mr Yukich advised the Court that his union was in bargaining with the employer and had applied for facilitation and expressed the hope that the matter before the Court would be resolved by the parties. He asked that the process be allowed to take its course before either party applied further time and expense to the proceedings before the Court. On the basis of that material, on 11 October 2010 I advised that the matter would be stayed until the outcome of the facilitation process was notified to the Court.

[10] Mr Yukich advised the Court on 11 April 2011 that bargaining had been completed but no agreement had been reached and that he would be filing a memorandum regarding the new evidence. In spite of attempts by the Registry to clarify the issue with the parties, the Court heard no more until 21 July when Mr Yukich filed his present application seeking to have evidence of historical bargaining put before the Court.

[11] By a minute of 9 August 2011, in order to clarify the position, I directed Mr Yukich to file a fuller memorandum setting out precisely the basis upon which he sought to have affidavit evidence heard by the Court, together with a draft affidavit and also directed the exchange of submissions. On 7 September, Mr Yukich filed an affidavit of Neville Shakes who was formerly employed by the defendant at its Kawarau Mill as a control system technician. That affidavit sets out an extensive history of the leave provisions and attaches copies of expired collective agreements.

[12] Mr Yukich also filed full submissions referring to the relevant authorities including *National Distribution Union Inc v Capital and Coast District Health Board*⁴ and *Robinson v Capital and Coast District Health Board*,⁵ and *Cerebos Greggs Ltd v Service and Food Workers Union Nga Ringa Tota*.⁶

[13] I note that the Court of Appeal has granted leave on 31 August 2011⁷ to appeal against that last decision on the following question of law:

Did the Employment Court err in concluding that the extra week's leave, for those employees qualifying for that leave, ceased to be an enhanced or additional entitlement on 1 April 2007 and became part of the four week's annual holidays provided by the Holidays Act 2003?

[14] Ms Dunn responded by memorandum on 13 September 2011 maintaining the defendant's opposition to the filing of additional evidence at this late stage. She observed that the parties had already filed an agreed statement of facts and that the timetable put in place in September 2010 did not contemplate the filing of further evidence. She submitted the plaintiff should not be given the opportunity to file

⁴ [2010] NZEmpC 2.

⁵ [2010] NZEmpC 3.

⁶ [2011] NZEmpC 55.

⁷ [2011] NZCA 431.

further evidence. She referred to the *Silver Fern* judgment and submitted that it and the *Tramways* series of cases had emphasised the importance of the parties' intention when interpreting contractual obligations. She accepted that the wording in previous agreements between the parties may be relevant and, in particular, the 2002 and 2004 collective agreements which were attached to the agreed statement of facts that was filed on 23 March 2009. She submitted that the draft affidavit did not contain any relevant evidence. She noted that the defendant was not incorporated until 25 July 2000 and therefore she submitted, any agreements or expressions of intention regarding annual leave prior to that date, including a 1996 collective agreement, were not relevant as they could not indicate any intention or past agreement on the part of the defendant. She advised that if, contrary to those submissions, the Court was minded to admit the evidence filed by the plaintiff, the defendant sought the opportunity to file additional evidence and, if the matter was to proceed other than on an agreed statement of facts, it would be timely to revisit whether a hearing ought to be held.

[15] Following the chambers conference on 4 October I determined that the parties could file evidence of the previous negotiations, agreements and the custom and practice at the Mill. Issues of relevance or the weight to be given to such evidence could be dealt with at the hearing, the parties having agreed that the matter should be heard in open Court.

[16] I reached that conclusion because of the statements in paragraphs [42] and [43] of the *Silver Fern* decision, where the Court of Appeal ruled that it was appropriate for Judge Shaw to have taken into account evidence of the terms of the prior instruments and of the approach adopted by the parties over a period of nearly 40 years, prior to the 2004 agreement. The Court of Appeal had previously referred to the decision of the Supreme Court in *Vector Gas Limited v Bay of Plenty Energy Ltd*⁸ which states that a Court may construe a contract against the factual background having regard to the genesis and, objectively, the aim of the transaction.

[17] The parties then agreed to the following directions:

⁸ [2010] NZSC 5, [2010] 2 NZLR 444.

- a) Within 14 days the defendant would provide to the plaintiff evidential material concerning the takeover of the defendant of the Mill and any transitional or interim arrangements made.
- b) Within 7 days the plaintiff will either file a further affidavit including any agreements that had not been located at the time the earlier affidavit was sworn or an agreed statement of facts dealing with these issues.
- c) The defendant may file affidavits in response within 14 days of receipt from the plaintiff of any further affidavit or, if there is to be no further affidavit, within 14 days of receipt of such advice.
- d) The parties have agreed to accept a fixture on Friday 25 November 2011.
- e) Each party will advise the other side and the Court seven days prior to the fixture, if it is intended to cross-examine any deponents of the affidavits filed.

[18] I also note that Mr Yukich has advised that the plaintiff is seeking six weeks of annual leave for employees who have both completed four years of continuous service and who were also employed as shift employees.

B S Travis
Judge

Judgment signed at 2.30pm on 5 October 2011