IN THE EMPLOYMENT COURT

CHRISTCHURCH

[2011] NZEmpC 55

CRC 29/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CEREBOS GREGGS LIMITED Plaintiff
AND	SERVICE & FOOD WORKERS' UNION NGA RINGA TOTA Defendant

Hearing: 4 June 2010
(Heard at Wellington)

Counsel: Jane Latimer, counsel for the plaintiff
Peter Cranney and Anthea Connor, counsel for the defendant

Judgment: 27 May 2011

JUDGMENT OF JUDGE A A COUCH

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[1] When the Holidays Act 2003 came into force on 1 April 2004, it preserved the existing entitlement of employees to three weeks' paid annual

holidays. At the same time, it provided for an increase to four weeks' paid annual holidays to be effective from 1 April 2007.

[2] Most employment agreements provide explicitly for annual holidays and other forms of paid leave for employees. In many cases, agreements which were in force both before and after the change in statutory entitlement to annual holidays which occurred in April 2007 did not clearly provide for the effect of that change on employees' overall entitlements to paid leave. The resulting uncertainty has led to several cases being heard and decided by the Court. This is another such case.

[3] The plaintiff and defendant were parties to a collective agreement covering members of the defendant employed at the plaintiff's Dunedin site and which was in force from 28 August 2005 until 30 August 2008 (the 2005 collective agreement). That agreement contained a section dealing with several differing forms of leave. The parts of that section relevant to this case were:

> **LEAVE**
>
> Subject to the following, provisions for leave are in accordance with prevailing legislation. Currently the Holidays Act 2003 provides for public holidays, annual holidays, sick leave and bereavement leave as follows.
>
> ...
>
> Note that the entitlements in Clauses 16, 17, 19 and 20 are inclusive of and not in addition to the entitlement for Leave provided in the Holidays Act 2003 and amendments.
>
> ...
>
> **17 Annual Holidays**
>
> 17.1 At the end of each year of employment with Cerebos Gregg's you are entitled to three weeks annual holidays.
>
> ...
>
> 17.4 Upon the completion of 6 years current continuous service you will for the sixth and subsequent years be entitled to an additional one week of annual holiday.
>
> 17.5 If you have regularly and continuously been employed on shift work, you will receive the following holiday entitlements, with a pro rata

adjustment for periods of between one and twelve months on such work:

- Monday to Friday shifts — One week's holiday
- The 12/2 rosters set out in Schedule B — Eight days holiday

...

[4] The Employment Relations Authority concluded that, after 1 April 2007, the reference in cl 17.1 to "three weeks" ought to be read as "four weeks". It also concluded that cl 17.4 provided an enhanced benefit for long serving staff which was of a different nature to annual leave as provided for in s 16 of the Holidays Act 2003. On this basis, the Authority determined that the week's holiday provided for in cl 17.4 was additional to and not part of the four weeks' annual holidays required by the Holidays Act 2003 after 1 April 2007. The plaintiff challenged the whole of that determination[1] and the matter proceeded before the Court by way of a challenge de novo. The relevant facts were agreed and all necessary documents admitted by consent. The hearing, therefore, consisted solely of submissions by counsel.

Principles

[5] The principles to be applied in construing and applying employment agreements in cases such as this were discussed in depth by this Court and by the Court of Appeal in *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd*[2] and *NZ Meat Workers and Related Trades Union Inc v Silver Fern Farms Ltd (formerly PPCS Ltd).*[3] In deciding this case, I am guided in particular by the principles enunciated or approved by the Court of Appeal in its decisions in those cases.

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[1] CA 176/09, 15 October 2009.

[2] [2006] ERNZ 1005, [2008] ERNZ 584 and *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd* [2008] ERNZ 229 (CA).

[3] [2009] ERNZ 149 and *Silver Fern Farms Limited v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317.

Issues

[6] The ultimate issue in this case is whether, after 1 April 2007, employees who had completed six years' continuous service were entitled to four weeks' annual holidays and no more or, by operation of cl 17.4, were also entitled to an additional week of holiday.

[7] Resolving that issue requires consideration of a number of subsidiary and inter-related issues:

(a) What was the nature of the benefit conferred by cl 17.4? Was it annual holidays for the purposes of s 16(1) of the Holidays Act 2003 or some other form of paid leave?

(b) After 1 April 2007, what was the effect on cl 17.1 of the 2005 collective agreement of s 6(3) of the Holidays Act 2003?

(c) How is s 6(3) of the Holidays Act 2003 to be applied to a collective agreement? In particular, is it to be applied in relation to the circumstances of each individual employee covered by the agreement or to the collective agreement as a whole?

[8] Section 6 of the Holidays Act 2003 provides:

> **6 Relationship between Act and employment agreements**
>
> (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 the Illegal Contracts Act 1970.

The cases for the parties

[9] For the plaintiff, Ms Latimer's primary submission was that the relevant terms of the 2005 collective agreement were clear, unambiguous and could sensibly be given effect according to their ordinary meaning.

[10] Taking this approach, Ms Latimer offered the following analysis of the key provisions of the 2005 collective agreement. Clause 17.1 provides a contractual entitlement to three weeks' annual holidays. Clause 17.4 entitles qualifying employees to "an additional one week of annual holiday". The answer to the obvious question "additional to what?" is that it is additional to the three weeks annual holidays provided for in cl 17.1. On its words, the collective agreement did not confer an entitlement to any more than four weeks' annual holidays and to adopt an interpretation which gave an entitlement to five weeks' annual holidays would "do violence to the wording of this agreement".

[11] Ms Latimer noted that the parties had entered into the 2005 collective agreement after the Holidays Act 2003 had been passed and the change to take effect on 1 April 2007 was known. In that knowledge, she submitted the parties could have altered cl 17.1 to provide for four weeks' annual holidays after 1 April 2007 but did not do so. Rather, they entered into an agreement which gave longer serving employees four weeks' annual holidays throughout its term but entitled other employees to only three weeks' prior to 1 April 2007.

[12] In support of this analysis, Ms Latimer made two further related submissions. In reliance on the full Court decision in its reconsideration of the *Tramways* case.[4] Ms Latimer submitted that the Holidays Act 2003 does not require employment agreements to specify an entitlement to four weeks' annual holidays. Rather, it ensures that employees will receive that minimum entitlement by providing in s 6(3) that any lesser provision in an employment

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[4] At paragraph [13].

agreement will be of no effect. She reinforced that submission by comparison with ss 52 and 53 which positively require employment agreements to include other provisions confirming statutory rights.

[13] Ms Latimer also drew my attention to s 192 of the Employment Relations Act 2000 which provides that the Court may not make an order cancelling or varying any term of a collective agreement.

[14] For the defendant, Mr Cranney relied very largely on the proposition that the entitlement under cl 17.4 of the 2005 collective agreement was not an entitlement to annual holidays but rather to service leave. As such, he submitted that it could not be counted in meeting employees' statutory entitlement after 1 April 2007 to four weeks' annual holidays and that employees with more than six years' service remained entitled to an extra week's leave over and above their four weeks' annual leave.

[15] In support of this proposition, Mr Cranney distilled from the decided cases what he submitted were the applicable legal principles:

(a) In s 6, the Holidays Act 2003 distinguishes between minimum statutory entitlements on the one hand and "enhanced and/or additional" entitlements on the other.

(b) The question of whether a reference to "annual holidays" in an employment agreement means the statutory minima, or an additional/enhanced entitlement, is a matter of contractual interpretation.

(c) The relevant issue is whether the parties agreed to convert any additional non-statutory leave to annual leave as defined by the Holidays Act 2003.

(d) Long service leave is not annual leave as that term is defined in the Holidays Act 2003.

(e) Holiday provisions in employment agreements should be interpreted in a way which does not deprive them of large parts of their meaning.

(f) A reference to the Holidays Act 2003 in the annual holidays provision of an employment agreement is an indicator that the holidays are intended to be annual holidays for the purposes defined in s 3 of that Act.

[16] Mr Cranney submitted that, applying these principles to cl 17 of the 2005 collective agreement, the additional week's holiday referred to in cl 17.4 was "unambiguously an additional/enhanced entitlement for the whole term of the agreement" and that it was "a separate clause providing leave over and above the statutory minimums for a non-statutory purpose."

Discussion and decision

[17] It is ironic that both counsel submitted that the provisions of the 2005 collective agreement at issue in this case were unambiguous yet urged me to reach entirely different conclusions, supported in each case by well researched and persuasive submissions. That fact alone suggests that the provisions in question are realistically capable of more than one interpretation and, in that sense, are ambiguous.

[18] That ambiguity, however, arises only in relation to the interpretation and application of those provisions to events after 1 April 2007. Prior to that date, the several provisions of cl 17 could readily be applied to every employee covered by the agreement. The change in statutory entitlement which occurred on 1 April 2007, however, made the first sentence of cl 17.1 problematic. By specifically providing for "three weeks annual holidays", it fell short of the statutory minimum of four weeks. While Ms Latimer's argument was that the entitlement to the remaining week was provided under cl 17.4, that could only possibly be so for those employees to whom cl 17.4 applied, that is those with six years' service. For other employees, the

collective agreement conferred an entitlement to less than the statutory minimum and brought it within the scope of s 6(3) of the Holidays Act 2003.

[19] That raises a fundamental question about the application of s 6 to collective agreements. Is it to be applied to the individual circumstances of each employee covered by a collective agreement or is it to be applied to the collective agreement as a whole? If it is to be applied to each employee separately, that raises the prospect that certain provisions of the agreement may be effective in relation to some employees and of no effect in relation to others. If it is to be applied to the agreement as a whole, the outcome may be that certain provisions are rendered ineffectual even though they provide some employees with everything the statute requires.

[20] Mr Cranney submitted that the effect of s 6(3) of the Holidays Act 2003 was to render any provision of a collective agreement which fails to provide the statutory minimum of no effect generally. In support, he referred to the decision of Judge Shaw in the *Silver Fern Farms* case where she said of a clause in the collective agreement providing for "three weeks annual holiday".[5]

> The only way of making sense out of clause 10.2 in the 2004 agreement after 1 April 2007 is to read it as providing for 4 weeks' annual holiday. That was the legal requirement.

[21] The implication of Mr Cranney's submission was that, if the only source of contractual entitlement to annual holidays for some employees was cl 17.1, it would be rendered of no effect from 1 April 2007. If cl 17.1 was rendered of no effect generally, the ground would be cut from under Ms Latimer's "3 + 1" argument that the collective agreement continued to provide long serving employees with the statutory minimum of annual holidays.

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[5] At [48].

[22] Ms Latimer contended that s 6 must be applied individually to each employee according to his or her particular circumstances. As she observed, s 6 refers consistently to "an employee" in the singular. While there may be some significance in this use of language, there is a presumption that references in legislation to the singular include the plural.[6]

[23] Ms Latimer also submitted that to read an explicit reference in the collective agreement to "three weeks" as "four weeks" would be to amend the agreement and that s 192(1) of the Employment Relations Act 2000 precluded the Court from doing so. Section 192(1) provides:

> **192 Application to collective agreements of law relating to contracts**
>
> (1) The court may not, under section 162 (as applied by section 190(1)), make in respect of a collective agreement an order cancelling or varying the agreement or any term of the agreement.

[24] While I accept the logic of this submission, I do not accept Ms Latimer's subsequent submission that Judge Shaw wrongly decided the *Silver Fern Farms* case because she purported to vary the agreement actually reached between the parties. In reaching the decision she did, Judge Shaw was not departing from what the parties agreed. To the contrary, she was giving effect to what she perceived the genuine intent of the parties to be. In doing so, she had regard to various aspects of the collective agreement in dispute. Of particular significance was the provision in the disputed clause that annual holidays were to be allowed "in accordance with the Holidays Act 2003" which suggested the parties intended the benefit conferred by the collective agreement to be no less than the minimum required by the statute. Ms Latimer was on much stronger ground when she submitted that Judge Shaw's decision in the *Silver Fern Farms* case could be distinguished on its facts and I return to that submission later.

[25] Although s 6 of the Holidays Act 2003 was closely considered by both the full Court and the Court of Appeal in the *Tramways* case, the question of

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[6] Interpretation Act 1999, s 33.

how it should be applied to collective agreements providing differing holiday entitlements for employees covered by it was not directly addressed. In the *Silver Fern Farms* case, the Court of Appeal touched on the issue when they said:

> [40] The second issue was the meaning to be given to cl 10.2 in the light of the increase in the statutory minimum holiday entitlement. Clause 10.2 provided for only three weeks annual holiday for non-casual employees. As from 1 April 2007, cl 10.2 constituted an employment agreement which restricted or reduced the statutory entitlements of the employees. By virtue of s 6(3) of the Holidays Act 2003, cl 10.2 was of no effect to the extent that it did so.

[26] This dictum does not, however, decide the issue. Rather, it simply relates the words used in s 6(3) to the facts of the case and is arguably consistent with either of the alternatives.

[27] Resolution of this issue lies in the meaning of the term "employment agreement" as it is used in s 6. Section 5(2) of the Holidays Act 2003 expressly imports the meaning given to "employment agreement" by the Employment Relations Act 2000 which "includes an employee's terms and conditions of employment" in "a collective agreement together with any additional terms and conditions of employment".[7] This reflects the provisions of section 61(1) of the Employment Relations Act 2000:

> **61 Employee bound by applicable collective agreement may agree to additional terms and conditions of employment**
>
> (1) The terms and conditions of employment of an employee who is bound by an applicable collective agreement may include any additional terms and conditions that are—
>
> (a) mutually agreed to by the employee and the employer, whether before, on, or after the date on which the employee became bound by the collective agreement; and
>
> (b) not inconsistent with the terms and conditions in the collective agreement.

[28] It follows from this that, in determining what the employment agreement of any employee is for the purposes of s 6 of the Holidays Act

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[7] Employment Relations Act 2000, s 5.

2003, regard must be had not only to any applicable collective agreement but also to any additional terms and conditions of employment. As those additional terms can only be the result of individual agreement, any assessment of whether they contribute to meeting the statutory minimum holiday entitlements can only be done on an individual basis.

[29] This is consistent with the scheme of s 6 in the context of the Holidays Act 2003. The statute establishes what those minimum entitlements are. For annual holidays, the minimum entitlement is set by s 16(1). How that entitlement is conferred on employees is primarily a matter for agreement between each employee and his or her employer. So long as the employment agreement between them provides the employee with an entitlement which meets or exceeds the statutory minimum, the entitlement arises out of the agreement and may include "enhanced or additional entitlements". If the employment agreement "excludes, restricts or reduces" an employee's statutory entitlement, the agreement "has no effect to the extent that it does so". In that case, the employee's entitlement is conferred by the statute rather than the employment agreement.

[30] I take that approach to this case. On its face, cl 17.1 of the 2005 collective agreement entitled all employees bound by it to three weeks' annual holidays. On its own, that clearly did not meet the statutory minimum of four weeks which applied from 1 April 2007. To determine whether the employment agreement of each employee as a whole met the statutory minimum, therefore, the enquiry must then be whether:

(a) The proper construction of cl 17.1 was that all employees were entitled to four weeks' annual holidays; or

(b) Some other provision of the collective agreement entitled the employee to a fourth week of annual holidays; or

(c) An additional term agreed individually with the employee entitled him or her to a fourth week of annual holidays.

[31] The defendant's case was focussed on excluding the second of those possibilities. Mr Cranney submitted that, applying the principles distilled from the previous decided cases, the "additional one week of annual holiday" to which long serving employees were entitled under cl 17.4 should be construed as "service leave" which could not be counted as part of the minimum entitlement to annual leave conferred by s 16(1) of the Holidays Act 2003. In support of this submission, Mr Cranney invited me to adopt the reasoning employed by Judge Shaw in the *Silver Fern Farms* case and by the Chief Judge in two subsequent cases[8].

[32] In the *Silver Fern Farms* case, Judge Shaw identified four reasons for her conclusion.[9] The first was a finding of fact that the "additional week of annual holiday" to which long serving employees were entitled was "not given for the purpose of rest and recreation as described in s 3(a) of the Holidays Act." That conclusion was based on the particular facts of that case and I see no reason to make a similar finding of fact in this case. The 2005 collective agreement was concluded at a time when the parties were aware of the provisions of the Holidays Act 2003, including the increase to four weeks' annual holidays scheduled to take effect on 1 April 2007. In a change from previous agreements, where the term "annual leave" was used, the parties deliberately used the term "annual holiday" to describe the additional entitlement conferred on longer serving employees by cl 17.4 of the 2005 collective agreement. This may be contrasted with cl 17.5 where the parties described shift leave simply as "holiday". In the absence of any evidence suggesting that another meaning was intended, the inference must be that the parties intended the term "annual holidays" to have the meaning given to it under the Holidays Act 2003.

[33] It was central to Mr Cranney's argument that, because the additional week's holiday conferred by cl 17.4 was only available to employees with

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[8] *National Distribution Union Inc v Capital and Coast District Health Board* [2010] NZEmpC 2 and *Robinson v Capital and Coast District Health Board* [2010] NZEmpC 3.

[9] Paragraphs [41] to [47].

long service, that altered the nature of the holiday. I do not accept that proposition. As the full Court recognised in the *Tramways* case, the reason why employees are entitled to a particular holiday and the nature of that holiday are two different concepts. In that case, the employees bound by the collective agreement were entitled to an additional week's holiday in recognition of the nature of their work. The full Court found, however, that the purpose of the additional holiday was for rest and recreation and, consistent with s 3(a) of the Holidays Act 2003, ought to be regarded as annual holidays for the purposes of the statute.[10] In this case, the basis on which employees became entitled to an additional week's holiday under cl 17.4 was long service but that did not necessarily determine the nature of the holiday which I find the parties intended to be annual holidays for the purposes of the Holidays Act 2003.

[34] Related to that first reason, the second reason briefly mentioned by Judge Shaw was that the entitlement to an additional week's holiday was not conferred on all employees bound by the collective agreement. I do not regard this as a persuasive factor in this case. Whether all or only some of the employees bound by a collective agreement are entitled to a particular benefit does not alter the nature of that benefit. As discussed above, the basis on which an employee may qualify for a holiday and the nature of the holiday conferred are different concepts.

[35] The third reason given by Judge Shaw in the *Silver Fern Farms* case was that employees entitled to the additional week of holiday could exchange it for cash and that the Holidays Act 2003 did not then contemplate such an exchange for annual holidays. It is understandable that this was a very persuasive factor as it rendered the additional week's holiday conferred by cl 10.4 of the collective agreement in that case essentially different in nature to annual holidays under s 16(1) of the Holidays Act 2003. There was no comparable provision in the 2005 collective agreement at issue in this case.

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[10] [2006] ERNZ 1005 at [40].

[36] The final reason relied on by Judge Shaw was another finding of fact that the parties to the collective agreement intended the extra week's holiday available to long serving employees to always be additional to the statutory minimum amount of annual holidays. That was based to a large extent on the provisions of a subsequent collective agreement made in 2007 which changed the core entitlement to annual holidays to four weeks but retained an entitlement to an additional week's holiday after six years' service. That is a very different factual situation to this case.

[37] Overall, I find that the parties intended the additional week's holiday conferred by cl 17.4 of the 2005 collective agreement to be annual holidays for the purposes of the Holidays Act 2003. It follows that the 2005 collective agreement effectively provided employees with six or more years' service with the statutory minimum of annual holidays and s 6 has no application to their employment agreements.

[38] I turn now to the possibility that the 2005 collective agreement can be properly interpreted as providing four weeks' annual holidays to employees not entitled to the benefit of cl 17.4. As the full Court found on reconsideration in the *Tramways* case, the proper construction of the Holidays Act 2003 is that, while it fixes a statutory minimum entitlement to annual holidays, it does not require the parties to employment agreements to specify four weeks' annual holidays.[11] Whether they have done so is a matter of construction of the employment agreement in question. Unlike the situation in the *Silver Fern Farms* case, there is no evidence that the parties in this case intended cl 17 to confer on all of the employees bound by it an entitlement to the statutory minimum of annual holidays. It follows that, unless they had individually agreed terms of employment providing for an additional week's annual holidays, employees who did not have six years' service were not contractually entitled to the statutory minimum of annual holidays after 1 April 2007 and s 6 applied to their employment agreements. In those cases,

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[11] [2008] ERNZ 584 at [13].

the employees became entitled to four weeks' annual holidays by operation of the statute.

[39] In the statement of claim, the plaintiff sought a declaration that "the maximum leave to which the defendant's members are entitled is four weeks' annual leave." Although the plaintiff has essentially been successful, the form of declaration made needs to be somewhat different to that sought and this is reflected in the conclusion which follows.

Conclusions

[40] In summary, my conclusions are:

(a) The benefit conferred on employees by clause 17.4 of the 2005 collective was an entitlement to annual holidays which could form part of the minimum entitlement conferred on employees by s 16(1) of the Holidays Act 2003.

(b) The plaintiff's challenge is successful.

(c) By operation of s 183(2) of the Employment Relations Act 2000, the determination of the Authority is set aside and this decision stands in its place.

Comment

[41] This decision is delivered very much later than would normally be the case and I am conscious of the inconvenience to the parties of the delay. The principal reason for that delay has been the effect of the Christchurch earthquakes on the Court's resources.

Costs

[42] The plaintiff has been successful in its challenge. In the sense that costs usually follow the event, the plaintiff is entitled to a reasonable

contribution to its costs. As this case involved the interpretation of a collective agreement in which both parties have an ongoing interest, however, it may be that costs are not sought. That will be a matter for the plaintiff. Costs are reserved. If an order is to be sought, Ms Latimer should file and serve a memorandum within 20 working days after the date of this judgment. Mr Cranney is then to have a further 15 working days in which to respond.

A A Couch
Judge

Signed at 2.30pm on 27 May 2011