

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2011] NZEmpC 56
CRC 17/10**

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

BETWEEN SEALORD GROUP LIMITED
Plaintiff

AND SERVICE & FOOD WORKERS' UNION
NGA RINGA TOTA
Defendant

Hearing: 4 June 2010
(Heard at Wellington)

Counsel: Rob Towner, counsel for the plaintiff
Peter Cranney and Anthea Connor, counsel for the defendant

Judgment: 27 May 2011

JUDGMENT OF JUDGE A A COUCH

[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 Nelson plant and which was in force between 8 May 2006 and 11 May 2008 (the 2006 collective agreement). Clause 29 of that agreement provided:

29. ANNUAL HOLIDAYS

- (a) Annual holidays shall be allowed in accordance with the Holidays Act 2003.
- (b) An additional weeks leave entitlement will be given to employees after the completion of five years continuous service. The additional week may be taken in conjunction with or separately from the first three weeks each year as agreed between the employee and their immediate supervisor or manager.
- (c) In addition to the annual holidays provided for in (a) above, and the service holiday provided for in (b) above if applicable, employees regularly employed on shifts as defined in Clause (8) of this Agreement shall be allowed one extra weeks holiday on completion of 12 months service as a shift worker.

...

[4] The Employment Relations Authority concluded that paragraphs (a) and (b) of cl 29 identified two separate kinds of leave; annual holidays and service leave. It determined that, after 1 April 2007, paragraph (a) entitled employees to four weeks' paid annual holiday and that, by virtue of paragraph (b), long serving employees were entitled to a further week's leave additional to the statutory entitlement and which was unaffected by the increase in annual holidays. The plaintiff challenged the whole of that determination¹ 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*

¹ CA 217/09, 17 December 2009.

*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.

Submissions

[6] For the plaintiff, Mr Towner’s fundamental submission was that cl 29 ought to be interpreted in accordance with the common intention of the parties at the time it was agreed. He submitted that a useful tool in ascertaining that intention was the content of preceding documents applying to the same work as the collective agreement in this case. To that end, he provided extracts from awards registered in 1985 and 1990 and three subsequent collective employment contracts and collective agreements.

[7] What is apparent from those documents is that, while the structure of the clause has remained largely the same, some particular features may be noted:

- (a) Paragraph (a) of what is now cl 29 has remained unchanged other than to alter the reference from the Holidays Act 1981 in earlier documents to the Holidays Act 2003 in the 2006 agreement.
- (b) The additional week’s leave provided for in paragraph (b) has been described as a “service holiday” throughout. In the awards, this was the heading of paragraph (b). In the subsequent collective employment contracts and collective agreements, paragraph (c) has referred to “the service holiday provided for in (b) above”.
- (c) The manner in which the service holiday was provided changed significantly. The awards provided that employees who had completed six years’ continuous service “shall for the sixth and

² [2006] ERNZ 1005 and *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland 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* [2010] NZCA 317.

subsequent years be entitled to an annual holiday of four weeks instead of three weeks”. In the collective employment contract dated 1999, this changed to “An additional week’s leave entitlement will be given to staff after the completion of five years’ continuous service.” It then described how the “fourth week’s leave” might be taken.

- (d) The subsequent collective employment contract agreed in 2000 introduced the wording which was then repeated in the 2001, 2004 and 2006 collective agreements. The reference to “the fourth week” was changed to “the additional week”.

[8] Based on these previous documents and the wording of cl 29 of the 2006 collective agreement, Mr Towner submitted that the “original intention” of the wording in cl 29 was to give employees an entitlement to a total of four weeks’ annual holidays under the “annual holidays” clause, notwithstanding that the clause dealt with statutory holidays, a service holiday and a further holiday for shift workers.

[9] In making this submission, Mr Towner relied heavily on the wording of the awards and the 1999 collective employment contract. He submitted that these showed an underlying intention that no more than four weeks holiday was to be allowed for annual holidays and any service holiday combined.

[10] By way of ancillary support for this submission, Mr Towner also relied on a clause in the plaintiff’s human resources policy which, under the heading “Additional Leave Entitlement”, contains the sentence “In no case will more than 4 weeks annual leave be granted.”

[11] For the defendant, Mr Cranney supported the Authority’s determination, very largely for the reasons it gave. His first submission was that there was no operative ambiguity in cl 29 of the 2006 collective agreement. He submitted that it provided clearly and unambiguously for two separate entitlements, being annual holidays and a service holiday.

[12] In support of this submission, Mr Cranney referred me to s 6 of the Holidays Act 2003 and to the manner in which it was interpreted and applied by the full Court in the *Tramways* case. Section 6 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.

[13] In the *Tramways* case, the applicable collective agreement provided for three weeks' annual holidays and that "in addition" to those holidays, "employees shall be entitled to a further holiday of one week per annum in recognition of the nature of the work"⁴. Referring to s 6, the full Court noted that the issue was whether the parties agreed that the further week's leave should be annual holiday and that the answer was to be found in the agreement rather than the statute.⁵ Mr Cranney submitted that the wording of cl 29 of the 2006 collective agreement made it clear that the parties intended the leave conferred by paragraph (b) to be an additional entitlement which was separate and distinct from annual holidays.

[14] Both in addition and in the alternative, Mr Cranney submitted that any ambiguity in cl 29 ought to be resolved in favour of an interpretation which did not extinguish employees' entitlement to a service holiday.

Discussion and Decision

[15] I accept Mr Cranney's submission that the key issue in this case is the nature of the additional week's leave to which long serving employees were entitled under cl 29(b) of the 2006 collective agreement. I do not, however, accept his submission

⁴ At [10].

⁵ On reconsideration [2008] ERNZ 584 at [15] and [21].

that, because employees became entitled to the additional week's leave provided for in cl 29(b) in recognition of long service, that leave could not possibly be annual holidays for the purposes of s 16(1) of the Holidays Act 2003. I dealt with this point in *Cerebos Greggs Ltd v Service & Food Workers Union Nga Ringa Tota*⁶ and, for the reasons I gave there, I find that the purpose for which a holiday is allowed and the nature of the holiday allowed are different concepts. While the purpose may be a factor to be taken into account in determining the nature of the holiday, it is not decisive.

[16] In this case, the only aspect of the 2006 collective agreement suggesting that the parties may have intended the entitlement under paragraph (b) of cl 29 to be annual holidays is that it is the heading of the clause. Otherwise, the indications are that something else was intended. The reference to "leave" is in contrast to the term "annual holidays" in paragraph (a) as is the specific description of the leave as "service leave". My attention was also drawn to Appendix C to the 2006 collective agreement which preserved the entitlement of certain employees in Nelson to an additional week's "annual leave" after five years' service.

[17] I find that the parties to the 2006 collective agreement did not intend paragraph (b) of cl 29 to confer an entitlement to "annual holidays" as that term is used in the Holidays Act 2003.

[18] Mr Towner's primary submission was that the parties intended a limit of four weeks on all leave conferred by cl 29. I find no credible basis for that submission. The plain meaning of the words used in paragraphs (b) and (c) of the clause is that service leave and shift leave entitlements are each to be cumulative on the entitlement under paragraph (a) to annual leave. All previous documents had similar wording. It follows that, even when the statutory entitlement was to three weeks' annual holidays, any employee who was a shift worker and had long service was entitled to five weeks' leave.

[19] To the extent that the awards and collective employment contracts may have provided some support for the proposition that annual leave and service leave

⁶ [2011] NZEmpC 55, heard at the same time as this case.

combined should not exceed four weeks, that disappeared before the 2006 agreement was concluded. The parties chose to alter the wording of paragraph (b) of cl 29 in the 2000 collective employment contract by changing the previous reference to “the fourth weeks leave” to “the additional week” and this change was sustained in the subsequent collective agreements.

[20] The plaintiff’s reliance on its human resources policy is also problematic. It was not negotiated or agreed with employees or their union. Such a unilateral document assists very little, if at all, in ascertaining the mutual intention of the parties to the collective agreement. It certainly does not persuade me to depart from the clear meaning of the words used in the agreement which, as I have noted, are consistent with numerous previous agreements.

[21] It is also apparent that, although one of the policy documents relied on by the plaintiff records that it was revised in February 2009, it is clearly in error. It begins by saying the “employee will be entitled to three weeks annual holidays upon completion of each year’s continuous service, in accordance with the Holidays Act 2003.” That was nearly two years after the statutory entitlement to annual leave had been increased to four weeks.

[22] I find that the proper interpretation of cl 29(b) of the 2006 collective agreement is that the “additional weeks leave” to which long serving employees were entitled was not “annual holidays” for the purposes of s 16(1) of the Holidays Act 2003.

[23] What are the consequences of that conclusion? In my decision in the *Cerebos Greggs* case, I discussed the application of s 6(3) of the Holidays Act 2003. For the reasons I gave in that decision, it is clear that it must be applied to the individual circumstances of each employee bound by the collective agreement. That consideration must have regard to the whole of the employment agreement between that employee and the employer, including not only the terms of any applicable collective agreement but also any individual terms of employment which may have been agreed.

[24] In the absence of any relevant individual terms of employment, the only entitlement to annual holidays under the 2006 collective agreement was that in paragraph (a) of cl 29. From 1 April 2007, that entitlement to three weeks' annual holidays was less than the statutory minimum of four weeks. Accordingly, s 6(3) applied to render cl 29(a) of no effect with respect to those employees and they would have been entitled to four weeks' annual holidays by operation of the statute. Other aspects of cl 29 would have remained in effect. It follows that any employee with five years' continuous service would have been entitled to an additional week's leave over and above his or her four weeks' annual holidays.

Conclusion

[25] In summary, my judgment is:

- (a) The proper interpretation of cl 29(b) of the 2006 collective agreement is that the "additional weeks leave" to which long serving employees were entitled was not "annual holidays" for the purposes of s 16(1) of the Holidays Act 2003.
- (b) The change in statutory entitlement to annual holidays did not affect the interpretation or application of paragraph (b) of cl 29 of the 2006 collective agreement. Employees who had completed five years' continuous service remained entitled to a week's leave in addition to their annual holidays.
- (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

[26] 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

[27] The defendant has been entirely successful in resisting the plaintiff's challenge. In the sense that costs usually follow the event, the defendant 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 defendant. Costs are reserved. If an order is to be sought, Mr Cranney should file and serve a memorandum within 20 working days after the date of this judgment. Mr Towner 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