IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 61
ARC 105/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TATUA CO-OPERATIVE DAIRY COMPANY LIMITED Plaintiff
AND	NEW ZEALAND DAIRY WORKERS' UNION TE RUNANGA WAI U INC Defendant

Hearing: 18 June 2010
By written submissions of plaintiff filed on 27 October 2010
By written submissions from the defendant filed on 10 November 2011
(Heard at Auckland)

Counsel: Garry Pollak, counsel for plaintiff
Helen White, counsel for defendant

Judgment: 13 June 2011

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff (Tatua) has challenged a determination of the Employment Relations Authority, issued on 30 November 2009[1] which interpreted the long service entitlements contained in two succeeding collective agreements.

Factual background

[2] The following facts were not in issue. The plaintiff is an independent cooperative dairy company and has a significant number of long serving employees who are directly affected by a disagreement as to the application, interpretation and

[1] AA428/09.

operation of the current collective agreement. The plaintiff and the defendant (the Union) disagree on how to apply the current collective agreement which came into force on 15 November 2008 (the current collective). It is common ground that the current collective contains more beneficial long service leave entitlements, which the parties have described as "the enhanced leave entitlements", than the previous collective agreement and there is a dispute as to how the enhanced leave entitlements should operate. Clause 17 of the now expired collective agreement (the expired collective) provided:

> **17 SPECIAL HOLIDAYS FOR LONG SERVICE**
>
> **17.1 ENTITLEMENTS**
>
> A worker shall be entitled to special holidays as follows:
>
> 17.1.1 One special holiday of 40 hours after the completion of 10 years and before the completion of 20 years of continuous service with the employer.
>
> 17.1.2 One special holiday of 80 hours after the completion of 20 years and before the completion of 30 years of continuous service with the employer.
>
> 17.1.3 One special holiday of 120 hours after the completion of 30 years and before the completion of 40 years of continuous service with the employer.
>
> 17.1.4 One special holiday of 200 hours after the completion of 40 years continuous service with the employer.

[3] The expired collective, as does the current collective, provided that the long service leave could be taken in variable amounts.

[4] Clause 17 of the current collective increased the entitlements by 40 hours from 40 to 80; 80 to 120; 120 to 160 and 200 to 240 hours but otherwise the wording remained the same. The current collective also contains the following clauses:

> **17.2 PAYMENT FOR LONG SERVICE HOLIDAYS**
>
> All such special holidays provided for in clause 17.1 shall be on ordinary pay as defined by the Holidays Act 2003 and its amendments, and may be taken in one or more periods and at such time or times as may be agreed by the employer and the worker
>
> 17.2.1 At the request of the worker, the employer and the worker may agree to the payment of long service leave owing in lieu of taking the

leave, payment to be at the rate set out in Clause 17.2. Such agreement shall be in writing and signed by the employer and the worker prior to any payment being made.

17.4 TERMINATION

If a worker having become entitled to a special holiday leaves his/her employment before such holiday has been taken he/she shall be paid in lieu thereof.

[5] Clause 1.6 of the current collective provides:

1.6 PREVIOUS CONTRACTS OF EMPLOYMENT

It is a condition of this Agreement that it shall supersede all previous terms and conditions of employment contained in any relevant Collective Agreement and/or, all terms and conditions of employment by way of an Individual Employment Agreement, verbal or written agreed between the parties.

No worker shall be disadvantaged by the coming into effect of this Collective Agreement. Individuals who have entitlements over and above this agreement shall retain those additional terms and conditions.

[6] When the expired collective came to an end, some long serving employees had not taken up their full entitlements and still had special leave owing to them. A dispute has arisen as to whether they can claim the enhanced entitlements under the current collective in addition to, or in place of, their previously accrued entitlements. The parties summarised their respective positions by giving the Authority five examples to illustrate the various situations that gave rise to the dispute. The five situations and the respective views of the entitlements were encapsulated in a spreadsheet which I set out:

EMPLOYEE	EMPLOYEE START DATE	LENGTH OF SERVICE ON OR BEFORE 14.11.08	LENGTH OF SERVICE ON OR AFTER 15.11.08	ALLOCATION ON OR BEFORE 14.11.08	OUTSTANDING (UNUSED) AS AT 15.11.08	NEW ALLOCATION ON OR AFTER 15.11.08	NZDWU BELIEVE ENTITLEMENT SHOULD BE	TATUA BELIEVE ENTITLEMENT SHOULD BE
A	15.11.1995	10 yrs	10 yrs *(no change)*	1 wk	1 wk	0 wks	2 wks (+1 wk)	1 wk
B	15.11.1995	10 yrs	10 yrs *(no change)*	1 wk	0 wks	0 wks	0 wks	0 wks
C	15.11.1998	0 yrs	10 yrs	0 wks	0 wks	2 wks	2 wks	2 wks
D	15.11.1988	10 yrs	20 yrs	1 wk	1 wks	3 wks	*5 wks (+1 wk)	4 wks (1 wks + 3 wks)
E	15.11.1988	10 yrs	20 yrs	1 wk	0 wks	3 wks	3 wks	3 wks (0 wks + 3 wks)

The determination

[7] Each party had advanced its own interpretation of the clauses to support its position as shown in the spreadsheet. The Union's position was that if an employee had taken the special leave entitlement before commencement of the current collective, then the employee had no entitlement to the enhanced leave. If the employee had only partially taken the leave, the employee received the enhanced entitlement.

[8] Tatua's position was that the enhanced entitlements applied only to those employees who qualified for it on or after the commencement of the current collective and those who had either taken all or part of their entitlements during the currency of the expired collective received no enhanced leave under the current collective.

[9] The Authority disagreed with the positions of both parties. It found that the provisions of the current collective superseded those of the previous, that the enhanced entitlements applied to all employees and there was no further qualification additional to that of service, as expressly stipulated in the clause. The Authority found:[2]

> Qualifying for the entitlement and the taking of the entitlement are two separate and unrelated things. Whether or not long service special leave is partially or wholly taken prior to the Collective is entirely irrelevant. There is nothing in the wording of the clause which requires any consideration of whether long service special leave has already been either wholly or partially taken previously.

[10] The Authority's reasoning was translated as follows in terms of the table tendered by the parties:

[2] At [16].

Employee	Start date	Service	Leave	Entitlement
A	15.11.95	10+ yrs	Unused	80 hours
B	15.11.95	10+ yrs	Used	40 hours
C	15.11.95	10+ yrs	20 hrs used	60 hours
D	14.11.98	10 yrs, 1 day	Unused	80 hours
E	15.11.98	10 yrs	Unused	80 hours
F	14.11.88	20 yrs, 1 day	Unused	120 hours
G	15.11.88	20 yrs	Used	40 hours

[11] Forty hours translates as one week, 80 hours as two weeks and 120 hours as three weeks. Neither side had contended for the position as determined by the Authority.

Pre-contractual negotiations

[12] There had been an issue before the Authority as to whether the pre-contractual negotiations should be taken into account in interpreting the provisions of the collectives. The Authority found that the wording of clause 17 was clear and unambiguous and was to be construed according to the natural and ordinary meaning of the words. Because it found there was no ambiguity, it declined to enquire into the pre-contractual negotiations or the subjective intentions of the parties.

[13] At the Court hearing the Supreme Court decision *Vector Gas Ltd v Bay of Plenty Energy* Ltd[3] was discussed and it was agreed that the parties would be free to file affidavits dealing with the course of the negotiations for the current collective. The parties would then file submissions dealing with that new evidence in light of the *Vector Gas* decision and would address issues such as admissibility and relevance. They were provided with the opportunity for a further oral hearing, but neither party sought that, although they both filed further written submissions. The Union filed an affidavit of Mark Hope, its Organiser for the Tatua site who was the advocate in the negotiation of the current collective.

[3] [2010] NZSC 5, [2010] 2 NZLR 444.

[14] Tatua filed an affidavit of Ewen Gardner, previously Tatua's General Manager, Operations who was involved for Tatua in negotiating the current collective. Tatua also filed an affidavit of Brent Webster, the Production Manager who reported to Mr Gardner and who also attended bargaining meetings for the current collective.

[15] The deponents each gave their views on their undertaking of how the clause was to be applied.

[16] Mr Hope's evidence was that one of the Union's claims was to increase the long service leave provision. When asked by Tatua's representatives to explain how it would apply, he claims he explained that it would apply to any worker who qualified in terms of the clause but if that worker had already used all or part of their entitlement for a given period then they would not get the top up for that period. In those circumstances the Union would consider Tatua had already met their obligations under the current provision. The employee's service would still be continuous and they would get the higher amount in the next period of entitlements. Mr Hope claims that Mr Webster made the comment that it would be unfair for some workers to miss out on the improved entitlement because they had used some of the existing entitlement and Mr Hope claims he responded by saying that he would be comfortable for all workers to get the full amount if Tatua thought that would be more equitable. He invited Tatua, if it had an alternative approach to the application of the clause, to table it so it could be discussed, or a note could be included in the terms of settlement explaining how it was to be applied. Mr Hope deposes that Tatua did not table any alternative approach, the claim was not discussed in detail again, and no explanatory note was drafted. The claim was agreed to as it appears in the terms of settlement. Mr Hope deposes that he advised members of the Union employed by Tatua at a site ratification meeting that those members who had used all or part of an entitlement under the current provision would not get the top up but their service would still be continuous so they would still get the approved entitlement in the next period.

[17] Mr Gardner's evidence was that, despite the difficult economic times in which they were bargaining, Tatua agreed to include an enhanced long service

provision in the current collective. He deposes that cl 17 of the current collective contains the same wording as that used in Tatua's collective agreement covering trade staff, engineers, and electricians. This same provision has been in that collective for some years but Mr Gardner's evidence was that there has never been any question about splitting the entitlements or retrospective application of the clause based on whether or not an employee has taken any or all of the long service leave entitlement during the currency of the preceding collective agreement. Mr Gardner deposes that he did not recall Mr Hope or any other representative of the Union expressing a view as to how it should be applied during the course of the bargaining. He deposes that had the view held by the Union been expressed there would have been a much earlier disagreement and Tatua's representatives would have required the clause to be clarified before concluding bargaining. He deposes that the Union's view was expressed for the first time after the bargaining was concluded and there was then an exchange of emails recording the different positions of the parties.

[18] Mr Webster gave supporting evidence to the effect that he could not recall any discussions during bargaining about how the new long service leave provisions would be actually applied and recorded a similar understanding of the clause as that expressed by Mr Gardner. He did not recall any discussion about splitting the entitlement or making aspects of it retrospective and deposes that if such an issue had been raised at bargaining it would have had to have been determined prior to the terms of settlement being concluded.

[19] Mr Pollak, on behalf of Tatua, submitted that there was no evidence from what was said by the deponents in their affidavits that there was an agreed interpretation of the clause in the course of the negotiations and that the dispute only arose after the current collective was agreed to and ratified. He submitted that it is difficult to reconcile fundamentally opposed recollections in the affidavits and in such circumstances the additional evidence cannot assist the Court in interpreting the current collective. He observed that Mr Hope's evidence at best simply says that he raised his understanding during the negotiations but Mr Hope did not contend that Tatua had responded by agreeing.

[20] Ms White, on behalf of the Union, submitted that the Supreme Court in *Vector* expressly rejected the admission of evidence of subjective intention and she submitted that for this reason much of the evidence in the affidavits was therefore irrelevant. She cited from the judgment of Tipping J at para [31]:

> The key point is that extrinsic evidence is admissible if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning both or all parties intended their words to bear. Extrinsic evidence is also admissible if it tends to establish an estoppel or agreement as to meaning.

[21] Although Ms White relied on Mr Hope's evidence that he communicated his understanding of the interpretation of the clause as increasing entitlements she accepted there is no evidence that this explanation was accepted by Tatua. She submitted that both parties agreed that the claim was made by the Union to increase entitlements, and accepted, without qualification, that this is the extent of the relevant evidence after inquiry. She submitted that no evidence has come to light that suggests that the Court should do anything beyond accepting the plain meaning of the clause. In the circumstances of this case she submitted that there was no agreed special meaning and therefore the evidence did not really assist.

[22] I agree with the submissions of counsel that the evidence of what was discussed at the negotiations does not assist in the interpretation of the clause. The only exception is that it may have been arguable by Tatua that the practice adopted over a number of years over an identical clause in a different collective involving different employees may provide some guidance to the interpretation of the current collective. That argument, however, was not clearly pursued and I do not rely upon it.

The contentions

[23] Tatua contends that cl 17 ensures that the entitlements to special holidays crystallise at the date the entitlement falls due and in that sense it is similar to ordinary holiday provisions. Tatua contends that it does not actually matter when the employee takes the additional leave because the entitlement still exists. Tatua submits that the enhanced entitlements arising after 15 November 2008, can only apply to those employees who become entitled to a long service leave step on or

after that date and that the provisions cannot have a retrospective effect. Tatua submits that not only would there be a retrospective application of the provisions if the Union's position is accepted, but also a double entitlement, to a degree, for some particular employees. Further, it submits that the Union's position involves splitting entitlements by reference to previous collectives and this again would be an illogical application of the current collective. Mr Pollak said he derived assistance from the following statement in a decision of Tindall J in *Inspector of Awards v NZ Co-operative Dairy Co Ltd*,[4] applied in *Northern Caretakers etc Union v Bradbury Wilkinson & Co (NZ) Ltd*:[5]

> The Court in interpreting the provisions of awards usually avoids a construction which requires the superimposition of one payment upon another in respect of the same matter unless the intention that it should be so superimposed is very clearly expressed.

[24] Mr Pollak also anticipated that the Union would rely on cl 1.6 but submitted that the right crystallised on the anniversary date and the entitlement depended upon which collective was in force at the time. Although the current collective was said to supersede all previous collectives, the expired collective still remained relevant in terms of accrued rights and arrears. Thus, he submitted, there is still the right to sue for unpaid remuneration arising out of a contractual entitlement in a replaced agreement. That right would be to sue for the rate that was current at the time the replaced agreement was in force and would not be increased as a result of a new collective increasing remuneration entitlements.

[25] Tatua accepted that when the leave was actually taken it would be paid for at the applicable rate at the time but the right to the leave existed from the point of entitlement. Mr Pollak submitted that this was reinforced by cls 17.2 and 17.4 which treat the special leave as though it was annual holidays and contain words such as "if a worker having become entitled to a special holiday". This, he submitted, indicated that the rights were being crystallised when the employee reaches 10, 20, 30 or 40 years of continuing service. He submitted that the date of entitlement was based on the employee's anniversary of service and this was supported by the use of the word "entitled" in cl 17.4. He submitted that an employee who has previously reached

[4] [1941] BA 568.
[5] [1990] 1 NZILR 660 at 665.

that point of entitlement cannot then be entitled to an additional entitlement for the same condition precedent. There was no issue, however, that the employee would be entitled to an enhanced entitlement on the next anniversary date which occurs after the coming into force of the current collective.

[26] Mr Pollak submitted that a parallel can be made with the Holidays Act 2003 where the fourth week becomes an entitlement after the Act came into effect on 1 April 2007. An employee then became entitled, he submitted, to the additional week's leave on the subsequent anniversary of employment.

[27] Ms White submitted that the entitlement to long service leave was subject to whatever the current collective states about the nature and degree of the entitlements. Such rights depend upon the contractual negotiations and may be varied up or down or may be removed entirely. She submitted that if an employee takes a special holiday, that employee is accessing a contractual right founded on the current entitlement. If an employee became eligible for long service leave under clause 17 of the expired collective, during the life of that agreement, she submitted that the employee was entitled to what was prescribed under that agreement. If the employee took that entitlement the employee would have enjoyed the one off holiday and Tatua would have met its contractual obligations. However, if the employee did not use the entitlement before 15 November 2008, but remained within the entitlement period, then, for example, if that entitlement had been negotiated away in a new collective, she submitted that employee would have lost the entitlement altogether but for the savings clause.

[28] Ms White observed that under both collectives, in spite of the reference to "one special holiday" in cls 17.1.1 to 17.1.4, entitlements may be taken in one or more periods and therefore it was contemplated that an employee may only have used some of the contractual entitlements. When that scenario occurs, she submitted that the remainder of the leave is not an entitlement under the expired collective but an entitlement under the current collective. The balance of the entitlement would therefore, be increased. She submitted that it is in the nature of one collective replacing another that the parties agree that the old terms and conditions can either be relied on or superseded. The Union also relied on clause 1.6, which in this case

contemplated that no employee would be disadvantaged by the coming into force of the current collective.

[29] Ms White supported her submissions by comparing two hypothetical employees, one who started work on 14 November 2008, one day before the current collective came into force, and one who started on 16 November, one day after. She submitted that the latter, who would reach the anniversary days after the former, would be entitled to an extra 40 hours of special leave for having worked for less time (two days) than the former. She submitted that the intention of the special leave provision was to reward loyalty and it ran contrary to the intention of that clause that these employees would be treated so differently simply because of their start dates.

[30] It was the essence of the argument for the Union that the right did not crystallise on the anniversary date, but the entitlement was available for the entire period between each of the anniversaries. For example, it was available between 10 and 20 years of continuous employment. This, apparently, was the wording relied on by the Authority to find that the entitlement remained available until it was used. The entitlement was to a special holiday "after the completion of … years and before the completion of … years of continuous service". The Union accepted that if the opportunity was given to the employee to take the holiday during this period then there would be no entitlement after the expiry of that period. Although not strictly before the Court, the Union's position appeared to be that the right would be forfeited if not used within that period.

Contract interpretation

[31] The principles the courts have evolved for the interpretation of collective employment agreements are succinctly set out in the following passages from *New Zealand Meat Workers Union of Aotearoa Inc v AFFCO New Zealand Ltd*[6] which I adopt and will endeavour to apply.

> [28] In *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* the Court of Appeal affirmed the approach adopted in that case by Judge Shaw to the interpretation of a collective employment

[6] [2011] NZEmpC 32.

agreement, describing it as "conventional and appropriate". The Court of Appeal recorded that in her approach to the interpretation of the relevant provision, Judge Shaw had considered the language used in the context of prior instruments and she had striven to interpret the relevant clause in a way which would remove apparent inconsistencies and give effect to what she considered to be the relevant purpose of the provision. The Court of Appeal also recognised that the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*, a judgment delivered subsequent to Judge Shaw's decision, had reaffirmed that in the construction of a commercial agreement, material extrinsic to the agreement could be used to clarify its meaning, whether or not the terms used were ambiguous. Of special relevance to the instant case, the Court of Appeal noted that *Vector* had recognised that in the interpretation exercise it was appropriate to examine the history of the parties' dealings and prior instruments between the parties.

[29] Mr Mitchell referred the Court to the judgment of the full Court in *Dwyer v Air New Zealand Lt (No 2)* which was a decision concerned with the meaning of a collective employment contract. In that case the Court stated:

> We accept that our task in this part of the case is objectively to ascertain the mutual intentions of the parties and that by doing so we not only have regard to the particular words in the particular clause at issue but also to the nature and purpose of the employment contract. Reasonableness of result is a relevant consideration also in choosing between rival constructions and the contextual matrix is also to be taken into account.
>
> ...
>
> It is important to recall that, as in the case of many other employment contracts, this was a special contract written not by lawyers but by the participants in the enterprise that it was to cover and intended to be understood by them and not for later dissection by lawyers. The contract is to be interpreted in the context of the community within which it operates.
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> It is for that reason that the Court looks in the evidence to find what interpretation has been applied in the operation of the contract rather than what interpretation might subsequently be drawn from its words when one party is dissatisfied with the consequences of the contract in operation.

(Footnotes omitted)

[32] As I have noted above, the only evidence as to the operation of a similar contractual clause, albeit not in a collective agreement between the parties to this litigation, was that in Mr Gardner's affidavit and neither party expressly argued that the practice adopted in the operation of that collective agreement should be taken into account in interpreting the current collective.

[33] I am left then with the need to construe the clause in question in the context of all relevant provisions of the current collective and the understanding advanced by counsel that the object of the clause was to reward long serving employees.

Discussion

[34] The strongest argument for the Union is that the wording of cl 17.1 creates a continuum during which an employee may elect to take all or part of the special leave and that it is the entitlement according to the current collective that sets the length of that leave. The position then would be the same as that for the payment for the leave which is determined at the point of time that the leave is actually taken (cl 17.2). If that interpretation is adopted it is not the anniversary of the 10, 20, 30 or 40 years that becomes critical, it is the date upon which the leave is actually taken. Thus if an employee has taken all but one day of the special leave available to that employee under the expired collective and elects to take the one day remaining under the current collective, on this interpretation, the employee would be entitled to the enhancement of the 40 extra hours.

[35] That interpretation is based on the words in cls 17.1.2 to 17.1.4, "one special holiday of … hours after the completion of … years and before the completion of … years of continuous service".

[36] The contrary interpretation of cl 17 is that the entitlement becomes vested or accrued on the anniversary date of 10, 20, 30 or 40 years but that leave must be taken within 10 years and before the next anniversary date. Otherwise, it will be lost. Clause 17.2.1 allows for an agreement of payment in lieu of the leave being taken and cl 17.4 allows for payment in lieu if the employee leaves Tatua's employment before the leave has been taken.

[37] If the current collective has come into force between two anniversary dates for long serving employees, it does not clearly have the effect of enhancing an existing entitlement because it does not expressly state that it is to have retrospective effect. The clause is ambiguous.

[38] When interpreting statutes there is a presumption against retrospectivity, embodied in s 7 of the Interpretation Act 1999, which provides that an enactment does not have retrospective effect. There is no presumption against retrospectivity in relation to contracts as parties have the ability to arrange their terms and conditions in any way they choose as long as the terms are not inconsistent with statute. As Slade J has put it in the English Employment Appeal Tribunal:[7]

> …there is no contractual inhibition on some terms introduced by the same contract having retrospective and some prospective effect and for there to be some phasing out of old terms and the gradual introduction of the new.

[39] Nevertheless the cases cited by Mr Pollak are helpful by analogy although I note that they dealt with the issue of double payments in the same document for the same work performed. In the present situation, the Court is being asked to look at two contracts rather than simply one, dealing not with double payments but long service leave entitlements.

[40] Tindall J, quoted in paragraph [23] above, states the Court requires the clear expression of an intention to provide a double entitlement. This approach is consistent with the judgment of the Court of Appeal in *Apple Fields Ltd v Counterpoint Equities Ltd*.[8] In that case, the Court considered a contract which contained one clause which required payment of a fee and another clause which required a fee if certain circumstances arose. The Court noted that if both clauses operated, then two fees would be payable under the appellant's interpretation of the contract. The Court rejected that interpretation stating that in "commercial terms the possibility of a double fee would seem very unrealistic."[9] This was part of the Court of Appeal's reliance on what is commercially realistic or what might be termed 'business common sense' in interpreting the contract. I adopt the same approach in this case.

[41] To adopt the Union's position would disadvantage employees who have used their entitlements to special leave during the currency of the expired collective and advantage those who had not used all or any of their entitlements. Such a result

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[7] *Potter v North Cumbria Acute Hospitals NHS Trust (No 2)* [2009] IRLR 900 at [86].
[8] CA 249/98, 4 May 1999.
[9] At [18].

would appear to be contrary to the intention to equally reward long service employees, an object that no doubt applied to the expired collective as well as to the current collective. I find nothing in the plain words of cl 17 which would justify such a variation of treatment. It would be contrary to business commonsense.

[42] There is no issue between the parties that employees who reach an anniversary date during the currency of the current collective receive the enhanced entitlement but I can see no mandate in the wording of cl 17 or cl 1.6 to give those employees, who were fortunate enough not to have taken all their leave under the currency of the expired collective, the right to receive the enhancements.

[43] The logic of the Union's position would also suggest that even if the leave had been fully taken during the currency of the expired collective, there would still be an entitlement to the enhanced merits under the current collective, a claim the Union has expressly declined. The issue of payment for the leave is dealt with expressly in the clause and applies at the point of time the leave is taken. It does not have the retrospective effect that the Union's interpretation would have as to the length of the leave entitlement.

[44] For these reasons, I accept Mr Pollak's submissions that the wording of cl 17 of the current collective, viewed as a matter of commercial realism in the absence of clear words to the contrary, applies only to those whose anniversary dates are reached during the currency of the current collective and not to those whose anniversary dates were reached during the currency of the expired collective. I agree with Mr Pollak that support for Tatua's position can be derived from the word "entitled" in cl 17.4 which must be taken to mean that the date of entitlement is based on the employee's anniversary of service. Those employees' entitlements are based on the expired collective and have either been taken or, if not taken, are to be based on the agreement that existed at the time those rights were accrued. If agreement can be reached between Tatua and the eligible employees for those rights to be paid for in lieu of the taking of the leave, the payment will be made on the basis of the rates provided in the current collective at the point of time that the agreement to pay in lieu is reached.

Conclusion

[45] Tatua's challenge is successful and its interpretation of the application of cl 17 of the current collective is upheld in place of the Authority's determination.

[46] I note that, although Tatua did not expressly seek costs, the Union did seek an award of costs on the defence of the challenge. I hold the tentative opinion that the resolution of this dispute was in the interests of both parties and that each should bear their own costs. If either party does not accept that view, then a memorandum as to costs should be filed and served within 30 days from the date of this judgment, with the other party having 21 days to respond.

BS Travis
Judge

Judgment signed at 11.30am on 13 June 2011