IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 56
ARC 62/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS UNION Plaintiff
AND	NORSKE SKOG TASMAN LIMITED Defendant

Hearing: 25 November 2012 and further submissions dated 16 and 21 March 2012
(Heard at Auckland)

Counsel: L J Yukich, advocate for plaintiff
Kylie Dunn and June Hardacre, counsel for defendant

Judgment: 3 April 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS

---

[1] This proceeding raises an issue as to the leave entitlements of long serving employees and shift workers following the increase to the minimum statutory annual holiday entitlement from 1 April 2007.

[2] The plaintiff contends that the parties' collective employment agreement provides for holiday entitlements in addition to the minimum statutory requirement of four weeks' annual leave now conferred by the Holidays Act 2003. The Employment Relations Authority declined to adopt the interpretation advanced on behalf of the plaintiff, finding that the leave entitlements provided for in the collective agreement were subsumed by the statutory increase in the annual holiday entitlements which took effect from 1 April 2007.

[3] A statement of claim challenging the Authority's determination was filed on 11 August 2008. The parties initially requested that the challenge be dealt with on the papers. An adjournment was subsequently granted, by agreement, pending delivery of the Court of Appeal's judgment in *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc.*[1] That judgment was delivered on 21 July 2010. Mr Yukich, advocate for the plaintiff, then advised the Court that the union was in bargaining with the defendant and had applied for facilitation. He asked that the process be allowed to run its course before either party applied further time and expense to these proceedings. That request was granted. In the event no agreement was reached. The plaintiff then filed an application seeking leave to place evidence of historical bargaining before the Court. That application was granted on 5 October 2011.[2] Judge Travis directed that the parties could file evidence as to previous negotiations, agreements and custom and practice, which they did.

The Collective Agreement

[4] Part four of the collective agreement deals with issues of leave. It provides that:

> 14.1 Annual holidays shall be paid in accordance with the Holidays Act 1981 and its amendments.
>
> 14.2 Each employee shall be entitled to annual holiday of 127.5 work hours per year (equivalent to three 42.5 hour weeks for day employees).
>
> 14.3 While on holiday an employee shall continue to receive normal salary.
>
> 14.4 An employee's holiday shall be taken at a time mutually agreed by the company and the employee. Holiday leave shall not accrue from one leave year to the next without the written approval of the company, except for amounts of leave smaller than 8.5 work hours which will automatically accrue into the next leave year.
>
> 14.5 Upon completion of FOUR (4) continuous years service with the company, each employee shall for the FOURTH and subsequent years of continuous service be entitled to an additional 42.5 work hours annual holiday per year (equivalent to one 42.5 hour week for day employees).

---

[1] [2010] NZCA 317, [2010] ERNZ 317.
[2] [2011] NZEmpC 126.

14.6 Time served as an apprentice with the company shall count as time served the purpose of this clause.

14.7 Shift employees shall be entitled to an additional annual holiday of 42.5 work hours per year.

Summary of parties' submissions

[5] The plaintiff submits that the leave entitlements contained in the collective agreement were "automatically" increased from 1 April 2007, when the minimum statutory annual holiday entitlement was increased from three weeks to four. It submits that from that date, each employee became entitled to four weeks' annual holiday and once he/she completed four years of continuous service, they became entitled to five. Shift workers became entitled to five weeks from 1 April 2007, and six on completion of four years' continuous service (namely four, plus one, plus one).

[6] The defendant submits that the contractual entitlement to an additional week of leave under the agreement has been subsumed by the statutory obligation to provide a minimum of four weeks' annual leave to all employees from 1 April 2007. The defendant denies that the entitlements under cls 14.5 and 14.7 are in addition to the current statutory entitlement, and denies that it has a contractual obligation under cl 14.7 to provide a further week of leave to employees who work shifts. It says it has provided an additional (fifth) week of leave to shift workers since 1 April 2007 in recognition of the burden that such work places on employees and their families, but submits that there is no contractual obligation to do so. It submits that as non-shift employees (day employees) receive four weeks' annual holiday a year and shift employees receive five weeks' annual holiday each year, all employees receive at least four weeks' annual holiday and accordingly Norske Skog has complied with its obligations under the Holidays Act 2003.

The statutory framework

[7] The Holidays Act 1981 was replaced by the Holidays Act 2003. The 2003 Act came into force on two dates. From 1 April 2007, it provided for a fourth week

of paid annual holidays for all employees.[3] Prior to 1 April 2007, employees had been entitled to three weeks of annual holiday. The Act did not expressly address the position of employees who had a pre-existing contractual entitlement to a fourth week of annual holiday.

[8] Section 3 states the Act's purpose as being to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with certain minimum entitlements. These include, under s 3(a), annual holidays "to provide the opportunity for rest and recreation".

[9] Section 6(1) provides that entitlements under the Act are minimum entitlements. These minimum entitlements do not prevent an employer from providing an employee with "enhanced or additional entitlements", whether specified in an employment agreement or otherwise on an agreed basis with the employee.[4]

[10] The statutory increase to four weeks' annual holiday did not automatically increase the entitlements of all employees. That is because some employees already had a contractual entitlement to four weeks' annual holiday. Rather, the effect of the amendment was to require that *all* employees receive a minimum of four weeks' annual holiday – anything extra was a matter of contract or extra-contractual agreement between the parties.

The issue

[11] The issue at the heart of this case is whether the collective agreement provided for an increase in the annual holiday entitlements for shift workers and/or employees with at least four years of continuous service (long service employees)

---

[3] Section 16, Holidays Act 2003.

[4] Section 6(2). The words "enhanced" and "additional" were examined by the Full Court of the Employment Court in *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd* [2006] ERNZ 1005; reconsidered in *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd* [2008] ERNZ 584, and, on appeal, by the Court of Appeal in *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd* [2008] NZCA 159, [2008] ERNZ 229. The Court of Appeal found that the words overlap (at [20]).

above the prevailing statutory minimum entitlement. In other words, did the parties intend to maintain relativities in the annual holiday entitlements of the three categories of employees identified in cl 14 following the increase to four weeks' statutory annual holiday from 1 April 2007?

[12] The issue arises because the parties failed to specify what was intended by way of annual holidays from 1 April 2007. Prior to that time, all day employees were entitled under cl 14.2 to three weeks' annual holiday, which coincided with the then statutory minimum. All employees with four continuous years of service were entitled to an additional week of annual holidays. Shift employees were entitled to an additional week of annual holiday.[5]

[13] If, as the defendant submits, each category of employee was entitled to four weeks' annual holiday after 1 April 2007, they would receive no more than the statutory minimum to which all employees had become entitled. And employees with four years of continuous service and shift workers, who had previously enjoyed additional annual holidays over day employees with less accrued time with the company, would be on an equal footing with other employees (absent any extra contractual agreement). Relativities between employees would, accordingly, be lost.

The factual context

[14] The factual context in which this dispute arises is set out in the agreed summary of facts and uncontested affidavits filed by the parties.

[15] The original term of the Agreement at issue in these proceedings was from 1 July 2002 to 30 June 2005. It appears that annual holidays were not discussed during negotiations for the 2002 collective agreement. The agreement was renegotiated in 2004. Annual holidays were not discussed during the course of these negotiations either, despite the fact that, at the time these negotiations took place, both parties were aware of the provisions of the Holidays Act 2003 and were aware

[5] Issues relating to shift workers with at least four years' continuous service are discussed below.

of the increase to a fourth week of statutory annual leave which was to take effect from 1 April 2007.

[16] The collective agreement was due to expire before the increase in the statutory minimum entitlement took effect. A "Variation of Collective Agreement" was entered into in December 2004, which (amongst other things) extended the term of the agreement to 7 February 2007. It also updated the public holidays clause in the agreement, by referring to the Holidays Act 2003. No change was made to cl 14, which continued to refer to the Holidays Act 1981.[6]

[17] In 2008, the parties entered into further negotiations for a new collective agreement. The term of this agreement was from 20 November 2008 to 7 February 2009. The agreement was said to be on the same terms and conditions as the then expired collective agreement (together with the variations reflected in the December 2004 document), with a number of additional changes. Clause 14 was not altered. The defendant claimed changes to cl 14 to amend the reference to the 1981 Act, to alter the minimum entitlement at cl 14.2 to four weeks, and to remove the entitlement to long service leave. The plaintiff claimed changes to increase the minimum entitlement to the statutory minimum of four weeks and to change the reference to the Holidays Act 2003. However, a stalemate was reached. The leave provisions contained within cl 14 remained the same.

[18] Prior to 1 April 2007, the collective agreement provided for annual holidays that were more favourable than the three week entitlement conferred by the Holidays Act 1981. That is because day workers began to accrue three weeks' annual holiday from commencement of employment; employees, who were shift workers, received three weeks' annual holiday as well as a further week of annual holiday in recognition of the shift role they performed in accordance with cl 14.7; and all employees received a further week of annual holiday once four years of service was completed in accordance with cl 14.5.

---

[6] The parties were at odds as to whether this document constituted an amendment or a variation, however it was generally agreed that the issue was not of direct relevance to the issues before the Court.

[19] Following the increase in the statutory minimum entitlement on 1 April 2007, the defendant provided (it says gratuitously) shift workers with five weeks of annual holiday, in recognition of the role they perform.[7]

[20] Clause 14 has been in Norske Skog's collective agreements covering employees in the Control Systems area for many years. It is accepted that it is in identical terms to the annual holidays clause contained in previous collective agreements covering such employees.

[21] The evidence relating to the ways in which annual holidays have historically been dealt with by the parties is referred to below.

Principles of interpretation

[22] In *Silver Fern Farms* the Court of Appeal observed that the failure of the parties to address the effect of a supervening increase in the minimum statutory annual leave entitlement could be categorised as giving rise to an ambiguity.[8] The Court said that this lent weight to the post-*Vector Gas Ltd v Bay of Plenty Energy Ltd*[9] argument for examining the history of the parties' dealings. It posed the question in that case as follows:[10]

> Was the additional week to continue on top of the new statutory minimum or did the parties intend that the four weeks in cl 10.4 would remain at that level despite the increase in the statutory minimum? Alternatively, the statutory increase part-way through the currency of the 2004 agreement could lead to the conclusion that something had "gone wrong" with the language of the agreement. … How was the contract to be interpreted in the new statutory context?

[23] Issues relating to the calculation of annual holiday entitlements following the amendment to the minimum entitlement in the Holidays Act 2003, have been considered in three Court of Appeal judgments – *Tramways*,[11] *Silver Fern Farms*,

---

[7] Agreed statement of facts, [15]. Mr Haslam, Human Resources Advisor Norske Skog, deposed that it was also to reflect the burden that shift work places on employees and their families.
[8] At [41].
[9] [2010] NZSC 5, [2010] 2 NZLR 444.
[10] At [41].
[11] See above n 4.

and *Service and Food Workers Union Nga Ringa Tota v Cerebos Gregg's Ltd*.[12] In those cases, the Court of Appeal has made clear that a reference to annual holidays in an agreement does not necessarily mean that the statutory minimum applies in every case. Each agreement is to be interpreted on its own terms.

[24] It is equally clear that the Court has no jurisdiction to impose contractual obligations on parties to a collective agreement. To do so would be to vary the terms of a collective agreement, in breach of s 192 of the Employment Relations Act 2000.

[25] It is the collective agreement, not the Holidays Act 2003, that provides the starting point for the interpretative exercise.[13]

Discussion

[26] On its face, cl 14 provides that each employee is entitled to three weeks' annual holiday a year and that, once each employee has completed four years of continuous service, he or she becomes entitled to an additional week of annual holiday. That extra week of holiday is said to be equivalent to one 42.5 hour week for day employees. Shift employees are entitled to an additional annual holiday of 42.5 hours per year.

[27] As from 1 April 2007, cl 14.2 constituted an employment agreement which restricted or reduced the statutory entitlements of the employees covered by that clause. Clause 14.2 was of no effect to the extent that it did so.[14]

[28] Counsel for the defendant submitted that cl 14 was clear and did not give rise to any ambiguity. I do not accept that submission. An ambiguity arises from the parties' failure to specify the effect of the rise in the statutory minimum entitlement after 1 April 2007. An issue arises as to what the word "additional" in cls 14.5 and 14.7 was intended to apply to. It could mean additional to the three weeks specified in cl 14.2 (and impliedly in cl 14.1, given the statutory rate under the Holidays Act

---

[12] [2012] NZCA 25.
[13] *Cerebos* at [17].
[14] *Silver Fern Farms* at [40].

1981 was three weeks) or additional to the current applicable statutory minimum rate. Further, there is an issue as to the intended interrelationship between cls 14.5 and 14.7, and whether it was intended that long serving employees who are shift workers are entitled to an additional week of annual leave over and above the entitlements of long serving employees who are day workers.

[29] Mr Haslam (Human Resources Advisor, Norske Skog) deposed that the defendant agreed to the annual leave claim in the 2004 collective agreement on the basis that it meant the same as that in the 2002 collective agreement. Two points can be made in relation to this. First, the subjective views of one party as to what it intended or understood its words to mean are not relevant to the contractual interpretation exercise.[15] Second, even if it was relevant, it casts no light on what the 2002 provisions meant – simply that whatever was meant in 2002 was intended (by the defendant at least) to carry over into the 2004 agreement.

[30] There are three possible explanations for the parties' failure to specifically address the impact of the 1 April 2007 statutory increase. They may have considered that no change was needed to cl 14, as the change in the minimum entitlement was not due to take effect until after the collective agreement was due to expire. They may have considered that the impending increase was sufficient to meet the disadvantageous nature of shift work and to meet the underlying purposes of long service leave. Alternatively, the parties may have intended that the pre-existing relativities between the three categories of employees identified in cl 14, and throughout previous agreements, would remain intact.

[31] While the wording of cl 14 itself does not strongly indicate which of these possibilities is to be preferred as reflecting the parties' objective intention, their history of prior dealings does.

[32] In *Silver Fern Farms*, the Court of Appeal confirmed that:[16]

> It was appropriate for the judge to take into account the undisputed evidence as to the terms of the prior instruments. Given the failure by the parties to

---

[15] *Vector Gas* at [19]-[20].
[16] At [43].

> address the effect of the increase on the statutory minimum, it was proper for the judge to consider the approach adopted by the parties over the period of nearly 40 years prior to the 2004 agreement.

[33] Counsel for the defendant accepted that the Court may have regard to the parties' prior employment agreements in determining their underlying intention.

[34] It was established that cl 14, in its current form, has been a feature of the collective agreements between the parties for many years. Mr Shakes (a long term employee at the mill) traversed the history of the provision, deposing that from 1960 onwards, an additional week of annual holiday was provided for those working shifts, in addition to the minimum two weeks' annual holiday then provided under the Annual Holidays Act 1944. He deposed that from 1963/1965 an additional week of annual holiday (service leave) was provided for employees with various qualifying periods of years of service.

[35] Mr Shakes' evidence was that when the Annual Holidays Amendment Act 1974 increased the statutory minimum from two to three weeks of annual leave, both of the additional entitlements to shift and service leave continued to be provided, although the qualifying period for service leave was adjusted. He deposed that these entitlements continued after the Holidays Act 1981 came into effect.

[36] Mr Shakes deposed that the additional week of leave for long serving employees provided for from 1965 onwards was intended as a reward for those who had attained four years of service with the company.

[37] The way in which the parties dealt with holiday entitlements over the course of a number of years, and through increases in the statutory minimum entitlements, assists in understanding the intention underlying their most recent employment agreements. As Judge Shaw held in the Employment Court in *Silver Fern Farms*:[17]

> The earlier clauses in the predecessor documents point to the genesis and aim of the clauses in their latest manifestation.

---

[17] *NZ Meat Workers and Related Trades Union Inc v Silver Fern Farms Ltd (formerly PPCS Ltd)* [2009] ERNZ 149 at [26].

[38] Clause 14 has been in the parties' collective agreements for a long time and in materially the same terms. It has consistently drawn a distinction between day workers, shift workers and long serving employees and the holiday entitlements of each. The latter two categories have historically received holiday entitlements over and above the prevailing statutory minimum rate that day workers with less than four years' continuous service have received. The extra holiday provided over the years to long serving employees has been to reward longevity of service and loyalty. The extra holiday provided to shift workers has been to acknowledge the onerous nature of that type of work.

[39] The agreement provides for other forms of leave, including long service leave under cl 15. I do not consider that this materially assists in determining the meaning to be given to cl 14, as cl 15 relates to additional special holidays following 10 to 40 years of service.[18]

[40] Counsel for the defendant submitted that the extra week of holiday conferred on shift workers from 1 April 2007 does not represent any concession as to its legal obligations. However, the fact that there has been a long history of differentiating between the holiday entitlements of the three categories of employee referred to in cl 14 (namely day workers, shift workers, and long serving employees), and of according extra holidays above the applicable statutory entitlement to the latter two categories, reflects an underlying intention to maintain relativities between the categories following any increase to the prevailing legislative minimum entitlement to annual holidays. If the additional holiday for long serving employees is to be absorbed into the statutory entitlement, the purpose of the clause, and the parties' intention, would be defeated.[19] Similarly, if the additional holiday for shift workers was to be regarded as a non-contractual entitlement that too would be at odds with the way in which the clause has applied over time.

[41] It is clear that the parties were aware of the impending increase to the minimum annual holiday entitlement at the time they negotiated the 2004 agreement,

---

[18] A similar clause existed in the *Silver Fern Farms* collective agreement above n 17, at [12].
[19] As the Chief Judge observed in *Robinson v Capital and Coast District Health Board* [2010] NZEmpC 3 at [15]-[16].

and subsequently when some amendments were agreed in 2007. Despite this, they did not provide, as they could have, for an increase to four weeks in cl 14.2. This weighs in favour of the interpretation advanced by the defendant. However, as the Chief Judge held in *National Distribution Union Inc v Capital and Coast District Health Board*:[20]

> The dominant and inescapable element that determines the case, however, is the clear intention of the parties to differentiate the annual holiday entitlements of ... employees.

[42] In *Silver Fern Farms*, the parties had failed to address the impending 2007 changes expressly in their 2004 agreement. They referred to the Holidays Act 2003 but left cl 10.4 unaltered by continuing to refer to the four weeks' holiday to be taken in conjunction with or separately from the first three weeks' holiday. Counsel for the employer (unsuccessfully) argued that this failure indicated that the parties intended to cap the annual holidays at four weeks after 1 April 2007. Judge Shaw held that to interpret cl 10 as imposing a cap of four weeks would rob the words "additional week of annual holiday" of meaning, and would be inconsistent with the intention of the parties to confer more annual holiday on qualifying employees than non qualifying employees.[21]

[43] The history of the parties' dealings in the present case, as in *National Distribution Union*, squarely points to an intention to differentiate between categories of employees and to maintain relativities in relation to their holiday entitlements. This intention is reflected in the wording of cl 14.1, and the parties' agreement that annual holidays were to be paid in accordance with the Holidays Act 1981 "and its amendments". This suggests that the collective agreement would comply with both existing and future legislative requirements coming into force during its currency. The underlying intention is reinforced by the reference (in cl 14.2) to the then applicable three week minimum entitlement.[22]

---

[20] [2010] NZEmpC 2 at [24]. This intention was primarily drawn from the history of the parties' contractual dealings.
[21] *Silver Fern Farms*, above n 1, at [47].
[22] See too *Cerebos* on this point, at [18], where the Court of Appeal observed that, by specifying in the introductory notes to the collective employment agreement that the leave provisions were to be "in accordance with prevailing legislation", the parties intended that the collective agreement would comply with both existing and future legislation to come into force during the agreement's currency.

[44] The fact that the word "annual" is used in cls 14.5 and 14.7 does not mean that the extra holiday referred to in those provisions was intended to equate to the annual holiday provided for under the Holidays Act. While the parties could have agreed to reward long service and recognise the demanding nature of shift work by some other mechanism (such as a one-off payment) the fact that they chose to describe it as annual holidays cannot be regarded as fatal. It simply describes how the reward/recognition is to be constituted and may be taken.[23] It does not lead to a conclusion that the annual holiday referred to in cls 14.5 and 14.7 equates to the holiday provided for in cl 14.2. That is because it is the underlying intention of the parties in relation to the purpose of the holiday that is pivotal, rather than how it is described. This point was emphasised by the Chief Judge in *National Distribution Union*[24] and *Robinson*,[25] and by Judge Shaw in *Silver Fern Farms*.[26]

[45] The distinct nature of the holiday entitlements referred to in cl 14 is reflected in the lack of cross-reference between the holiday entitlements provided for in cls 14.5 and 14.7, and the statutory holiday entitlement contained within cl 14.2. This omission provides a point of distinction with the *Tramways* case. There the contractual provisions clearly linked the statutory entitlement of three weeks' holiday to the additional one week of holiday.

[46] Further, in *Tramways*, cl 21.2 made it clear that the extra week, in addition to the three weeks specified in cl 21.1, was "in recognition of the nature of the work", namely shift work, and cl 21.2 expressly stated that the additional week provided for, in combination with the three weeks in cl 21.1, made a total of four weeks per year. In these particular circumstances, the Employment Court held that the provisions unambiguously provided for four weeks' leave, and that the parties had not agreed to five.

---

[23] *Robinson* at [17].
[24] At [24].
[25] At [14].
[26] At [40]. In *National Distribution Union* the Chief Judge also noted that long service leave was designed to operate as an incentive for an employee to remain in long term employment with the same employer, and to accordingly benefit the employer (by not having to incur the expenses associated with appointing and training new staff) at [10].

[47] In the present case, the sequencing of entitlements in cls 14.1 to 14.7 reinforces the underlying intention that the entitlements were intended to be cumulative, and in addition to the applicable statutory rate.

[48] The admitted purpose of the additional one week of holiday in cl 14.5 was to reward long service and was intended as a special benefit.[27] That is how it has been dealt with for many years. It was a contractually agreed reward.[28] I find, having regard to the context and history of cl 14, that the benefit contained within cl 14.5 was intended to survive the legislative changes introduced from 1 April 2007, as it had previously survived increases to the minimum statutory leave entitlements (as confirmed by Mr Shakes).

[49] While the extra holiday for shift workers in the present case is for rest and recreation, that (of itself) does not mean that the additional week referred to in cl 14.5 is subsumed within the statutory minimum entitlement increased from 1 April 2007. As the Court of Appeal observed in *Cerebos*:[29]

> [In *Tramways*] the Employment Court concluded the relevant clause specifying that a worker's gross entitlement was "a total of 4 weeks leave per year" was sufficient recognition of the nature of the work consistent with the statutory purpose of annual holidays – namely rest and recreation. That was because it was expressly stated in the contract to be "in recognition of the nature of the work". *However, that conclusion in a different contractual setting is not a justifiable or logical premise for concluding that, because the statutory purpose of the benefit is rest and recreation, the contractual entitlement must therefore count towards the minimum annual holiday entitlement required by the legislation* ... Judge Couch erred in focussing his analysis on the statutory purpose or nature of the leave, rather than the contractual purpose of granting the additional benefit.

[50] And that:[30]

> The statutory nature or purpose of annual leave should not be confused with the parties' contractual purpose of granting an extra week's leave of that nature.

---

[27] As in *Cerebos* at [21].
[28] See *Cerebos* at [25].
[29] At [39]-[40]. Emphasis added.
[30] At [23].

[51] Section 6(2) of the Holidays Act 2003 recognises that an employer may provide an employee with an enhanced or additional entitlement on a basis agreed with the employee. In the present case, that agreement is reflected in the clear distinction drawn within cl 14 between the categories of employee and the differing holiday entitlements applying to each, reflecting an intention that qualifying employees would receive more holidays than non-qualifying employees. Unlike the situation in *Tramways*, where there does not appear to have been any evidence before the Court as to the history of dealings between the parties and the way in which additional holidays had been dealt with over time, in the present case the evidence shows a clear pattern of differentiating the holiday entitlements of long serving employees, shift workers and day workers.

[52] When viewed in context, it is apparent that the parties intended cl 14.2 to set the base entitlement for all employees at the prevailing statutory minimum rate, and to provide extra holiday entitlements for shift workers. While such an interpretation requires three to be read as four in cl 14.2, it does less violence to the agreement than an interpretation that involves reading cls 14.5 and 14.7 as being of no effect from 1 April 2007, in circumstances where no such limitation is expressed within the provision and such an interpretation would be inconsistent with the way in which cl 14 has operated consistently over time.

[53] Mr Shakes' unchallenged evidence was that the parties have a history of conferring an extra week of holiday on shift workers who have achieved four continuous years of service. That supports an interpretation of cl 14.7 that such workers are entitled to the prevailing statutory minimum rate (from 1 April 2007, four weeks), plus an additional one week by virtue of their role as shift workers, plus an additional one week as a reward for long service. Such an interpretation is also consistent with the evident thrust of cl 14, reflecting relativities between categories of employees, is consistent with the sequencing of entitlements in the provision, and is consistent with the underlying purpose of the entitlements (to reward long service and to recognise the arduous nature of shift work). Interpreting cl 14 as conferring no greater entitlement on shift workers who have achieved four years of continuous service than long serving day workers would cut across the underlying intention of the parties, and would fail to reward such employees for their long service.

[54] This leads to a conclusion that shift workers are entitled to an additional week of annual holiday once they have completed four years of continuous service (namely four, plus one, plus one).

Conclusion

[55] The collective agreement specifies an annual entitlement to three weeks' holiday for day employees. At the time the agreement was entered into, this equated to the applicable minimum statutory rate. Clause 14.2 was declaratory of the statutory minimum entitlement then existing for all employees.[31] The agreement provided for additional annual holiday entitlements for shift workers and long service employees.

[56] When read in context, and against the backdrop of prior instruments and the history of dealings between the parties, the "additional" holidays referred to in cls 14.5 and 14.7 are in addition to the statutorily aligned entitlement in cl 14.2. The collective agreement distinguishes between base entitlement to annual holidays and additional entitlements to annual holidays for long service employees and shift workers. In light of the conclusions I have reached, it is unnecessary to deal with a subsidiary argument advanced by the plaintiff that the defendant was estopped by convention from advancing its interpretation of cl 14.

Result

[57] The plaintiff sought a ruling that cl 14.2 of the collective agreement was varied by the Holidays Act 2003 from three to four weeks, or was of no effect, and that cls 14.5 and 14.7 were not varied by the Holidays Act.

[58] As from 1 April 2007, cl 14.2 constituted an employment agreement which restricted or reduced the statutory entitlements of the employees covered by that clause. Clause 14.2 was of no effect to the extent that it did so.

---

[31] *Cerebos* at [19].

[59] Day employees are entitled, from 1 April 2007, to four weeks' annual holiday a year. Long service employees, who are day workers and who have four years' continuous employment with the defendant company, are contractually entitled to five weeks' annual holiday a year from 1 April 2007.

[60] Shift workers are contractually entitled to five weeks of annual holiday a year from 1 April 2007.

[61] Shift workers who have four years' continuous employment with the defendant company are contractually entitled to an additional one week of annual holiday a year from 1 April 2007, additional to the five weeks' annual holiday a year they are otherwise entitled to.

Costs

[62] If any issue of costs arises, and cannot otherwise be agreed between the parties, they may be the subject of an exchange of memoranda, with the plaintiff filing a memorandum within 60 days of the date of this judgment, and the defendant filing within a further 30 days.

Christina Inglis
Judge

Judgment signed at 2pm on 3 April 2012