IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 114
CRC 2/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	THE SALVATION ARMY Plaintiff
AND	RITCHIE STEWART AND RAYMOND JOHNSTONE Defendants

Hearing: 11 July 2011
Supplementary submissions received 13 and 16 April 2012.
(Heard at Wellington)

Appearances: Tim Clarke, counsel for the plaintiff
Peter Cranney, counsel for the defendant

Judgment: 18 July 2012

JUDGMENT OF JUDGE A A COUCH

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[1] This case concerns the entitlement of the defendants to annual leave under their employment agreements with the plaintiff. Those agreements provide for three weeks annual holidays "in accordance with the Holidays Act 1981" and for "an additional week of annual leave" after the completion of five years' service.

[2] A dispute has arisen following the change to the Holidays Act 2003 which increased the minimum statutory entitlement of employees to annual holidays from three to four weeks. The defendants, who both have more than five years service, say they are now entitled to five weeks annual holiday. The plaintiff says they remain entitled to only four weeks.

[3] The Employment Relations Authority upheld the defendants' claim and declared that they were entitled to five weeks annual holiday.[1] The plaintiff challenges that determination. The matter proceeded before the Court as a hearing de novo.

Facts

[4] The parties very helpfully supplied an agreed statement of facts which is:

- By an individual employment agreement in writing dated 10 March 1998, the plaintiff agreed to employ the first defendant as an Aftercare Coordinator for the plaintiff's Bridge Programme in Christchurch. The first defendant remains in that role, and also coordinates the STEPS programme and supervises two social workers.

- By an individual employment agreement in writing dated 20 March 2003, the plaintiff agreed to employ the second defendant as a case worker for the plaintiff's Bridge Programme in Christchurch. The second defendant is currently employed as a Senior Case Worker.

- Each defendant has been in continuous service since commencing employment with the plaintiff.

- Apart from the last word in the clause, the defendants' individual employment agreements both contain an identical annual leave clause:

  "Annual leave entitlement, in accordance with the Holidays Act 1981, is 3 weeks leave after the end of each year of employment for full time employees, pro rated for part time employees.

  An additional week of annual leave shall be allowed on completion of the 5th and subsequent years of current and continuous service.

  Annual leave must be taken at times approved by The Salvation Army and must include one period of at least two weeks in each year. The employee shall not accumulate annual leave from one anniversary year to another unless by written agreement with The Salvation Army.

  Annual leave entitlement of an existing employee shall be transferred to this agreement [contract]."

[1] [2011] NZERA Christchurch 3.

- The defendants' individual employment agreements have not been amended or varied since commencement of their employment with the plaintiff.

[5] The parties also provided an agreed bundle of documents containing the full employment agreements.

The legislation

[6] The employment agreements refer to the Holidays Act 1981. Section 11 of that Act was:

> **11. Entitlement to annual holidays with pay**
>
> Except as otherwise provided in this Act, every worker shall at the end of each year of his employment by any one employer become entitled to an annual holiday of 3 weeks on holiday pay calculated in accordance with this Act.

[7] This was the statutory provision in force when each of the defendants entered into his employment agreement with the plaintiff. On 1 April 2003, the Holidays Act 2003 came into force. As enacted, s 16(1) of that Act provided:

> **16 Entitlement to annual holidays**
>
> (1) After the end of each completed 12 months of continuous employment, an employee is entitled to not less than 3 weeks' paid annual holidays.

[8] When the Holidays Act 2003 was enacted, it also contained provisions increasing the minimum entitlement to annual holidays to four weeks after a further four years. Thus, on 1 April 2007, s 16(1) of the 2003 Act became:

> **16 Entitlement to annual holidays**
>
> (1) After the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks' paid annual holidays.

[9] The 2003 Act also contains the following relevant provision:

> **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.

Discussion and decision

[10] In his primary submissions on behalf of the plaintiff, Mr Clarke relied substantially on the reasoning in my decision in *Cerebos Greggs Limited v Service and Food Workers' Union Nge Ringa Tota*[2].

[11] That reasoning focussed on the nature and purpose of the additional week's leave conferred on longer serving employees and whether that satisfied the minimum requirements of the Holidays Act after 1 April 2007. Mr Clarke submitted that the additional week's leave was clearly for the purpose of rest and recreation and was therefore "annual holiday" as that term is explained in s 3 of the Act. As both defendants were entitled to that additional week's leave by virtue of their long service, he submitted that the employment agreements provided the minimum entitlement under s 16 of the Act and were therefore unaffected by s 6(3).

[12] After those submissions were made, the Court of Appeal allowed an appeal against my decision in the *Cerebos Gregg's* case[3]. They found that I had erred in principle by "focussing primarily on the statutory nature and purpose of annual leave instead of construing the relevant provisions according to their plain meaning and purpose."[4] As the Court of Appeal put it earlier in their decision; "The critical question was whether the parties' agreed purpose was to provide long serving employees with a special benefit."[5]

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[2] [2011] NZEmpC 55.
[3] *Service and Food Workers Union Nga Ringa Tota v Cerebos Gregg's Limited* [2012] NZCA 25.
[4] At [47].
[5] At [24].

[13] The other ground on which the appeal was allowed was that, in relying on the decision of the full Court on reconsideration of the *Tramways* case[6], I had "failed to apply what was by 2010 a settled line of authority in [the Court of Appeal] and the Employment Court." The Court of Appeal was of the view that the *Tramways* case ought to have been distinguished and that the reasoning adopted in a series of other decisions[7] was more properly applicable. They also said "Parties to litigation in the Employment Court are entitled to a consistent approach to construction of largely similar contractual instruments."[8]

[14] As this decision of the Court of Appeal impacted significantly on the arguments presented at the hearing of this matter, I granted counsel's request to make further submissions in light of it. They were also invited to make submissions on the relevance to this case of Judge Inglis' decision in *Eastern Bay Independent Industrial Workers Union Inc v Norske Skog Tasman Limited*,[9] which had then just been delivered. I am grateful for the supplementary submissions counsel made.

[15] For the plaintiff, Mr Clarke submitted that both the *Cerebos Gregg's* case and the *Norske Skog* case were distinguishable on their facts. He drew my attention to differences in the introductory notes to the annual holidays provisions of the employment agreements in each case. He also submitted that, in contrast to the other cases, there was no evidence in this case of the parties' intention that the contractual annual holiday entitlement would increase following legislative change. In the same vein, he submitted that there was also no evidence that the parties intended the additional week of leave in recognition of long service to continue in effect following any legislative change.

[16] For the defendants, Mr Cranney submitted that there was no appropriate basis on which to depart from the Court of Appeal decision in the *Cerebos Gregg's* case. He referred to paragraph [18] of that decision where the Court of Appeal found it

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[6] *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Limited* [2008] ERNZ 584.
[7] *National Distribution Union Inc v Capital and Coast District Health Board* [2010] ERNZ 499, *Robinson v Capital and Coast District Health Board* [2010] ERNZ 507 and *Silver Fern Farms Limited v New Zealand Meat Workers and Related Trades Unions Inc* [2010] ERNZ 317 (CA).
[8] At [48].
[9] [2012] NZEmpC 56.

significant that the collective agreement in question specified that the leave provisions were to be "in accordance with *prevailing* legislation." Mr Cranney submitted that there was a direct parallel in this case because the parties had recorded in their employment agreements under the heading "General duties of the parties" that they would observe "regulatory provisions" including "Acts of Parliament". This, he said should be taken to mean the provisions of statutes as applicable from time to time.

[17] Mr Cranney then referred to the replacement of the Holidays Act 1981 by the Holidays Act 2003 and submitted that the legal issue arising out of that change was the same in this case as in the *Cerebos Gregg's* case, namely whether the extra week's leave for long serving employees ceased to be an enhanced or additional entitlement[10] and was instead absorbed within and became part of the four weeks' annual holidays provided for after 1 April 2007 in s 16(1) of the 2003 Act. Mr Cranney submitted that the answer in this case must be the same as the Court of Appeal found it to be in the *Cerebos Gregg's* case and in the other cases approved by the Court of Appeal in that decision. The employment agreements in question provide a special benefit for service which is preserved, not eliminated, on a proper construction of the documents.

[18] In deciding this matter, I must be guided by the decision of the Court of Appeal in the *Cerebos Gregg's* case. The ultimate issue is the meaning and application of the employment agreements between the parties. In deciding what that should properly be, my primary focus must be on the terms of the agreement. If their meaning and purpose is plain, that should be given effect, subject only to compliance with any applicable statute.

[19] The meaning of a contract is to be determined as at the time it is formed. In this case, both employment agreements were concluded while the Holidays Act 1981 was in force and the Holidays Act 2003 was not in contemplation. This was expressly acknowledged in the agreements where the annual leave entitlement was expressed to be "in accordance with the Holidays Act 1981". In making the general commitment to observe statutory obligations contained in the general provisions of

[10] This being a reference to s 6(2) of the Holidays Act 2003.

each agreement, however, I find that the parties intended to comply with any other statutory requirements as to annual holidays which might be substituted for those in the 1981 Act. This reference to the Holidays Act 1981 and the subsequent reference to "3 weeks leave" was intended to be declaratory of the statutory minimum at the time the agreements were concluded and not to the exclusion of any subsequent statutory obligation which might overtake it.

[20] The second issue is what the parties intended by the second sentence of the annual leave clause:

> An additional week of annual leave shall be allowed on completion of the 5th and subsequent years of current and continuous service.

[21] The meaning of this provision and its purpose are plain from the words used. The parties intended that an employee who had completed five years' service should receive one more week of annual holiday than an employee with less than five years' service. In terms of s 6(2) of the 2003 Act, that extra week was an enhanced entitlement and, prior to 1 April 2007, there is no other way in which it could sensibly have operated.

[22] There is nothing to suggest that the parties intended that provision of the annual leave clause to operate differently after 1 April 2007. The original intention should therefore be given the same effect after 1 April 2007 as it had prior to that date. Employees who had completed five years' service should receive one more week's annual leave than those who had not. As those who had not completed five years service became entitled on 1 April 2007 to four weeks' annual holidays, it follows that those who had completed five years' service became entitled to five weeks' leave.

Result

[23] The challenge is unsuccessful. Both defendants are entitled to five weeks' annual leave. In the case of Mr Stewart, that entitlement accrued on 10 March 2008 being the next anniversary of his employment after 1 April 2007. In the case of Mr

Johnstone, it accrued on 20 March 2008, being the date on which he completed five years' service.

Comment

[24] I commend the parties and counsel on the manner in which this litigation was conducted. The provision of a brief, agreed statement of facts and succinct, focussed submissions enabled the hearing to be efficient and economical. Counsel were not to know then that the Court of Appeal would give the decision it did in the *Cerebos Gregg's* case but they responded to it with equally concise and thoughtful submissions which I found very helpful.

Costs

[25] The defendants are entitled to a contribution to the costs they have incurred in resisting the plaintiff's challenge. I expect the parties and counsel will use their best endeavours to agree costs but, if that is not possible, Mr Cranney should file and serve a memorandum within 30 working days after the date of this decision. Mr Clarke will then have a further 20 working days in which to respond.

A A Couch
Judge

Signed at 3.30pm on 18 July 2012.