IN THE EMPLOYMENT COURT
WELLINGTON

WC 7/09
WRC 21/08
WRC 39/08

WRC 21/08 IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
WRC 39/08 IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	NZ MEAT WORKERS AND RELATED TRADES UNION INCORPORATED Plaintiff
AND	SILVER FERN FARMS LTD (FORMERLY PPCS LTD) Defendant

Hearing: 17 February 2009
(Heard at Wellington)

Appearances: Megan Gundesen, Counsel for Plaintiff
T P Cleary, Counsel for Defendant

Judgment: 20 April 2009

JUDGMENT OF JUDGE C M SHAW

Introduction

[1] This is an application for declarations about the meaning and effect of the annual holiday clauses in two collective agreements. The plaintiff has challenged an Employment Relations Authority determination (WA 76/08, 29 May 2008) which interpreted the first agreement (the 2004 CA). The Authority found that additional leave granted for a period of continuous service met the minimum annual leave

requirement of the Holidays Act 2003 and that the clause in question capped the entitlement to such employees at 4 weeks.

[2] Following that determination the question of the interpretation of the second agreement (the 2007 CA) was removed from the Authority and both have been heard together.

[3] The dispute between the parties is whether clause 10 in both agreements entitled employees with 6 years' continuous service to an extra week's holiday a year in addition to the 4 weeks' annual holiday.

[4] The issue is whether as a result of the change to the Holidays Act 2003 union members at the Silver Fern Farms Ltd Hawera plant who have completed 6 years' current continuous service are entitled to 4 or 5 weeks' annual holidays per year.

[5] The plaintiff says that the clauses mean that those employees who have been employed for at least six consecutive seasons are entitled to an extra week of annual holidays over and above the 4 weeks' annual holidays minimum mandated by the Holidays Act 2003 since 1 April 2007.

[6] The defendant says that the clause means that qualifying employees are only entitled to 4 weeks' annual leave which coincides with the 4 weeks' annual holiday minimum in the Holidays Act 2003.

[7] The plaintiff seeks three declarations:

> *(a)* *A declaration that the further holiday of one week per annum in recognition of six or more years of current continuous service is not annual leave within the meaning of subpart 1 of Part 2 of the Act.*
>
> *(b)* *A declaration that the further holiday of one week per annum is additional to and not part of the 4 weeks' annual holiday conferred by the Act (after 1 April 2007).*
>
> *(c)* *A declaration that if there is a term in the earlier collective and the latest collective limiting the combined total of the annual holidays as defined in the Act and the additional further holiday of one week per annum in recognition of 6 years continuous service (which is denied), such term excludes, restricts or reduces the employees'*

entitlements under the Act and therefore pursuant to section 6(3)(a) of the Act has no effect to the extent that it does so.

The facts

[8] The plaintiff is a registered union which represents approximately 300 employees at the Hawera meat processing plant. Over 120 members of the union have been employed at the plant for at least six consecutive seasons. The plant was owned by Richmond Limited until 2003 when that company was bought by PPCS Limited. In 2008 PPCS became Silver Fern Farms Limited.

[9] The 2004[1] and 2007[2] collectives which are in issue in these proceedings are standard meat workers' agreements. The 2004 collective agreement came into force after the Holidays Act 2003 was enacted. That Act increased minimum annual holidays from 3 weeks to 4 weeks from 1 April 2007.

[10] Part 3 of each agreement deals with all leave including annual holidays in clause 10. The only statute referred to in Part 3 is the Holidays Act 2003. The 2007 version of clause 10 made two changes from the 2004 version. The relevant parts of clause 10 are set out with the 2007 changes noted in bold:

> *10.1 Except as specified in this clause, annual holidays shall be allowed in accordance with the Holidays Act 2003.*
>
> *10.2 At the end of each year of employment with the Company, an employee shall be entitled to three **[four]** weeks annual holiday.*
>
> *10.3 Annual holidays shall be paid in accordance with the Holidays Act 2003.*
>
> *10.4 An employee covered by this clause shall, upon completion of 6 years current continuous service with the Company, be entitled for the sixth and subsequent years to an additional week of annual holiday. The fourth week's holiday may be taken in conjunction with or separately from the first three weeks holiday as agreed between the Plant Manager and the employee, provided that the employee may elect to be paid in lieu if taking the fourth weeks holiday. **[Subject to Court Final Decision]***
>
> …

[1] Richmond Limited Hawera Collective Employment Agreement 20 December 2004 – 20 December 2007
[2] PPCS Limited Hawera Collective Employment Agreement 1 October 2007 – 30 September 2009

[11] The clause 10.4 provision of an additional week of annual holiday upon completion of 6 years' current continuous service is referred to by the parties and in this judgment as the continuous service leave clause.

[12] Clause 11 of both agreements provides another form of leave recognising more than 12 years' service:

> ***LONG SERVICE LEAVE***
>
> *11.1 Employees shall be entitled to long service leave in accordance with the following scale:*
>
> *One holiday of two weeks after the completion of 12 years and before the completion of 20 years current continuous service with the Company.*
>
> *One holiday of three weeks after the completion of 20 years and before the completion of 25 years current continuous service with the Company.*
>
> *One holiday of four weeks after the completion of 25 years and before the completion of 30 years current continuous service with the Company.*
>
> *One holiday of five weeks after the completion of 30 years and before the completion of 35 years current continuous service with the Company.*
>
> *One holiday of six weeks after the completion of 35, 40, 45, 50, 55 and 60 years.*
>
> *11.2 Payment for all such leave shall be as provided in clause 10.3.*
>
> …

[13] Mr Woodhead, the president of the Hawera Meatworkers Union, a sub-branch of the plaintiff union, gave evidence of the history of the continuous service leave provision. It has existed in various forms in awards and collective agreements since 1966.

[14] From 1966 until 1985 the awards contained a clause which began with the statement that the provisions of the relevant Act governing annual holidays should apply with exceptions. These exceptions included an annual holiday 1 week longer than that provided in the statute for employees with specified periods of continuous

service. This was referred to as the *"additional week's holiday"* until the 1970 award.

[15] In 1970 a provision for long service leave was included in the award to give 2 or more weeks' *"special holiday"* for employees with specified numbers of years of continuous service. This meant that employees with up to 6 years' continuous service had their service recognised under the annual holidays provision and employees with 12 years or more service were recognised by long service leave. The annual holidays clause entitled the employees in the former category to 3 weeks' holiday instead of the 2 weeks under the Annual Holidays Act 1944. That third week's holiday could be taken separately or in conjunction with the first 2 weeks' holidays.

[16] From 1970 the holidays provisions in the awards remained unchanged until 1985 when what the parties refer to as a "cash-up" clause was added. In lieu of the extra week of annual holiday granted for continuous service the employer could agree to pay wages to an individual employee. That scheme has continued until the present although since 1994 in the form of collective agreements rather than awards.

Principles of construction

[17] The principles applied by this Court in interpreting collective agreements were summarised by a full Court in the *New Zealand Tramways*[3] case:

> *The starting- point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of the entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectively, the aim of the transaction;…*

[3] *New Zealand Tramways and Public Transport Union Inc v Transportation Auckland Corporation Ltd* [2006] ERNZ 1005 at para [16]

[18] In *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd*[4] the Court of Appeal described the use of the surrounding circumstances to ensure the natural meaning of the words is correct as "cross-checking."

[19] In *ASTE v Chief Executive of Bay of Plenty Polytechnic*[5] Judge Colgan (as he then was) held that the interpretation of an agreement should not be narrowly literal but should accord with business common sense. He went on to say:

> *… The interpretation, rather than being based simply on dictionary meanings and grammar, should fulfil the purpose of the contract. Even if the drafting is inept, the Court should be able to give effect to the underlying intent. Moreover, if a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find a more liberal interpretation which satisfies business common sense and fulfils the parties' purpose.*

[20] I also recognise that:[6]

> *…employment agreements are often the product of a history of instruments of varying sorts by which the parties have attempted to define their relationship. The result may be a document which is a mix of new provisions designed to meet changing statutory or industrial requirements grafted onto existing and long-standing provisions.*

[21] These principles apply against the background of s101(d) of the Employment Relations Act 2000 ("the Act") which provides that one of the objects of Part 9 of the Act is "*to ensure that the role of the Authority and the Court in resolving employment relationship problems is to determine the rights and obligations of the parties rather than to fix terms and conditions of employment*."

The legislative framework

[22] The application of the annual leave part of the Holidays Act 2003 to clauses in collective agreements dealing with entitlements to annual holidays has been dealt with recently by the Court of Appeal.

[23] In *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd*[7] the

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[4] [2001] NZAR 789 (CA)
[5] [2002] 1 ERNZ 491 at 500
[6] *New Zealand Merchant Service Guild IUOW Inc v Interisland Line A Division of Tranz Rail Ltd* [2003] 1 ERNZ 510 at 513-4
[7] [2008] ERNZ 229

Court of Appeal interpreted annual holiday clauses similar to those in the present case in the light of the provisions for annual holidays in the Holidays Act 2003. It held that the terms *"enhanced"* and *"additional"* with reference to entitlements to annual holidays in s6(2) of the Holidays Act overlapped and there was no absolute distinction between them.

[24] After the Court of Appeal referred the case back to the Employment Court the full Court held in a subsequent decision[8] that:

> …
>
> - *Since 1 April 2007 the Holidays Act has provided for a statutory minimum of 4 weeks' annual holiday for all employees.*
> - *The Holidays Act contemplates that employers may provide enhanced or additional entitlements by agreement and these are enforceable by the employees rather than a Department of Labour inspector as they are separate and distinct from the minimum entitlement.*
> - *The question of whether an agreement does provide such an enhanced or additional entitlement and the scope of the entitlement is dependent not on the Act but on the wording of the agreement.*

Predecessor awards and collective agreements

[25] Mr Cleary submitted that the parties' mutual intent can be ascertained by objectively analysing the words used. If the meaning of the words are clear, evidence of previous agreements or negotiations may not have a bearing on the interpretative question. For that reason he submitted that apart from providing some context Mr Woodhead's evidence cannot assist in resolving the interpretation of clause 10.

[26] I hold that this is a case where the history of predecessor documents is relevant and useful because it explains the setting against which the 2004 and 2007 agreements were made. The earlier clauses in the predecessor documents point to the genesis and aim of the clauses in their latest manifestation. This is not evidence

[8] *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd* AC 48/08, 12 December 2008 at para [15]

of negotiations which led up to the finalising of these particular clauses which would be prohibited from being considered in interpreting collective agreements. Instead it is part of the factual matrix and is an objective guide to the intention of the parties.

[27] In this case history shows that, from its earliest appearance, the continuous service clause was intended to reward employees for a specified period of service by giving them either 1 extra week's holiday a year or 1 week's extra pay.

[28] From 1966 the awards provided for an additional week's holiday. From 1970 they expressly gave 3 weeks' holiday to employees with continuous service instead of the 2 weeks provided by the holidays legislation.

[29] It is apparent that the aim of the earlier awards was to give an additional or extra entitlement either by way of holiday or money to recognise years of continuous service. This same aim was evident in the 2004 collective agreement. When that collective agreement was entered into, the 2003 Act gave a minimum annual holiday of 3 weeks and all employees were entitled both in law and under the collective agreement to 3 weeks' annual holiday. Clause 10.4 gave those with 6 years' continuous service an additional entitlement of 1 week of annual holiday.

Meaning of clause 10.4

[30] Mr Cleary submitted that, although there are two collective agreements to be interpreted in this proceeding, the Court should begin by interpreting clause 10 in the 2004 version. He argued that by consciously referring to the Holidays Act 2003 in the 2004 collective agreement the parties must be taken to have known of the changes which were to occur on 1 April 2007 but in spite of this they left clause 10.4 unchanged by continuing to refer to the fourth week's holiday to be taken in conjunction with or separately from the first 3 weeks' holiday.

[31] This failure of the parties to address the impending 2007 change shows, in his submission, that they intended to cap the annual holidays at 4 weeks after 1 April 2007. Mr Cleary says that having interpreted the 2004 collective agreement in this way that interpretation will apply to the 2007 collective agreement.

[32] Mr Cleary analysed clause 10 as follows:

- There is a distinction between annual holidays in clause 10 and the long service leave in clause 11.
- Clause 10 deals exclusively with annual holidays which are capped at the prevailing minimum in clause 10.2.
- Clause 10.3 provides that all employees' annual holidays including the *"additional week of annual holidays"* referred to in clause 10.4 are to be paid in accordance with the payment machinery provisions of the Holidays Act 2003.
- He accepted that at the commencement of the 2004 agreement this additional week represented an additional or enhanced entitlement.
- The reference in clause 10.4 to the additional week as *"the fourth week's holiday"* shows that unambiguously the *"additional week of annual holiday"* represents a fourth week of annual holiday rather than a fifth week.
- The plain meaning of clause 10 read objectively as a whole and in the context of the remainder of the document is that the parties have agreed that those with the required continuous service were entitled to 4 weeks' annual holidays when the 2004 agreement came into force and that the status quo would be maintained even after Parliament increased the minimum.
- The ability to cash up the entitlement does not destroy or distort its characterisation as annual holidays as it was in the employee's sole prerogative to do this. The employee was still entitled to paid time off work for an additional fourth week's holiday for rest and recreation after 1 April 2007.

[33] In his submission each of these factors show that the clause 10.4 holiday is annual leave and not intended to be additional to the statutory minimum.

Discussion

[34] Although in both collective agreements the continuous service leave clause is labelled as an annual holiday it is treated differently from annual leave. The history of the clause since 1966 explains how this occurred. The additional leave for continuous service was always calculated with reference to the minimum annual holidays allowed by statute. As it represented another week of holidays per annum it is understandable that it was included and referred to as an annual holiday.

[35] In contrast, the long service leave entitlement in clause 11 is a one-off extra holiday when each specified service anniversary is reached. Long service leave is not a holiday taken annually.

[36] I do not accept that clause 10 is unambiguous. It is sufficiently unclear for the parties to have left the interpretation to the Court when they could not agree on this when negotiating the 2007 collective agreement. The ambiguity arises because from 1 April 2007 the words *"additional week of annual holidays"* in clause 10.4 did not tally with the reference to 3 weeks' holiday referred to in the second part of clause 10.4. Since then the ordinary meaning of the words in the second part conflicted with the first part of clause 10.4 and rendered the notion of an additional holiday redundant. Employees who were entitled to an extra holiday in March 2007 were not entitled to it in April 2007 following the change to the minimum annual holidays. Such a diminution in holiday entitlements would require express words and the agreement of affected employees.

[37] Further, because the parties had not provided for the anticipated statutory increase the clause 10.2 reference to 3 weeks' annual holiday in the 2004 agreement was not in accord with the Holidays Act 2003 after 1 April 2007. From then the reference to 3 weeks' holiday was out of date. For these reasons it is necessary to construe clause 10.4 to give effect to its underlying intent.

[38] On behalf of the plaintiff Ms Gundesen pointed out that clause 10.4 is in two parts. Its first sentence gives the substantive entitlement to continuous service leave: an additional week of annual holidays. In her submission the second part of clause

10.4 describes how the additional week's holiday may be taken. It does not limit the total leave but provides a mechanism for the use of the additional week given for recognition of service including the ability to cash up the entitlement.

[39] I agree with Ms Gundesen that when read in this manner clause 10.4 makes sense. It is not a literal interpretation of the second half of clause 10.4 but does give effect to the underlying intent.

[40] I conclude that the intent of clause 10 of the 2004 agreement was to provide annual holidays to all employees as required by statute and to recognise continuous service of eligible employees by granting another week's holiday each year additional to the statutory entitlement.

[41] Although the continuous service leave is called an additional week of annual holiday it was not intended to be annual holiday as contemplated by the Holidays Act 2003 for the following reasons.

[42] It is not given for the purpose of rest and recreation as described in s3(a) of the Holidays Act. This is in contrast to the *New Zealand Tramways* case which it was found the leave was to recognise the nature of the work and for the purpose of rest and recreation. In that case the purpose of the extra leave was consistent with the statutory purpose of annual holidays. In the present case the purpose of clause 10.4 is different from the statutory purpose. It is to recognise continuous service and it is not universal to all employees.

[43] Clause 10.2 specifies the employees' entitlement to annual holidays to be first 3 and then 4 weeks' annual holidays. This provides the baseline for the additional holiday referred to in clause 10.4.

[44] Clause 10.4 of the 2004 agreement refers to an additional week of annual holiday which may be treated separately from the first 3 weeks' holiday. This 3 weeks' holiday is plainly a reference to the statutory annual holiday entitlement when the 2004 agreement came into force and shows that the drafters intended the continuous service leave to be different from annual holidays.

[45] The Holidays Act 2003 does not contemplate the cashing up of any part of annual holidays. Section 16(1) provides that at the end of each completed 12 months of continuous employment an employee is entitled to not less than 4 weeks' paid annual holidays.

[46] Mr Cleary's submission that the interpretation of the 2004 collective agreement would lead automatically to the interpretation of the 2007 collective agreement does not assist the defendant in the light of this decision.

[47] In the 2007 agreement clause 10 as a whole acknowledges the entitlement of all employees to 4 weeks' annual holiday. The additional week of annual holiday in clause 10.4 confers a week of holiday each year additional to the statutory entitlement enjoyed by all other employees. The references to the fourth week's holiday which follow cannot logically be interpreted as imposing a cap of 4 weeks. To read it this way would be to rob the words *"additional week of annual holiday"* of meaning. This interpretation is consistent with the intention of the parties when the 2004 collective agreement was entered into, that qualifying employees would get more holidays than non-qualifying employees.

[48] The purpose of clause 10.4 has not changed since 1 April 2007 but its meaning became ambiguous because the drafters of the collective agreement did not refer to the impending change to the statute. The only way of making sense out of clause 10.2 in the 2004 agreement after 1 April 2007 is to read it as providing for 4 weeks' annual holiday. That was the legal requirement. From then the continuous service leave was additional to the 4 weeks in spite of the reference to 3 weeks' holiday in the second part of clause 10.4. Employees with 6 or more years' continuous service have been entitled to 5 weeks' holiday each year since then.

[49] The interpretation of the 2007 collective agreement follows logically from that. It acknowledges 4 weeks' annual holidays in clause 10.2 and confers an additional annual week for continuous service in clause 10.4.

[50] While this interpretation requires the correction of an anomaly in the second part of clause 10.4 of both agreements, it does not alter the entitlements of those

employees with the required years of service to an extra week of holidays each year nor the bargain which was originally entered into by the parties to the collective agreement in 2004.

Decision

[51] I make the following declarations:

a) The further holiday of 1 week per annum provided in clause 10.4 of the 2004 and 2007 collective agreements in recognition of 6 or more years of current and continuous service is not annual leave within the meaning of Subpart 1 of Part 2 of the Holidays Act 2003.

b) The further holiday of 1 week per annum provided in clause 10.4 of the 2004 and 2007 collective agreements is additional to and not part of the 4 weeks' annual holidays conferred by the Holidays Act 2003 after 1 April 2007.

c) In the light of those declarations the third declaration sought by the plaintiff is not necessary.

Costs

[52] Costs are reserved. However, given that this is a question of interpretation of a collective agreement in which both parties have a mutual interest, it is a case where ordinarily costs should lie where they fall.

[53] If costs are sought the plaintiff is to file a memorandum within 14 days of this judgment. The defendant has 14 days to reply.

C M SHAW

JUDGE

Judgment signed at 11.00am on 20 April 2009