IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 3
WRC 9/09

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	BERNARD ROBINSON Plaintiff
AND	CAPITAL AND COAST DISTRICT HEALTH BOARD Defendant

Hearing: 10 June 2009
(Heard at Wellington)

Appearances: Peter Cranney and C Abaffy, Counsel for Plaintiff
H P Kynaston and S Ahn, Counsel for Defendant

Judgment: 18 January 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The issue for decision in this case is whether the term of a collective agreement providing for an additional week's annual holiday for employees who have completed 7 or more years of continuous service with an employer means a week's holiday in addition to the statutory minimum annual holidays or whether it is now incorporated into that enlarged statutory minimum.

[2] The Employment Relations Authority removed this proceeding to the Court for hearing at first instance on the application of both parties. This is one of two very similar cases heard on consecutive days involving the same employer although different plaintiffs and interpreting different collective agreements. Counsel for the parties were the same in each case and some of their submissions were cross-referenced between the two. Although considered separately and the subject of

separate judgments, the decisions have been released at the same time. The other case referred to is *National Distribution Union Inc v Capital and Coast District Health Board*[1]. The judgments should be read together.

[3] Bernard Robinson is an orderly at Wellington Hospital. Mr Robinson is employed by Capital and Coast District Health Board and is a member of the Service and Food Workers Union Nga Ringa Tota Inc. The employer and the union are parties to a collective agreement[2] that set relevant terms and conditions of employment of union members (including Mr Robinson). The collective agreement came into effect on 1 July 2007 and expired on 30 June 2009 but remains in effect during negotiations for a replacement.

[4] The decision of the case turns on the interpretation of the collective agreement. It is a multi employer collective agreement (a "meca"). Clause 19.1 of the meca provides, in accordance with the requirements of the Holidays Act 2003 (the "Act"), that all employees, other than casuals, are entitled to "4 weeks annual leave, taken and paid in accordance with the Holidays Act 2003."

[5] Clauses 19.2 and 19.3 adjust that universal position for the circumstances of individual employer district health boards. Those clauses provide:

> 19.2 Where Collective Agreements that were in place prior to 30 June 2007 at individual DHB [sic] had annual leave (incorporating Rec/Board days) in excess of 4 weeks all employees shall continue to be entitled to the leave; those employer specific provisions are attached as appendix 1.
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> **Note –** Where a Board and Recreation day was a stand-alone item in these collective agreements, the day shall become annual leave effective 1 July 2007; e.g. an employee with 4 weeks leave and a Board day and Recreation day shall be entitled to 4.4 weeks annual leave. An employee entitled to only one of these days shall be entitled to 4.2 weeks annual leave.
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> 19.3 Those employer specific provisions referred to in 19.2 above are attached as appendix 1 to this MECA. All cut off and implementation dates and provisions relating to recognition of service in relation to such leave will continue to apply with the individual DHB.

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[2] The District Health Boards and Service and Food Workers Union Multi Employer Collective Agreement 1 July 2007 to 30 June 2009.

[6] The defendant's previous collective agreement provisions are included in Appendix 1 to the meca. These provide materially as follows:

> 11.2 On the anniversary of the commencement of your employment you will be entitled to an annual holiday of 3 weeks on holiday pay calculated in accordance with the Holidays Act 2003. The time at which annual holidays are taken shall be subject to consultation and agreement between the employee and their manager provided that following such consultation the manager may fix the time for taking holidays by notice in writing if in his/her opinion it is either in the interests of the employer's operational requirements so to do or the employee's accumulated leave entitlement has become excessive.
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> 11.3 After the completion of seven years continuous service the employee will be entitled to an additional week of annual holiday for the seventh year and succeeding years. Those employees, as at 30 March 1995, who have an entitlement to the additional week's leave after six years or who, under a previous agreement would have a right to the additional week after six years, will retain that entitlement.

[7] Mr Kynaston argued for the defendant that clause 19.2 of the meca is important in interpreting Appendix 1, clause 11.3. It (19.2) is a mechanism by which employees' annual holiday entitlements under previous collective agreements were preserved. Clause 19.2 preserves expressly prior collective agreement annual leave entitlements in excess of 4 weeks including, particularly, what are described as "Rec/Board" days. Mr Kynaston submitted that this reference to "Rec/Board" days weakens what he described as the plaintiff's argument that the 3 plus 1 formula means in fact 4 plus 1 following the 2004 changes to the Act which took effect in 2007. That is because "Rec/Board" days are incorporated expressly and added to the annual holiday entitlements of the defendant's employees to the extent of 0.4 of a week.

[8] "Long Service Leave" is specifically dealt with in clause 21 of the meca. Clause 21.1 provides:

> 21.1 Employees are entitled to long service leave where those provisions existed in Collective Agreements that were in place prior to 30 June 2007 at individual DHB [sic].
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> 21.2 Those employer-specific provisions are attached as Appendix 1 to this MECA. All cut off and implementation dates and provisions relating to recognition of service in relation to long service leave will continue to apply at the individual DHB.

[9] The starting point for decision of the case is to interpret and apply the collective agreement. Not only must the words of the particular term or terms be interpreted, but this must be in the context of the whole document and of relevant antecedents.

[10] There is a long history of rewarding long service of hospital staff members by the provision of additional holidays. The earliest produced (but probably not the earliest) example of this was in the New Zealand Hospital Domestic Workers Award 9 February 1981, [1981] BA 2103. This provided annual holidays to employees covered by that award "as provided in the Annual Holidays Act 1944 and its amendments." Clause 7(b) provided:

> Upon completion of ten years' continuous service with the same employer, each worker shall for the tenth and subsequent years be entitled to an annual holiday of four weeks instead of three weeks paid as prescribed in subclause (a) of this clause. The fourth week's holiday may be taken in conjunction with or separately from the first three weeks as the employer may decide.

[11] Later, in the New Zealand Hospital and Area Health Boards Domestic Workers Award 26 October 1990 [1990] BA 11137 annual holidays were allowed "as provided in the Holidays Act 1981." Clause 7(b) then provided:

> Upon completion of seven years' continuous service with the same employer, each worker shall for the seventh and subsequent years be entitled to an annual holiday of four weeks instead of three weeks paid as prescribed in subclause (a) of this clause. The fourth week's holiday may be taken in conjunction with or separately from the first three weeks as the employer may decide. …

[12] The final example of this ancestry provided by Mr Cranney was the Capital Coast Health (Hospital Health Service) Support Services Collective Employment Contract 1 December 1998 – 29 February 2000. Clause 11 ("Public Holidays and Annual Holidays") provided at 11.1:

> 11.1 In each year every employee will be entitled to Public holidays as provided for in the Holidays Act. …
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> 11.2 On the anniversary of the commencement of your employment you will be entitled to an annual holiday of 3 weeks on holiday pay calculated in accordance with the Holidays Act 1981. …

> 11.3 After the completion of seven years continuous service the employee will be entitled to an additional week of annual holiday for the seventh year and succeeding years. Those employees, as at 30 March 1995, who have an entitlement to the additional week's leave after six years or who, under a previous contract would have a right to the additional week after six years, will retain that entitlement.
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> 11.4 All employees employed by the employer prior to the signing of this contract who are currently in receipt of four weeks annual holiday each year will still be entitled to four weeks annual holiday each year irrespective of their years of continuous service.

[13] There were similar examples in a more or less continuous lineage to the present position but which are unnecessary to cite. The important point is that the clauses now at issue must be seen in historical context of rewards in the form of holidays for long service.

[14] I find that the additional week's leave for long-serving employees of the defendant was intended to reward longevity of service by employees or their loyalty to the employer. It has a significant benefit for the employer as well as a cost. It is well known that staff turnover incurs costs of administration in new appointments, costs of retraining, costs in productivity while new staff get up to speed, and a number of other subtle but nevertheless tangible employment, and therefore business, costs. Long-term and loyal staff are generally a business asset. Hospital service staff would otherwise have an even higher turnover rate without incentives to stay.

[15] A reward or incentive, such as an additional week's leave to reflect long service, had necessarily to differentiate long-serving employees from others who were entitled, by law and contract, to the minimum annual leave of all employees.

[16] If the additional week of holiday is to be absorbed into the minimum statutory leave entitlement of 4 weeks after 1 April 2007, there will be no benefit to the employer or reward to the employee with 7 or more years of continuous service. This would be to defeat the purpose of the clause and the intention of the parties.

[17] Although what might be categorised as long service leave has been expressed by the parties as annual holidays, that describes how the reward is constituted and may be taken, that is, in the form of a paid holiday. The reward could equally have

been an additional week's wages, a return travel ticket to a specific destination, a retail store voucher or one of a number of forms of employee reward for long service. By describing the additional week's holiday as such, this defines it as an annual holiday on pay.

[18] Counsel were agreed that the word "additional" begs the question, additional to what? The answer is, in my assessment, additional to the annual leave allowed to employees with less than 7 years' continuous service.

[19] The argument for the employer is that if this is long service leave, it was specified and is additional to 3 weeks' annual leave and not to the minimum period of annual leave under the statute.

[20] "Annual" refers to how the leave may be calculated and taken, that is, once a year. In my assessment the label "annual" does not cause the leave to be in all respects the same as statutory (minimum) annual leave.

[21] I do not agree that by adding specifically ad hoc leave periods to the statutory 4 weeks' minima, the parties to the meca thereby showed their intention that the one week's additional leave for employees with more than 7 years' service was to be strictly in addition to the previous 3 weeks' mimima. Rather, this indicates that all employees were to enjoy the benefits of the statutory 4 weeks' holidays and those with additional entitlements were to preserve these as additions to the new minima. That is reinforced by clause 21.1 of the meca set out at para [8] of this judgment.

[22] Contrary to Mr Kynaston's arguments, I conclude that the judgment in *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd*[3] judgment is distinguishable. Also, contrary to Mr Kynaston's submissions, I agree with the judgment and the reasoning in the *NZ Meat Workers and Related Trades Union Inc v Silver Fern Farms Ltd (formerly PPCS Ltd)*[4] which cases, and my reasons for

[3] [2008] ERNZ 229 (CA)
[4] WC 7/09, 20 April 2009

distinguishing them, are dealt with in more detail in the concurrent *National Distribution Union* judgment.

[23] The employer's essential argument is that the plain words of the clause determine its meaning. A week's leave in addition to 3 weeks' leave is 4 weeks' leave and not 5. Its counsel submits that to reach the latter conclusion, the Court must substitute for the specific reference to 3 weeks' leave a phrase such as the minimum statutory annual leave entitlement. Further, the employer says that to adopt the plaintiff's interpretation would change the bargain substantially if reference to the figure "3" were to be read as "4" and/or "annual holidays" are to be read as some other type of leave, presumably long service leave. The employer says that it has bargained to pay employees with more than 7 years' continuous service, for 4 weeks' annual leave and the Court should not affect this bargain to the employer's disadvantage by increasing the cost to it.

[24] The substantial change to the bargain has, however in my view, been brought about by the Holidays Amendment Act 2004. The cost to employers generally of having to meet the cost of an additional week's leave in respect of many employees previously on minimum annual leave entitlements was no doubt significant. There may be, however, flow on costs from that alteration to the minimum depending upon the interpretation of particular employment agreements or collective agreements.

[25] The defendant's argument is that while the employer agreed to those of its employees with 7 years' service receiving an additional week's holiday, this was calculated from an agreed and certain base line of 3 weeks' paid holiday. Counsel for the employer contends that had the parties intended that employees would receive 5 weeks' holiday, or an additional week on top of whatever the statutory minimum might be, they could and would have said so expressly but did not.

[26] Comparing the effects of the plaintiff's interpretation, the defendant says that there will be an absolute cost to the employer of having to fund and manage the impact of an extra week of holidays for all employees with 7 or more years of service. The defendant says, by contrast, that the consequence to affected employees of its interpretation is that they will at most lose a relative benefit that they had over

their colleagues with shorter service before 1 April 2007 but will not lose anything in absolute terms, their entitlements remaining consistent with both the spirit and terms of the Holidays Act 2003. The question in this case is, however, one essentially of contract and not statutory entitlement and a marginal benefit to longer serving employees is at the heart of the provisions for interpretation.

[27] For the same reasons underpinning my decision in the companion judgment issued today between the National Distribution Union and the District Health Board[5], I find for the plaintiff's interpretation of the collective agreement's holidays provisions. Specifically, employees covered by the collective agreement who have more than 7 years' service with the employer are entitled not only to the minimum 4 weeks' annual holiday provided by the legislation, but also by contract to a further (fifth) week of annual leave as a reward for long service.

[28] The plaintiff is entitled to costs which, if they cannot be settled between the parties, may be the subject of a memorandum filed by counsel for the plaintiff before 1 March 2010 with the defendant having a further period of 1 month within which to respond by memorandum.

GL Colgan
Chief Judge

Judgment signed at 2.00pm on 18 January 2010

[5] *National Distribution Union Inc v Capital and Coast District Health Board* [2010] NZEMPC 2