IN THE EMPLOYMENT COURT
AUCKLAND

AC 48/08
ARC 46/06

IN THE MATTER OF	of a challenge to the determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC TRANSPORT EMPLOYEES UNION INCORPORATED First Plaintiff
AND	NATIONAL DISTRIBUTION UNION INCORPORATED Second Plaintiff
AND	TRANSPORTATION AUCKLAND CORPORATION LIMITED AND CITYLINE (NEW ZEALAND) LIMITED Defendants

Hearing: 16 October 2008
(Heard at Auckland)

Court: Judge B S Travis
Judge C M Shaw

Appearances: Peter Cranney and Greg Lloyd, counsel for the first and second plaintiffs and counsel for the New Zealand Council of Trade Unions
Kit Toogood QC and Andrew Caisley, counsel for the defendants
Tim Cleary, counsel for Business New Zealand

Judgment: 12 December 2008

JUDGMENT OF THE FULL COURT

Background

[1] This case was referred back to the Employment Court by the Court of Appeal[1] following its judgment of 11 June 2008. It directed this Court to reconsider its full

[1] (2008) 8 NZELC 99 386 (CA)

Court decision[2] on the interpretation of the annual leave provisions in a collective agreement in light of s6 of the Holidays Act 2003. The relevant collective agreement provided employees with more annual holidays than the minimum entitlement under the Holidays Act 1981. The Employment Court's decision of 27 November 2006 found that, in spite of the increase from 3 to 4 weeks' minimum entitlement for annual holidays introduced by an amendment to the Holidays Act 2003 in April 2007, the collective agreement did not entitle those employees to more than 4 weeks' annual holiday.

[2] The Court of Appeal found that, in reaching its decision, the Employment Court had erred in its construction of s6 of the Holidays Act by drawing a distinction between "*enhanced entitlements*" and "*additional entitlements*". Because the majority of the Court of Appeal was of the view that this appeared to have influenced the Employment Court's interpretation of the collective agreement, the matter was referred back for reconsideration in light of the Court of Appeal's judgment.

[3] The Employment Court's first decision was reached principally on the interpretation of the collective agreement. On its plain meaning the Court found the employees were entitled to 4 weeks' annual holiday. It also concluded that this provision met the requirements of the Holidays Act from 1 April 2007. The Court's observations on the meaning of s6 were in response to an argument presented on behalf of the unions by Mr Cranney.

[4] Mr Toogood for the defendants invited the Court to declare that the erroneous interpretation of s6 did not affect the outcome and to simply confirm the result of our first decision. Mr Cranney, however, has asked us to consider the whole matter afresh in light of the Court of Appeal's decision. In light of the Court of Appeal's ruling we are satisfied that the reasoning in the first decision needs clarification and have therefore reconsidered the matter fully.

[5] Three issues emerged from the submissions:

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[2] [2006] ERNZ 1005

a) What are the annual leave entitlements under the Holidays Act in light of s6 of the Act?

b) What did the parties agree to in the collective agreement?

c) Did that agreement, properly construed, comply with the Holidays Act after 1 April 2007 when the minimum went from 3 to 4 weeks?

Issue 1 – Annual leave entitlements under the Holidays Act

[6] The following sections are relevant to this issue:

> ***3 Purpose***
> *The purpose of this Act is to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to—*
>
> *(a) annual holidays to provide the opportunity for rest and recreation:*
>
> *(b) public holidays…*
>
> *(c) sick leave…*
>
> *(d) bereavement leave…*
>
> …
>
> ***5 Interpretation***
> *(1) In this Act, unless the context otherwise requires,—*
>
> ***annual holiday** means an annual holiday provided under subpart 1 of Part 2…*
>
> …
>
> ***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.*
>
> ***Part 2 Holiday and Leave entitlements***

Subpart 1 Annual Holidays

15 Purpose of this subpart

The purpose of this subpart is to—

(a) provide all employees with a minimum of 3 weeks' annual holidays to be paid at the time the holidays are taken; and

(b) require employers to pay employees at the end of their employment for annual holidays not taken; and

(c) enable employers to manage their businesses, taking into account the annual holiday entitlements of their employees.

[(d) to ensure that, on and from 1 April 2007, when an employee next becomes entitled to annual holidays, the employee's minimum entitlement is increased from 3 weeks' annual holidays to 4 weeks' annual holidays].

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.*

Part 3 Enforcement and other matters

Subpart 1 Enforcement

74 Who can enforce Act

(1) The provisions of this Act may be enforced in accordance with this Act by—

(a) an employee:

(b) an authorised representative:

(c) a representative of a union of which the employee is a member:

(d) an employer:

(e) a Labour Inspector.

(2) An employee's entitlement to annual holidays, public holidays, sick leave, or bereavement leave that are in addition to entitlements under this Act may be enforced only by the persons listed in subsection (1)(a) to (c).

[7] In the first judgment we concluded that the terms "*enhanced*" and "*additional*" in s6(2) related to different and discrete topics: the former exclusively to the four core entitlements of annual leave, public holidays, sick leave and bereavement leave and

the latter to other entitlements such as long service leave or rewards for extra productivity. We rejected the submission that the words were synonymous.

[8] The majority of the Court of Appeal found that s6(1) ensures that each entitlement provided to an employee by the Act is a minimum entitlement. The word "*entitlement*" in s6(1) referred to the four benefits listed in s3 namely annual holidays, public holidays, sick leave and bereavement leave. It found that s6(2) allows enhanced or additional entitlements by agreement, and the terms *"enhanced"* and *"additional"* overlapped. This meant that the provision of an advantage would be an enhancement and an enhancement may well be expressed as an improvement. The majority of the Court of Appeal found the distinction in s74(1) between the persons who can enforce the minimum entitlements under the Act and those in s74(2) who can enforce the enhanced or additional entitlements provided by agreement, reflected the policy of s6(2).

[9] In substance Mr Cranney's submission is that an agreement must specify the statutory minimum of 4 weeks' annual leave for the purpose of the Act and, unless the parties expressly agree, the provision of annual holidays in an agreement for any other purpose cannot be included in the statutory minimum. He argued that additional leave in recognition of the nature of the work, conceptually separate from statutory annual leave, is not of the same type and has a different purpose and origin.

[10] It is the case for the plaintiffs that the extra leave provided in the agreement, and expressed to be in recognition of the nature of the work, was an "*additional*" entitlement within the meaning of s6(2). It was therefore not an annual holiday as defined in the Act. As from 1 April 2007, the purpose of the minimum entitlement of 4 weeks' paid annual holidays was to provide employees with the opportunity for rest and recreation (s3(a)). Thus any additional entitlement or enhancement for any other purpose, even if it did serve in part the purpose of providing for rest and recreation, could not be taken into account as part of a statutory provision of 4 weeks' annual holiday.

[11] Although Mr Cranney accepted that extra annual leave in recognition of the nature of the work would serve the purpose of rest and recreation, as does service

leave and shift leave, he submitted that does not make the purpose of the extra leave the same as the purpose of statutory leave.

[12] If the additional annual leave in the agreement is not provided under sub-part 1 of part 2, Mr Cranney submitted it is not an annual holiday as defined in s5. Under s6 it is an extra entitlement, like annual service leave after 6 years service, or shift leave, which is provided solely and exclusively under an employment agreement and which has no connection at all with the statutory entitlement.

[13] The difficulty with this submission, as Mr Toogood submitted and with which Mr Cleary concurred, is that the Act does not read in this way. We agree with them that the Act simply states that each entitlement provided to an employee under the Act is a minimum entitlement. In respect of annual holidays from 1 April 2007 this is to be not less than 4 weeks' paid annual holidays to provide the employee with the opportunity of rest and recreation and to serve the purpose of promoting "*balance between work and other aspects of employees' lives*" (s3). No further guidance is provided. The Act does not require an agreement to specify 4 weeks' paid annual holidays. The most the Act achieves is to ensure that employees will receive the minimum entitlement.

[14] Anything agreed between the employer and employee which provides enhanced or additional entitlements over and above the minimum entitlement will be enforceable, but not by the employer or a Department of Labour Inspector (s74(2)). Nothing in the Act is intended to prevent the parties agreeing that the employee may be provided with enhanced or additional entitlements. Section 6(2) does not require any additional or enhanced agreement to be specified in an agreement.

[15] We conclude that, in accordance with the findings of the Court of Appeal:

- 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.

Issue 2 – What did the parties agree to in the collective agreement?

[16] In 2005 the first and second plaintiffs, together with two other unions and the defendants, concluded a collective agreement to come into force on 3 July 2005 and to expire on 2 July 2007. It was common ground between the parties that the factual position was that[3]:

> *At their last negotiation round the parties could not agree how the 2007 amendments would impact on the CEA and agreed to leave the clause as it was and seek a determination from the Authority. It is safe to say that the wording of clause 21 of the CEA was agreed between the parties prior to the passing of the 2007 amendments which will see all employees in New Zealand receive minimum annual leave entitlements of four weeks.*

[17] The relevant parts of the collective agreement provide as follows:

> ***5. GENERAL PRINCIPLES***
>
> *5.1. The parties acknowledge that this agreement was negotiated fairly and in good faith and with knowledge of information relevant to the terms agreed.*
>
> …
>
> ***19. STATUTORY LEAVE PROVISIONS***
>
> *Employees are entitled to leave in accordance with the Holidays Act 2003 and the terms of this Agreement. A summary of employees' key entitlements, under the Holidays Act 2003, is attached as schedule E to this agreement.*
>
> …
>
> *20.5 Public holiday's* [sic] *days that fall during an employee's annual leave will be counted as public holidays and not annual leave. Where the day of the public holiday is a day that an employee would otherwise have worked, then they will be entitled to public holiday pay at their relevant daily pay.*
>
> …

[3] Recorded by the Employment Relations Authority in its determination and in the Court of Appeal's judgment.

21. ANNUAL LEAVE

21.1 Three weeks annual holidays shall be allowed each year in accordance with the provisions of the Holidays Act 1981 and its amendments.

21.2 In addition to the holidays provided for in clause 21.1, employees shall be entitled to a further holiday of one week per annum in recognition of the nature of the work making a total of four weeks leave per year.

21.3 An employee's annual leave shall be taken at a time to be mutually agreed between the Company and the employee except that where agreement cannot be reached the company shall determine when the holidays are to be taken provided that a minimum of six weeks notice of holidays will be given.

21.4 Holidays may be taken in advance of the date on which they fall due.

21.5 The payment of annual holidays shall be in accordance with the Holidays Act 2003. (Generally this will be the average weekly wage for the 12 months prior to the holidays)
Where a full time employee takes more or less than a week's leave at any given time, the Company will calculate the amount of holiday pay payable to the employee for each day of leave less than or in excess of a week, by dividing the greater of the employee's "ordinary weekly" or "average weekly" pay by 5 days. A similar but pro rata calculation will be made for part time employees.

[18] There are numerous other parts of the collective agreement in which express reference is made to the Holidays Act. Examples are provisions inserted for the purposes of calculating the relevant daily pay for sick leave and bereavement leave. Schedule E, which summarises the current leave entitlements under the 2003 Act but does not refer to the change to 4 weeks' minimum annual leave from 1 April 2007, opens with the following wording:

> *The Holidays Act 2003 sets out your minimum entitlements to annual leave, public holidays, sick leave and bereavement leave. A summary of your key entitlements is set out below. The provisions in your employment agreement may improve upon these minimum entitlements.*

[19] The agreement categorises various forms of leave under specific headings including: public holidays (cl 20), annual leave (cl 21), long service leave (cl 22), sick leave (cl 23), bereavement leave (cl 25), parental leave (cl 26), unpaid leave (cl 27), and tuition leave (cl 29).

[20] Both the factual position set out above and the references to the statutory provisions in the agreement indicate that the parties were clearly aware of the 2003 Act. As the parties could not agree on what was to happen in 2007, cl 21.1 and its reference to the Holidays' Act 1981 was left as it was, and the issue was referred to the Authority for a determination.

[21] Mr Cranney correctly identified the issue as whether the parties actually agreed to convert the additional non-statutory leave provided in recognition of the nature of the work into annual leave as defined in the Act. He submitted that the majority of the Court of Appeal had distinguished the statutory purpose of leave, to provide employees with minimum entitlements to "…*annual holidays to provide the opportunity for rest and recreation*", from the purpose of the extra leave at issue in the present case.

[22] The majority of the Court of Appeal held that, because the document does not state clearly the position after 1 April 2007, there were two arguable constructions of cl 21. It expressed the view that cl 21.1 contained a misnomer by referring to the repealed 1981 Act although counsel agreed before this Court that the reference to the Holidays Act 1981 in cl 21.1 was not a mistake.

[23] The first construction suggested by the majority of the Court of Appeal was that the parties had left the clause unchanged because they regarded 4 weeks as sufficient to accommodate the disadvantageous nature of the shift work performed.

[24] Mr Cranney rejected this construction on the basis that the parties had recognised the need for an additional week because of the nature of the work. They had recorded this as a separate entitlement within the meaning of s6(2). Although like annual holidays under the Act, it also provided the employees with the opportunity for rest and recreation. The parties had not agreed to convert the additional leave into annual leave. Clause 21.2 states it is for a separate and distinct purpose. He submitted that the additional entitlement for a defined purpose prior to 1 April 2007 did not cease to provide any additional entitlement after that date.

[25] He rejected the notion that cl 21.2 leave, which had been agreed for the purpose of recognising the shift work, could be applied by the employer to satisfy the statutory minima under the 2003 Act. He said there was nothing in the clause which pointed in that direction except, arguably, the reference to the total of 4 weeks. If it is included in the statutory minima that would mean that from 1 April 2007 there was no recognition at all of the nature of work, leaving cl 21.2 with no meaning and rendering the word "*total*" superfluous.

[26] The second interpretation offered by the majority of the Court of Appeal was that cl 21.2 refers to whatever is the minimum statutory entitlement at the time and the contractual right for an additional week was provided regardless of whether the minimum statutory annual leave obligation was 3 or 4 weeks.

[27] Mr Cranney adopted this argument which meant the leave increased automatically to 5 weeks on 1 April 2007. He submitted this construction gave more weight to the reasons behind the legislation of enforcing a new general minimum of 4 weeks, regardless of how agreeable working conditions were. He noted that the majority of the Court of Appeal had accepted that bus drivers' conditions of work were more arduous than those of other employees and that this was recognised in cl 21.2.

[28] He submitted the additional week could not be an annual holiday within the meaning of the 2003 Act because it was not part of the annual holidays provided in sub-part 1 of part 2 which, prior to 1 April 2007, were 3 weeks. It had no connection at all with the statutory entitlement because there is nothing in the statute dealing with an extra week of annual leave in recognition of the nature of the work performed.

[29] Mr Cranney identified a third construction which was a variation on the second construction of the majority of the Court of Appeal, namely that the parties had simply left a gap or a lacuna. They had recorded separately the two types of leave, knowing that the statutory leave would be increased from 3 weeks to 4 weeks after 1 April 2007 for some employees during the term of the collective agreement, and provided that this increase was not to affect the entitlements in the clause.

[30] Finally he contended the requirement in cl 21.5, that the payment for annual holidays was to be in accordance with the 2003 Act, was not important because the voluntary adoption of a payment method did not convert the contractual extra leave to statutory leave prior to 1 April 2007.

[31] Mr Toogood pointed out there was no evidence led in either Court to demonstrate that bus drivers' working conditions were more arduous than those of other workers in New Zealand. Because there was no evidence their work was more arduous there was nothing to justify their entitlement to annual holidays being increased by a week, compared to all other employees in New Zealand. The purpose of an extra week in the collective agreement at the time it was entered into was to provide a total of 4 weeks' annual leave to deal with the unusual shift arrangements provided in the collective agreement.

[32] Mr Toogood submitted that reference in cl 21.1 to the 3 weeks' annual holiday in the 1981 Act and its amendments was wide enough to include succeeding legislation such as the 2003 Act. He submitted this was an intentional adoption of a formula or wording which the parties had agreed on through successive instruments. The parties had understood what they had agreed to but were not clear as to the effects of the 2003 Act after 1 April 2007.

[33] He argued that in interpreting the cls 21.1 and 21.2, the starting point was the 3 weeks' annual holidays provided. Clause 21.2 provided "*In addition to the holidays provided for in cl 21.1"* employees were to be entitled to "*a further holiday"* of "*one week per annum*". In his submission "*further*" meant a holiday of the same kind as that provided in cl 21.1, namely annual holidays for the purpose of the Holidays Act. The clause then explained that the extra week had been provided "in recognition of the nature of the work". The result is then summarised as "*four weeks leave per year*".

[34] Mr Toogood contended that the interpretation advanced by the plaintiffs does violence to the plain meaning of cl 21. Clauses 21.1 and 21.2 in totality provided 4 weeks' annual holiday, which still meets the statutory minima. The new Act therefore had no effect on the meaning of the clause. In Mr Toogood's submission it

is unnecessary to worry about the purpose of the annual holiday or whether there were differences between different types of annual leave. The parties' wish to recognise the nature of the work did not change the nature of the leave or the holiday. The defendants' interpretation allowed the wording of the agreement to be applied without doing it violence and did not require one word of cl 21 to be altered, disregarded or overlooked.

[35] It is the case for the defendants that what the parties were providing by cl 21 was that the employees should have 4 weeks' annual leave in recognition of the nature of the work of the employees covered by the agreement. They were unclear as to the effect of the statute but, in Mr Toogood's submission, the Act had no bearing at all on the clause and cannot alter the meaning of an agreement. It simply provides a statutory minima. The only issue is to construe the agreement to see whether it has met those minima. Any distinction between additional entitlements and enhancements under s6 was, he submitted, irrelevant.

Conclusion

[36] Applying the principles of interpretation set out in our first judgment, on a plain reading of the agreement we find that cl 21.1 provided 3 weeks' annual holiday. In addition to those 3 weeks' annual holidays cl 21.2 provided a further holiday of 1 week per annum in recognition of the nature of the work. This added an extra week of annual leave, making a total of 4 weeks' leave per year. That is the plain wording of cls 21. 1 and 21.2. They unambiguously provide a total of 4 weeks' annual holidays.

[37] We do not accept that any reference to annual holidays in an agreement must mean the statutory minima in every case. Each agreement must be interpreted on its own terms.

[38] The parties did not agree to 5 weeks' annual holidays as they could have. Nor did they agree that, in addition to any increases to the statutory annual holidays entitlement, the employees would be entitled to an additional week of annual holidays. The parties agreed to a total of what can only be regarded as 4 weeks'

annual holiday and payment for those annual holidays was to be calculated under the 2003 Act (cl 21.5).

[39] We agree with Mr Toogood that to adopt the plaintiffs' submissions would do violence to the plain wording of the clause. A requirement to give 5 weeks' annual leave was not agreed between the parties. We note that neither the Authority nor the Court can make any order varying a collective agreement or any term (s163 Employment Relations Act 2000) and to find, in the absence of express agreement, that the annual holidays were increased to 5 weeks would amount to such a variation.

Did the collective agreement comply with the Holidays Act 2003 after 1 April 2007?

[40] As the agreement provides 4 weeks' annual holidays it meets the statutory minima provided for all employees by the 2003 Act. Since 1 April 2007 the collective agreement therefore complies with that Act.

[41] For these reasons we confirm our earlier decision.

Costs

[42] Costs were properly not sought by the parties as this is clearly a test case.

B S Travis
Judge

C M Shaw
Judge

Judgment signed at 12.35pm on 12 December 2008