**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA593/2009**
**[2010] NZCA 317**

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| BETWEEN | SILVER FERN FARMS LIMITED<br>Appellant |
| AND | NEW ZEALAND MEAT WORKERS AND RELATED TRADE UNIONS INCORPORATED<br>Respondent |

Hearing: 3 June 2010

Court: O'Regan, Baragwanath and Randerson JJ

Counsel: T P Cleary for Appellant
I D Matheson and M R Gundesen for Respondent

Judgment: 21 July 2010 at 4 p.m.

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**JUDGMENT OF THE COURT**

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**A The appeal is dismissed.**

**B The respondent is entitled to costs against the appellant for a standard appeal on a Band A basis together with usual disbursements.**

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**REASONS OF THE COURT**

(Given by Randerson J)

## Introduction

[1] This appeal raises issues about the interpretation of two collective employment agreements in 2004 and 2007 affecting annual holiday entitlements in the meat processing industry. Clause 10 in each agreement provides for annual leave for non-casual employees at the Hawera meat processing plant now owned by the appellant, Silver Fern Farms Ltd. New Zealand Meat Workers and Related Trade Unions Inc contends that on their proper construction, the agreements entitle employees with six years current continuous service to one week's additional annual holiday above the statutory minimum annual holidays provided for in the Holidays Act 1991 and subsequently under the Holidays Act 2003. The latter increased the minimum annual holidays from three weeks to four weeks from 1 April 2007.

[2] The Union's contention would mean that qualifying employees would be entitled to five weeks annual holiday rather than the statutory minimum of four weeks. Silver Fern contends that qualifying employees are only entitled to four weeks annual leave, coinciding with the statutory minimum in the 2003 Act.

[3] In a decision issued on 20 April 2009, Judge Shaw ruled in favour of the Union's interpretation and declared that:[1]

> (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.

[4] On 9 September 2009 this Court granted leave to appeal under s 214 of the Employment Relations Act 2000 on two questions:

> (a) was there ambiguity in the plain meaning of the words?

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[1] *New Zealand Meat Workers & Related Trades Union Inc v Silver Fern Farms Ltd (formerly PPCS Ltd)* EC Wellington WC7/09, WRC 21/08, WRC 39/08, 20 April 2009 at [51].

(b) if not, was the interpretative approach adopted by the Employment Court incorrect in factoring in historical negotiations and contracts [when there was no ambiguity in the plain meaning of the words]. (Brackets added).

[5] Counsel later agreed to refine issue (b) by deleting the bracketed words.

**Background**

[6] The Union represents approximately 300 employees at the Hawera plant. Over 120 members of the Union have been employed at the plant for at least six consecutive seasons and are therefore qualifying employees. Until 2003, the plant was owned by Richmond Ltd at which time it was purchased by PPCS Ltd, now known as Silver Fern Farms Ltd.

[7] The agreements in issue are standard meat workers' agreements. The 2004 agreement was in force from 20 December 2004 to 20 December 2007. Clause 10 of the 2004 agreement relevantly provided:

> **10.0 ANNUAL HOLIDAYS**
>
> 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 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 week's holiday.

[8] At the time the 2004 agreement was entered into the Holidays Act 2003 had been enacted but (as noted) the increase in the minimum entitlement for annual

holidays from three weeks to four weeks did not come into effect until part-way through the term of the 2004 agreement on 1 April 2007.[2]

[9] The 2007 agreement was in force from 1 October 2007 to 30 September 2009. During the negotiations for the 2007 agreement, the parties could not agree about how cl 10.4 of the 2004 agreement would apply after the increased minimum statutory holiday entitlement commenced on 1 April 2007. It was agreed that the issue would have to be resolved by the Court. Accordingly, cl 10 of the 2007 agreement relevantly provided:

> **10.0 ANNUAL HOLIDAYS**
>
> 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 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 week's holiday. (**Subject to Court Final Decision**)

[10] The only changes made to the 2004 version of this clause were to amend cl 10.1 to refer to the new Act; to change the minimum entitlement under cl 10.2 from three weeks to four weeks; and to add the words "Subject to Court Final Decision" to cl 10.4. This reflected the agreement of the parties to amend cl 10.4 in the 2007 agreement once the Court had resolved whether the qualifying employees were to receive one additional week's leave above the new minimum statutory entitlement.

[11] On 29 May 2008 the Employment Relations Authority determined that the additional leave for qualifying employees under cl 10.4 of the 2004 agreement met

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[2] The increase in the minimum entitlement to four weeks was effected by ss 41, 42 and the First Schedule of the Holidays Act 2003.

the minimum annual leave requirement of the Holidays Act 2003. The clause capped the entitlement to qualifying employees at four weeks. That determination, along with the interpretation of the relevant clause in the 2007 agreement, were each removed from the Authority to the Employment Court and were heard together by Judge Shaw.

[12] The central issue before the Employment Court was whether, from 1 April 2007, qualifying employees were entitled to one week's annual leave in addition to the four weeks statutory minimum. Judge Shaw found that they were so entitled.

**Judge Shaw's approach**

[13] Judge Shaw's decision was delivered before the judgment of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd.*[3] She adopted the approach to the interpretation of collective agreements summarised by a full Bench of the Employment Court in *New Zealand Tramways and Public Transport Union Inc v Transportation Auckland Corporation Ltd:*[4]

> 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; …

[14] The Judge also referred to the decision of this Court in *Pyne Gould Guiness Ltd v Montgomery Watson (NZ) Ltd*[5] where the use of surrounding circumstances to ensure the natural meaning of the words is correct was referred to as "cross-checking". And she also adopted the view expressed by Judge Colgan (as he then was) in *ASTE v Chief Executive of Bay of Plenty Polytechnic*[6] that the interpretation of a collective agreement should not be construed in a narrowly literal way but

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3 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

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

5 *Pyne Gould Guiness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789.

6 *ASTE v Chief Executive of Bay of Plenty Polytechnic* [2002] 1 ERNZ 491 at 500.

should accord with business commonsense. Judge Shaw also endorsed this further statement by Judge Colgan:[7]

> … 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.

[15] The Judge recognised by reference to *New Zealand Merchant Service Guild IUOW Inc v Interisland Line (a division of Tranz Rail Ltd)* that:[8]

> … 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.

[16] The Judge then cited the decision of this Court in *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (NZ) Ltd*[9] as to the interpretation of annual holiday clauses in the light of the increased provision for annual holidays in the Holidays Act 2003.[10] The collective employment agreement in that case provided employees with three weeks annual holiday in accordance with the Holidays Act 1981 plus "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". The question was whether the "further holiday" was to be absorbed by, or would be in addition to, minimum annual leave after the increase in the minimum entitlement from three weeks to four under the Holidays Act 2003. The majority found that the Employment Court had erred in its approach to "enhanced or additional entitlements" under s 6 of the 2003 Act and referred the matter back to the Employment Court for reconsideration.

[17] Section 6 of the Holidays Act 2003 provides:

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7 At 500.

8 *New Zealand Merchant Service Guild IUOW Inc v Interisland Line A Division of Tranz Rail Ltd* [2003] 1 ERNZ 510 at 513-4.

9 *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (NZ) Ltd* [2008] ERNZ 229.

10 At [15].

> **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 –
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> (a) has no effect to the extent that it does so; but
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> (b) does not apply in respect of the Armed Forces as defined in section 2 (1) of the Defence Act 1990.

[18] After referral back from this Court, the Employment Court reconsidered the Tramways case and decided that, on the terms of the particular agreement in question, the parties had not agreed to five weeks annual holidays.[11] The Employment Court concluded[12] (in a passage cited by Judge Shaw in her decision):

> - 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.

[19] In the present case Mr Cleary had submitted before the Employment Court on behalf of Silver Fern (a submission repeated in this Court) that cl 10 of the 2004 agreement was not ambiguous. The Judge's reasoning to the contrary may be summarised as follows:

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[11] *New Zealand Tramways & Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd* [2008] ERNZ 584.

[12] At [15].

- Prior to 1 April 2007 all non-casual employees were entitled to three weeks annual holiday while qualifying employees were entitled to "an additional week".

- The 2004 agreement did not take account of the pending increase in the minimum statutory entitlement from 1 April 2007. From that date, the ambiguity arose because the words "additional week of annual holidays" in cl 10.4 "did not tally" with the reference to "three weeks holiday" referred to in the second part of cl 10.4.

- From 1 April 2007, the ordinary meaning of the words in the second part of cl 10.4 conflicted with the first part of that clause and rendered redundant the notion of an additional holiday.

[20] Central to the Judge's conclusion that qualifying employees were entitled to five weeks annual holiday after 1 April 2007 was her view that cl 10.2 in the 2004 agreement had to be read after that date as providing for four weeks annual holiday since this was the new statutory minimum. It followed that if cl 10.4 of the 2004 agreement were to be literally construed, qualifying employees would receive no more than four weeks annual holiday. This was no more than the entitlement of all non-casual employees. She concluded by reference to cl 10 and the history of previous awards and agreements in the industry that the intention was to provide the minimum statutory holidays for all non-casual employees and to recognise the continuous service of qualifying employees by granting one week's annual holiday additional to the statutory entitlement.

[21] The Judge also considered that:

- To cap the annual holiday entitlement at four weeks for all non-casual employees would rob any meaning from the words "additional week of annual holiday" in cl 10.4.

- Employees who were entitled to an additional week's holiday prior to 1 April 2007 would lose that entitlement after that date. Any such diminution of

holiday entitlements would require express words in the absence of agreement from affected employees.

- Clause 10.4 should be read in two parts. The first part established the substantive entitlement to the additional week of annual holidays while the second part provided the mechanism for the additional week's holiday and did not limit the leave entitlement established by the first part of the clause.

- Her conclusion would give effect to the underlying intent of the agreement which was to recognise continuous service by the additional week's holiday. It could be distinguished from annual holiday as prescribed by the Holidays Act 2003 because it was not given for rest and recreation as contemplated by s 3(a) of the Act.

- A further ground for distinguishing cl 10.4 from annual holidays as prescribed by the Holidays Act was that (unlike s 16(1) of that Act) cl 10.4 contemplated the employee electing to cash up the additional week's holiday.

[22] The Judge considered that the interpretation of the 2007 agreement followed logically from her conclusion about the construction of the 2004 agreement. Qualifying employees would be entitled to one additional week of annual holiday above the four weeks provided by cl 10.2.

**Submissions in this Court**

[23] Mr Cleary submitted for Silver Fern that the Judge had erred by conflating the concept of statutory annual holidays with contractual annual holidays. He submitted that cl 10 carefully distinguished between the two. In respect of the 2004 agreement, the reference in cl 10.2 to three weeks annual holiday was contractual in nature as was the additional week conferred on qualifying employees by cl 10.4. Approached in this light, no ambiguity arose. The parties were aware of the pending increase in the statutory minimum holiday entitlement yet did not provide for it. On a plain reading of cl 10.4, the "additional week of annual holiday" could only mean additional to the three weeks mentioned in cl 10.2.

[24] Mr Cleary submitted that when the 2007 agreement was under consideration the parties negotiated in the knowledge of the dispute over the meaning of the 2004 agreement. By then, the increase to four weeks in the statutory minimum entitlement had crystallised. The parties agreed to increase the entitlement for all employees under cl 10.2 to four weeks annual holiday but agreed to preserve the uncertainty over the outcome of the cl 10.4 dispute under the 2004 agreement by adding the words "Subject to Final Court Decision".

[25] Mr Cleary went on to submit that although the Judge was entitled to refer to the previous awards and agreements she had erred in concluding from them that the parties had intended qualifying employees were entitled to holidays additional to the level of the statutory annual holidays. Mr Cleary submitted that an analysis of the prior instruments showed there was an intention to reward qualifying employees for their long service by appropriate contractual provisions but they did not disclose an intention to maintain relativity with the statutory minimum.

[26] Mr Cleary acknowledged that the Supreme Court's decision in *Vector* had reaffirmed the position that material extrinsic to the contract could be used to clarify the meaning of an agreement, whether or not the terms used were ambiguous. He also acknowledged the principle articulated by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*:[13]

> The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Dipoock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v Salen Rederierna A.B* [1985] AC 191, 201:
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> > If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense it must yield to business commonsense.

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[13] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 – 913.

[27] Finally, Mr Cleary submitted that Judge Shaw's decision was inconsistent with the *Tramways* case.[14]

[28] Mr Matheson submitted on behalf of the Union that the Employment Court had correctly identified ambiguity in cl 10 of the two agreements. In particular, the Court had identified an inconsistency between the first and second sentences of cl 10.4 of both agreements once the statutory holiday entitlement was increased to four weeks from 1 April 2007. It was further submitted that the Employment Court did not err in its approach to the interpretation of the agreements. Its reference to the prior instruments was a proper reference to context. The decision of the Supreme Court in *Vector* supported the Employment Court's approach.

[29] Mr Matheson emphasised the apparent inconsistency (if a literal meaning were adopted) between the first sentence of cl 10.4 and the second. To interpret the second literally (as Silver Fern contended) would render the first sentence meaningless. Qualifying employees would no longer receive an "additional week" of annual holiday. They would receive no more than any other non-casual employee. He submitted there was nothing in the context surrounding the two agreements to suggest that the Union had agreed to remove the long-standing additional entitlement as from 1 April 2007.

[30] Mr Matheson also submitted that the Judge had correctly noted that the second sentence of cl 10.4 was not compatible with s 16(1) of the Holidays Act 2003 because it contemplated the ability to cash-up one week of the entitlement. That was not permitted in the case of a statutory holiday entitlement. It followed, in Mr Matheson's submission, that the ability to cash-up could only apply to an entitlement over and above the statutory minimum.

[31] In supplementary submissions, Mr Matheson referred us to two decisions of the Employment Court delivered after Judge Shaw's decision in which a similar interpretative approach was taken by Chief Judge Colgan.[15] It was found in each

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[14] Refer [18] above.

[15] *Bernard Robinson v Capital & Coast District Health Board* (2010) NZEMPC 3; *National Distribution Union Inc v Capital & Coast District Health Board* (2010) NZEMPC 2.

case that the purpose of the agreements in question was to provide an additional week's annual holiday as a reward for long service.

**Discussion**

[32] The jurisdiction of this Court does not extend to "a decision on the construction of any ... collective employment agreement".[16] But this Court has accepted in *Secretary for Education v Yates*[17] that appellate jurisdiction to intervene is not precluded where there has been an error of principle or approach to the construction of the collective agreement which amounts to a material error of law. McGrath J put it this way:[18]

> Accordingly under the 2000 Act, as under the 1991 Act, if the Employment Court reads the terms of an employment agreement in a manner that was not open to it this Court may intervene on the basis that a wrong principle has been applied, which may include that what the Employment Court has done does not in law amount to an orthodox interpretation of the contract. The latter conclusion will not lightly be reached but is an aspect of appellate supervision of the interpretation of agreements in the Employment Court jurisdiction under the 2000 Act.
>
> On the other hand if the Employment Court adopts an interpretation which reflects its view on an orthodox approach to contractual interpretation this Court must observe the statutory constraint and not intervene, even if it doubts the correctness of the outcome. Deference by this Court to the expertise and experience of the Employment Court remains a requirement of our employment legislation (to this extent).
>
> In this context the modern role of provisions such as ss 135 and 214 of the 2000 Act is to ensure that the Employment Court applies a principled approach to interpretation of employment contracts, protecting litigants to that extent by allowing a right of appeal, now under the 2000 Act with leave. But where an interpretation favoured by the Employment Court is the result of an orthodox application of the principles of contractual interpretation this Court is bound to respect that primacy.

[33] Glazebrook and William Young JJ agreed with this analysis.[19]

[34] In the light of the authorities, our jurisdiction is limited to an inquiry as to whether the Employment Court Judge adopted a principled approach to the

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16 Section 214(1).
17 *Secretary for Education v Yates* [2004] 2 ERNZ 313.
18 At [20] – [22].
19 Per Glazebrook J at [29] and William Young J at [97].

construction of the collective agreements. If the approach adopted is found to be correct, then it is not for this Court to revisit the conclusion reached by the Judge. That is so even if we might have reached a different conclusion as to the proper construction of the agreements at issue.

[35] The decision of the Supreme Court in *Vector* has already been mentioned. That decision was preceded by a series of important decisions of the House of Lords and this Court over a lengthy period.[20] *Vector* was concerned with the construction of a commercial agreement. A principal focus was whether evidence of negotiations leading to the agreement could be taken into account in its construction. That issue does not arise in the present case. Mr Cleary properly accepted that it was permissible for the Judge to consider the prior instruments between the parties or their predecessors. His complaint was that the Judge had misconstrued their effect.

[36] For present purposes, the summary provided by McGrath J in *Vector*[21] of Lord Hoffmann's five principles of interpretation in his judgment on behalf of the majority in *Investors Compensation Scheme Ltd v West Bromwich Building Society* is helpful:

> … In summary, Lord Hoffman said that interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.

[37] Tipping J also provided analysis relevant to the present case when he said:[22]

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[20] *Prenn v Simmonds* [1971] 1 WLR 1381 (HL); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL); *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 (HL); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 (HL); *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 (HL); *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA); *Ansley v Prospectus Nominees Unlimited* [2004] 2 NZLR 590 (CA).

[21] At [61].

[22] At [33].

> The foregoing analysis recognises that, generally speaking, issues of contractual interpretation arise in three circumstances: mistake; ambiguity; and special meaning. A mistake can represent either a drafting error or a linguistic error. Errors of this kind are primarily the subject of rectification. But a clear drafting or linguistic error, combined with equal clarity as to what was intended, can be remedied by way of interpretation, and in that respect context can and should be taken into account. An ambiguity arises when the language used is capable of more than one meaning, either on its face or in context, and the court must decide which of the possible meanings the parties intended their words to bear. A special meaning exists when the words used, even after the contractual context is brought to account, are linguistically still capable of only one meaning or are wholly obscure; but it is nevertheless evidence from the objective context that the parties, by custom, usage or agreement, meant their words to bear a meaning which is linguistically impossible (for example, black means white), or represents a specialised and generally unfamiliar usage.

[38] We see the interpretation issue in the present case as stemming from the failure by the parties to stipulate what was intended by way of annual holidays for qualifying employees after the increase in the statutory minimum entitlement from three weeks to four after 1 April 2007. Prior to that time, as Mr Cleary accepted, the 2004 agreement made perfect sense. All non-casual employees were entitled under cl 10.2 to three weeks annual holiday which coincided with the then statutory minimum. Qualifying employees were entitled to one additional week of annual holiday under cl 10.4.

[39] The failure of the parties to stipulate the effect of the increase in the minimum statutory entitlement to annual holidays from 1 April 2007 meant that the Employment Court was faced with two obvious issues of interpretation. The first was how the "additional week" of annual holiday referred to in the first part of cl 10.4 was to be given meaningful content. If, as Silver Fern contended, qualifying employees were only to receive four weeks annual leave after 1 April 2007, they would be receiving no more than the statutory minimum to which all non-casual employees were entitled.

[40] The second issue was the meaning to be given to cl 10.2 in the light of the increase in the statutory minimum holiday entitlement. Clause 10.2 provided for only three weeks annual holiday for non-casual employees. As from 1 April 2007, cl 10.2 constituted an employment agreement which restricted or reduced the

statutory entitlements of the employees. By virtue of s 6(3) of the Holidays Act 2003, cl 10.2 was of no effect to the extent that it did so.

[41] The failure of the parties to address the effect of the supervening increase in the minimum statutory entitlement could be categorised as giving rise to an ambiguity which lends emphasis to the post-*Vector* argument for examining the history of the parties' dealings. 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 (to use the expression identified by McGrath and Tipping JJ in *Vector*). How was the contract to be interpreted in the new statutory context?

[42] Confronted with this situation, Judge Shaw adopted an approach to the interpretation of the agreements which was conventional and appropriate. She considered the language used in the context of the prior instruments and she strove to interpret cl 10 in a way which would remove apparent inconsistencies and give effect to what she considered to be the evident purpose of the clause. She concluded that cl 10.2 of the 2004 agreement was linked to the statutory minimum entitlement as the parties themselves recognised by increasing the annual holiday entitlement from three weeks to four in the 2007 agreement. Given s 6(3) of the Holidays Act 2003, she concluded that the parties must have intended to increase the entitlement under cl 10.2 to the new statutory minimum of four weeks from 1 April 2007 since cl 10.2 would be of no effect to the extent it did not comply with the new minimum. The Judge reached the view that the reference to the "additional week of annual holiday" in cl 10.4 would be rendered redundant or meaningless if the interpretation espoused by Silver Fern were to be adopted.

[43] We also consider that 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 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. Although the qualifying periods

differed in the various instruments, there was (with one exception) a consistent pattern of one additional week of annual leave above the statutory minimum entitlement for longer serving employees. The sole exception to this pattern was in the 1974 collective agreement which anticipated a statutory amendment that year increasing the minimum entitlement from two weeks to three. No additional week was allowed for longer serving employees in the 1974 agreement. The three weeks minimum was paid to all employees after a 12 month period of service.

[44] Having considered the prior instruments, the Judge reached the view that there had been a consistent approach of rewarding the loyalty of longer serving employees by an additional week's annual holiday and that this was a contractual entitlement above the statutory minimum. That general conclusion was appropriate subject to the sole exception referred to in the preceding paragraph.

[45] We are satisfied the decisions of this Court and the Employment Court in the *Tramways* case are distinguishable. The further annual holiday of one week in that case was available to all employees in addition to the then three week statutory minimum not as a reward for long service but "in recognition of the nature of the work". There was nothing to indicate that the parties intended the additional week would continue to apply after the increase in the statutory minimum in the present case. That can be contrasted with the general pattern established by the history of prior instruments in the present case and the plain purpose of differentiating and rewarding longer serving employees by providing an additional week's leave which, unlike the statutory entitlement, could be cashed up. It is also consistent with the conclusion reached by Chief Judge Colgan in the decisions identified in [31] above.

[46] Given our finding that there was no error of principle in the Judge's approach, we do not have jurisdiction to intervene in the ultimate conclusion as to the interpretation of the 2004 agreement. Having reached her conclusions in respect of the 2004 agreement, the Judge was entitled, by the same principled approach, to reach the same conclusion in respect of the 2007 agreement.

**Result**

[47] The appeal is dismissed.

[48] The respondent is entitled to costs against the appellant for a standard appeal on a Band A basis together with usual disbursements.

Solicitors:
Reeves Middleton Young, New Plymouth for Respondent