IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 193
EMPC 67/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ADRIAN LE GROS Plaintiff
AND	FONTERRA CO-OPERATIVE GROUP LIMITED Defendant

Hearing:	27 September 2023
Appearances:	P Cranney and E Griffin, counsel for plaintiff R Rendle and A Shankar, counsel for defendant
Judgment:	8 November 2023

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The parties are at odds over the correct interpretation of a clause in a collective agreement. The clause (cl 6.4) relates to long service leave entitlements. The Employment Relations Authority determined that Mr Le Gros was not entitled to long service leave under the clause.[1] Mr Le Gros (represented by his Union, E Tū, who is party to the collective agreement) has challenged the determination on a de novo basis.

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1 *Le Gros v Fonterra Co-Operative Group Ltd* [2023] NZERA 35 (Member Blick).

[2] The challenge raises issues about the interpretation of employment agreements, given the distinct nature of those agreements and the statutory, and common law, context within which they sit. Before turning to those issues, it is convenient to set out the facts of the case.

The facts

[3] Mr Le Gros has worked for Fonterra for 20 years. He was initially employed as a reliability engineer and later became a lead planner, with a number of staff reporting to him. The lead planner role was not under coverage of a collective agreement. Accordingly, Mr Le Gros was employed under an individual employment agreement (signed on 20 October 2003).

[4] In March 2021 the Business Centred Maintenance Collective agreement (the BCM collective agreement) was extended to include the planners who reported to Mr Le Gros. In June 2021 Fonterra undertook a restructuring exercise, and the lead planner role held by Mr Le Gros was disestablished. He was offered, and accepted, redeployment into a planner role. He became covered by the collective agreement and became employed under those terms and conditions.

[5] Mr Le Gros' individual employment agreement had provided for four weeks' annual leave a year. It made no provision for long service leave. While no contractual provision was made for such leave, the human resources director issued a policy document (referred to as a directive) on an undisclosed date,[2] entitled the "Recognition of Long Service" directive. The purpose of the directive was stated to be to "acknowledge and recognise those employees who have provided Fonterra and its legacy organisations with significant ongoing service." While in force, the directive applied to workers on both individual employment agreements and those covered by a collective agreement, although in different terms. In this regard the directive provided that:

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[2] The only directive before the Court is dated 2022, so was not the relevant directive at the time Mr Le Gros reached his 10th anniversary of long service. It appeared to be common ground that the directive that did apply to him at the time was in materially the same terms.

3 Directive

3.1 Individual Employment Agreements (IEA)

3.1.1 In recognition of an employee's continued service, the following Fonterra Long Services Awards must be presented to all permanent salaried employees employed on IEA's at the completion of:

a. 10 years of continuous service

- Recognition item to the value of $50 from the Fonterra web store
- Net payment of $1000

b. 25 years of continuous service

- Certificate presented by a Business Unit Leader at an appropriate company-sponsored celebration
- Recognition item to the value of $100 from the Fonterra web store
- Net payment of $5,000

c. 40 years of continuous service

- Certificate presented by a Business Unit Leader at an appropriate company-sponsored celebration
- Recognition item to the value of $200 from the Fonterra web store
- Net payment of $10,000

[6] As I have said, the directive also made provision for those on a collective agreement. It provided that, in addition to the long service awards provided for in a collective agreement, the following awards were to be presented to all employees employed on collective agreements at the completion of:

…

a. 25 years of continuous service

- Certificate presented by a Business Unit Leader at an appropriate company sponsored celebration

b. 40 years of continuous service

- Certificate presented by a Business Unit Leader at an appropriate company sponsored celebration

[7] The directive dealt with "eligibility", stating that continuous service for the purposes of cl 3.1 "is determined from the start date for continuous service stated in the current employment agreement" (in Mr Le Gros' case 20 October 2003) and that "Membership of each club is restricted to current employees." The directive stated

that managers were to be accountable for ensuring that employees received their recognition in accordance with the standards set out in the directive, and "at the time they fall due".[3]

[8] In 2013 Mr Le Gros completed 10 years of continuous service for Fonterra and received a payment of $1,000 under the directive. If he had remained on an individual employment agreement, and if the directive remained in place, his next payment would fall due in 2028, after 25 years of continuous service. As I have said, Mr Le Gros moved to a collective agreement in 2022.

[9] The BCM collective agreement covering Mr Le Gros' new position contained provisions relating to long service leave. Those provisions were superior to the recognition provided for under the directive and contained differing milestone dates of service. There was no evidence before the Court as to the background to the long service provisions in the collective agreement.

[10] I note at this point that the BCM collective agreement provisions have since been altered following the Authority's determination and prior to the hearing. At the relevant time cl 6.4 of the collective agreement provided that:

> **6.4 Long Service Leave**
>
> In recognition of long service, employees are entitled to a special holiday as follows:
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> - 2 weeks after 15 and before 25 years continuous service
> - 3 weeks after 25 and before 35 years continuous service
> - 4 weeks after 35 and before 40 years continuous service
> - 5 weeks after 40 years continuous service.
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> Long service leave shall be taken in one or more periods at a time mutually agreed with the manager. An employee who resigns from the Co-operative will be paid in lieu of any outstanding long service leave entitlement. In the case of waged employees, the allocation shall be forty-two hours per week (to be applied from the date of ratification in 2021) of long service leave and paid at the higher of average earnings or the ordinary hourly rate.

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[3] As Mr Cranney, counsel for the plaintiff, pointed out, the directive sat outside both the individual employment agreement that Mr Le Gros had been on and the collective agreement that he moved to in 2021.

[11] By the time Mr Le Gros became covered by the collective agreement he had performed over 15 years of continuous service for Fonterra. He had performed that service while party to an individual employment agreement. The question that arose was whether Mr Le Gros was entitled to two weeks' long service leave under the collective agreement, as an employee who had completed over 15 years of continuous service for Fonterra. He considered, through the union, that he was; Fonterra considered that he was not. It is this issue which gave rise to the dispute now before the Court.

[12] Fonterra's position was that, while Mr Le Gros had commenced service with Fonterra in 2003, and that service was continuous, he was "not entitled to the 15 years' Long Service Leave under the [collective agreement] as he was not under those terms and conditions in 2018 when it would have been due…"; rather he had been on an individual employment agreement. At the time Fonterra advised that Mr Le Gros would be entitled to the 25 year long service leave benefit (3 weeks' paid leave) in 2028, assuming that cl 6.4 remained in its current form and he remained covered by the collective.[4] In other words, Fonterra's position was (and remains) that in order to be eligible for long service recognition under the collective agreement Mr Le Gros had to be not only a long serving employee of Fonterra but also covered by the collective at the time of his 15 year anniversary, and had to take that leave before the anniversary of 25 years' continuous service. Had Mr Le Gros moved onto the collective agreement the day before, or day of, his 15th anniversary he would have been entitled to long service leave.

[13] Mr Le Gros pursued a dispute in the Authority. There the Union argued that he became entitled to two weeks' long service leave on gaining coverage under the collective, having had 15 years' continuous service and less than 25 years' continuous service. The Authority did not agree, for reasons set out in the determination. In summary, the Authority considered that the provisional meaning of the reference to "after 15 and before 25" in cl 6.4 meant that a long serving employee becomes entitled to the special holiday of two weeks on the 15th anniversary of their commencement date and the employee is to use the entitlement within the next ten years.

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4 See email from Ms Sepschat to E Tū dated 6 October 2021.

[14] The Authority considered that the contractual context did not alter the provisional interpretation because the clause had been applied consistently over many years; it accorded with "business sense" for Fonterra to seek to incorporate limits on the banking of long service leave (and the reference to "before 25 years" in cl 6.4 reflected that); the interpretation advanced by the Union would inject a degree of inconsistency and unfairness which would be "contrary to good business common sense" and would enable employees to "game the system", which would also be "contrary to business common sense".[5]

[15] As will be apparent, the second part of the interpretative exercise undertaken by the Authority involved a focus on what may or may not be aligned with what a business might regard as sensible practice; a focus that also emerged from Fonterra's case on the challenge. This gave rise to submissions as to whether a broader perspective was appropriate when interpreting employment (as opposed to commercial) agreements.

What are the principles of interpretation which apply to the proper construction of employment agreements?

[16] As the Supreme Court has explained in the context of a dispute about the meaning of a commercial contract, the approach is objective. The aim is to ascertain the meaning which the agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the agreement. This objective meaning is taken to be that which the parties intended. While the meaning of a clause in an agreement may appear clear, meaning is informed by context. A provisional conclusion as to meaning is to be cross-checked against the context provided by the agreement as a whole, and any relevant background.[6]

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5 At [45]-[47].

6 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696. See too *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]-[63].

[17] While these principles were set out in a judgment which related to the interpretation of a commercial contract, a full Court of this Court has since confirmed that the same principles apply when interpreting employment agreements.[7] I see the statutory and common law context in which employment agreements are entered into and operate as being relevant to the interpretative exercise. And I see that as sitting comfortably with the authorities I have referred to.

[18] The first point is that this Court's role in interpreting employment agreements (including collective agreements) is, as Mr Cranney submitted, unique. That reflects the recognition (embedded in the Employment Relations Act 2000) that the work the Court does is specialised – it involves the resolution of issues between parties to employment relationships within the industrial relations framework. All of this receives statutory recognition, including via ss 214(1) and 216, limiting appeals against a decision on the construction of either an individual employment agreement or a collective employment agreement, and (when deciding an appeal) requiring regard to be had to the special jurisdiction of the Court, the objects of the Act (which include recognition of the inherent imbalance of power in employment relationships); the Court's equity and good conscience jurisdiction; the restrictions on judicial review of proceedings of the Employment Court; and various procedural provisions enabling the Court to effectually dispose of any matter before it according to the substantial merits and equities of the case.[8]

[19] I respectfully endorse observations about the unique nature of collective agreements made by the former Chief Judge in *New Zealand Airline Pilots' Association Inc v Air New Zealand Ltd*:[9]

> [14] Collective agreements are not contracts, at least in the traditional sense of the word. Nor are they "commercial" in the sense of regulating a

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7 *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2022] NZEmpC 78, [2022] ERNZ 304 at [27]-[31]. See too the earlier Supreme Court judgment, which did arise in the context of an employment agreement, in *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428 at [71].

8 See s 216.

9 *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2014] NZEmpC 168, [2014] ERNZ 709. While the majority of the Supreme Court held that the Chief Judge's summary of principles of contractual interpretation had been overtaken by the Supreme Court's judgment in *Firm P1*, and must be "put to one side", at [71], that observation was confined to the Chief Judge's summary at [21] of his judgment.

> relationship of seller and purchaser of goods or services in commerce. Collective agreements, as successors to collective contracts and awards, are rarely either generic or unique instruments. Rather, they represent the development of a particular employment relationship between an employer and a union over a long period, which is confirmed and altered from time to time in collective instruments which must and do expire and are renegotiated…
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> [15] For the most part, also, collective agreements are not drafted, negotiated and settled by practising lawyers…
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> [16] A collective agreement is a statutory creature. Although it is entered into between an employer (or employers) and a union (or unions), its provisions for the most part do not govern an operative employment relationship on a day-to-day basis with that union or unions. Rather, the persons affected principally by a collective agreement's provisions (apart from the employer or employers), are employees who are or may become members of the signatory union or unions.
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> …
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> [18] Collective agreements are not commercial contracts for the sale and purchase of goods or services between willingly contracting parties in a free marketplace. They are relational agreements which must comply with a significant number and range of statutory minima and exclusions. In many instances, especially in longstanding and highly unionised sectors such as commercial aviation, they are the product of compromise and opportunism.

[20] The Court's judgment as to the correct interpretation of the parties' collective agreement in the *Air New Zealand* case was overturned by the Court of Appeal. The matter then came before the Supreme Court. The majority of the Supreme Court referred to the Chief Judge's discussion of the unique character of collective agreements, including the relational nature of them representing the progression of an employment relationship on an ongoing basis and over a lengthy period. The majority held that:

> [77] If, in referring to "employment relations" common sense, the Employment Court simply sought to capture these features, there could be no objection to that. But, if what was meant was that contracts should be interpreted so they accord with the Court's view of common sense, rather than with the wording interpreted in light of the background that is problematic. That is because this exercise runs into the same difficulties with resorting to business common sense or commercial absurdity discussed in *Firm PI*.

[21] The point made in *Firm PI*, which appears to be the one being emphasised in the above passage, is that the Court does not substitute its own view. Commercial absurdity tends to lie in the eye of the beholder and (more generally) a Court is not

justified in concluding that a contract does not mean what it says simply because the Court considers that, so interpreted, the contract is unduly favourable to one party.[10]

[22] As the majority judgment of the Supreme Court in *New Zealand Airline Pilots' Assoc Inc v Air New Zealand Ltd*[11] also explained, the repeal of the Labour Relations Act 1987 and enactment of the Employment Contracts Act 1991 brought significant change to the way in which the nature of employment was characterised.[12] A review of judgments from that period reflects what has been described as a contractual approach to the resolution of disputes requiring the intervention of the Courts,[13] including some judgments dealing with the interpretation, application and operation of individual and collective employment agreements.[14] Those judgments, decided under the Employment Contracts Act, emphasise the relevance of business efficacy, commercial absurdity and business common sense as factors relevant to an assessment of objective intention.[15] As I have mentioned, those factors also weighed on the Authority in interpreting cl 6.4 in this case, and were advanced by Fonterra as relevant to the interpretative exercise on the challenge.

[23] The sort of points highlighted by the Employment Court in *Air New Zealand*, as to the special features of employment agreements as being relevant context, were recently emphasised by the Supreme Court in *FMV v TZB*.[16] There the Supreme Court referred to the "theme" of the Employment Relations Act as "relationships, not contracts." Employment relationships, as the Court pointed out, are fortified by overarching duties of broadly crafted good faith obligations (described as "the real focus under the current Act") and the Act's intended "levelling effect." The majority went on to refer to the design of the specialist institutions (Mediation Services, the Employment Relations Authority and the Employment Court) as intended to give

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10 *Firm PI,* above n 6, at [89]-[90], citing Lord Hoffman's observations in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [15]. See also *Dean v Chief Executive of the Ministry for Primary Industries* [2017] NZEmpC 139, [2017] ERNZ 808 at [47]-[50].

11 *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd*, above n 7.

12 At [28].

13 See for example *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, [2021] ERNZ 740 at [46].

14 See for example *Potter v Air New Zealand Ltd* [1999] 2 ERNZ 581 (EmpC); *Priest v Fletcher Challenge Steel Ltd* [1999] 2 ERNZ 395 (EmpC).

15 A point underscored by the Supreme Court's judgment in *Firm PI*, above n 6, at [79], confirming that Courts should have regard to the commercial purpose of interpreting a commercial contract when interpreting that contract (an observation Fonterra relied on in this case).

16 *FMV*, above n 13.

effect to the Act's overall object of building productive employment relationships through the promotion of good faith.[17]

[24] As Mr Cranney rightly pointed out, employers do many things for their employees aimed at supporting employment relationships, which are not driven solely by economic efficiency or business common sense. That is hardly surprising given the statutory and common law context under which employers are required to operate.

[25] The short, but pivotal, point is that employment agreements are not akin to arms-length business agreements; they involve people and human interactions (not the economic exchange of money for goods); they occur within the framework of multifaceted obligations, both statutory (such as mutual obligations of good faith) and common law (such as the obligation of fidelity and fair dealing). These features provide relevant context when the Court is asked to determine a dispute as to the correct interpretation, application and/or operation of a collective agreement (in this case) or an individual employment agreement.

[26] I see a long service leave provision in a collective agreement, provided by an employer to recognise continuous service by a loyal employee over many years, as requiring a broader contextual inquiry. While the business implications may well, as Fonterra says, be relevant to the contextual inquiry, they ought not to be given undue weight, must be considered in the mix with the relational aspects of the parties' agreement and must themselves be viewed in context. I see this approach as being consistent with the Supreme Court's analysis in *Bathurst* and *Air New Zealand*, and the Court's recent acknowledgment of the relational, not contractual, nature of the employment relationship in *FMV*.

[27] Finally, it is notable that in *Air New Zealand* the Supreme Court majority expressly left open the question of whether the nature and scope of the Employment Court's equity and good conscience jurisdiction is relevant to the interpretative exercise. In this regard s 189 provides that:[18]

> **189 Equity and good conscience**

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17 *FMV*, above n 13, at [1]-[2] and [44]-[59].
18 Emphasis added.

> (1) *In all matters before it*, the court has, *for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them* in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, *as in equity and good conscience it thinks fit*.
>
> (2) The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[28] The point was not argued in this case and it is not necessary for me to decide it. Other than noting that it appears to be seriously arguable, I say no more about it.[19]

[29] I approach the interpretation exercise in this case on the foregoing basis.

The meaning of cl 6.4

[30] Fonterra argued that the plain meaning of cl 6.4 emerges from the phrase "after 15 and before 25 years". It was submitted that this phrase makes it clear that an employee becomes entitled to the special leave on their 15th anniversary date and must use it by their 25th anniversary. This interpretation found favour with the Authority, which concluded that the word "after" in the context of the clause more than likely meant "on the completion of."[20] This led the Authority to form the provisional view that cl 6.4 meant that an employee becomes entitled to special leave of two weeks on their 15th anniversary and they are to use that entitlement within the next 10 years.

[31] It seems to me that the interpretation advanced by Fonterra (and accepted by the Authority) as to the plain meaning of cl 6.4 conflates two things. Taken on its face, cl 6.4 provides that any employee of Fonterra who has had 15 years of continuous service and is covered by the collective agreement is entitled to two weeks of special leave. This is reinforced, as argued by counsel for the Union, by the linking of the recognition of long service with entitlement, and use of the words "are entitled".

[32] There is no expressly stated caveat to the phrase "any employee", such as by stipulating that the employee must have been covered by the collective as at the date

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19 *Air New Zealand Ltd*, above n 9, at [42].
20 At [40].

of their 15th anniversary. The reference to "entitled" is not caveated either. Nor is it stated that the special leave becomes due on any particular date, as the reference to leave being taken on a date or dates mutually agreed with the manager makes clear. Rather, the clause states that an employee with 15 or more years of continuous service may claim the special leave they are entitled to, and they may take that leave at a time their manager agrees to. In other words, the reference to mutual agreement tells against Fonterra's reliance on the phrase "after and before" being linked to entitlement.

[33] Further, it is notable that the phrase "recognition of long service" is not qualified. *Any* service for Fonterra is regarded as service for the purposes of long service recognition, whether that service was performed under a collective agreement or an individual employment agreement or a varying combination of both. It is also notable that each bullet-pointed tranche of service in cl 6.4 builds on one another and incorporates the preceding tranche. For each of the four tranches of service, the collective agreement makes it clear that "all" continuous service is recognised, including for other employers.[21]

[34] Fonterra's submissions relating to the linked concepts of retrospectivity and double-dipping find some support in *Tatua Co-operative Dairy Company Ltd v New Zealand Dairy Workers' Union.* That case also involved the interpretation of a long service leave entitlement clause contained within a collective agreement, drafted in similar (although not identical) terms.[22] Clause 17 of that collective agreement provided that:

> A worker shall be entitled to special holidays as follows:
>
> 17.1.1 One special holiday of 40 hours after the completion of 10 years and before the completion of 20 years of continuous service with the employer.
>
> 17.1.2 One special holiday of 80 hours after the completion of 20 years and before the completion of 30 years of continuous service with the employer
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> …

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[21] See for example cl 24.5. While that clause does not apply to Mr Le Gros, in my view it is still helpful in ascertaining the meaning of clauses that do apply to Mr Le Gros, such as cl 6.4, as I understood counsel for Fonterra to accept.

[22] *Tatua Co-operative Dairy Co Ltd v New Zealand Dairy Workers' Union Te Runanga Wai U Inc* [2011] NZEmpC 61, (2011) 9 NZELR 107 at [2].

[35] In interpreting cl 17 the Court referred to the need for a clear expression of intention to provide a double entitlement.[23] In this regard Judge Travis considered that use of the word "entitled … must be taken to mean that the date of entitlement is based on the employee's anniversary of service". He went on to find that, when viewed as a matter of commercial realism and in the absence of clear words to the contrary, cl 17 only applied to those whose anniversary dates were reached during the currency of the collective, and not those whose anniversary dates were reached during the currency of the expired collective.[24]

[36] I read the judgment in *Tatua* as primarily founded on the presumption against retrospectivity in relation to consecutive contracts; the parties were presumed not to intend for a new collective agreement to apply to time periods covered by the expired collective agreement. The same concern does not neatly apply in relation to Mr Le Gros, where the collective agreement at issue was operative at all relevant times.

[37] Further, the clear wording objection identified in *Tatua* can (as I come to) go the other way. Nor does the "double entitlement" peril which concerned the Court in *Tatua* arise to the same extent, since this may occur on either party's interpretation, as I also explain below. Finally it may be noted that the Court of Appeal's judgment in *Apple Fields Ltd*, cited in support of the analysis in *Tatua*, arose in the context of a dispute about the meaning of a commercial contract and the potential imposition of a "double fee". The Court of Appeal characterised this potential (in ascertaining objective intention) as commercially "very unrealistic."[25] That is a point I also return to.

[38] In the present case it is relevant (in terms of the required contextual analysis) that the clause at issue is not an obligation on employees; rather it is wholly beneficial. Fonterra clearly intended to provide special recognition to employees who had provided it with long service. The clause is squarely focussed on the recognition of service to Fonterra, not on the contractual arrangements under which that service was or is being provided. That is significant for the interpretative exercise.

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23 Citing *Apple Fields Ltd v Counterpoint Equities Ltd* CA 249/98, 4 May 1999.
24 At [44].
25 *Apple Fields Ltd*, above n 23, at [18].

[39] As I have said, the statutory context is also relevant. Section 56 of the Act ("Application of collective agreement") provides that a collective agreement that is in force is enforceable by employees who "*are or become* members of a union that is a party to the agreement." I agree with Mr Cranney that the wording reflects a statutory intention enabling employees to move into collective agreements mid-term and for them to enjoy the entitlements conferred under that agreement. The wording mirrors that adopted in the collective agreement itself in cl 1.1 ("Parties, Coverage and Term"), which states that the agreement applied to employees of Fonterra employed within the Maintenance Services Group, covering employees at any Fonterra site "who are, or become, members of E Tū". In other words, a late-joining long-serving employee such as Mr Le Gros (who could not have been covered by the collective agreement sooner) becomes bound by the agreement as at the date of joining, but the terms of the collective agreement are also enforceable by that employee from that point.

[40] Witnesses for Fonterra made the point that cl 6.4 is a very long standing clause used in consecutive collective agreements and that no-one had ever sought to interpret it in the way the Union was seeking to do on behalf of Mr Le Gros. That, it was said, supported its interpretation. I accept that evidence as to the way in which a clause in a collective agreement has been interpreted and applied over time, or reproduced in successive collective agreements, may be relevant to the interpretative exercise as being indicative of objective intention.[26] I do not accept that the evidence in this case is materially helpful. While it was clear that some employees over the years had transferred from individual employment agreements to a collective agreement, the employment relations manager described the situation that Mr Le Gros was in as "rare". If the situation is rare, it is hardly surprising that it has not given rise to discussion or dispute. Against this backdrop I do not see how any sound inferences as to objective intention can be drawn from the fact that E Tū has failed to raise a dispute about the interpretation, application and/or operation of the clause before now.[27]

[41] A similar point can be made in respect of the absence of specific wording to cover the sort of situation that Mr Le Gros' situation has given rise to. I do not agree with the submission that if the parties had intended that someone like Mr Le Gros

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26 *Bathurst*, above n 6, at [89]-[90].
27 Compare the Authority's observation at [43].

would be covered by cl 6.4 they would likely have used more specific wording to convey that intention.[28] Again, if his is a "rare" situation a reasonably informed observer may reasonably conclude that neither Fonterra nor the Union turned their minds to it, rather than concluding that the intention was that cl 6.4 disentitled recognition unless an employee was covered by the collective as at the date of their anniversary.

[42] What a reasonably informed observer might, however, note, is the absence of wording such as appears in the directive, which specifically deals with "eligibility", stating that continuous service for the purposes of cl 3.1 "is determined from the start date for continuous service *stated in the current employment agreement*". The point is reiterated in cl 3.1.1 which provides that recognition "must" be presented at the "completion of" stated years of continual service. To put it another way, why – if the parties intended to limit recognition of 15 years of continuous service to those who celebrated their 15th anniversary on or after becoming covered by the collective agreement – does the clause not make that clear, particularly if limiting contingent liabilities and avoiding "gaming" by employees was, as Fonterra says, perceived to be an important factor?

[43] As I have signalled, Fonterra made much of business common sense in support of its favoured interpretation of cl 6.4, and these factors were relied on by the Authority in interpreting the clause. In summary, it was said that it is logical and consistent with business common sense that Fonterra would seek to incorporate limits on the banking of long service leave by providing time frames within which it was to be taken, and cl 6.4 should be interpreted accordingly; the systems adopted by Fonterra record entitlement on each applicable anniversary depending on whether an employee is on an individual or collective agreement and adopting the plaintiff's interpretation would be inefficient and costly; it would inject a degree of inconsistency between groups of employees, which would be contrary to good business common sense, and would enable employees to "game" the system which would also be contrary to business common sense.

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[28] Compare the Authority's conclusion at [44].

[44] There is a fundamental difficulty with Fonterra's arguments about business common sense. The concerns the company has identified essentially arise out of a directive it unilaterally decided to introduce, which gratuitously conferred long service leave entitlements on employees on individual employment agreements, adopting wording the company unilaterally selected and incorporating entitlement dates which significantly differed from those in the collective agreement. And while it remained open to Fonterra to take steps to revisit the directive and to minimise the issues it complains about it has not done so. Rather Fonterra seeks to rely on the business difficulties which it created to support a favourable interpretation of the collective agreement. I do not see that as an appropriate interpretative approach.

[45] Evidence was given as to the logistical difficulties associated with recording anniversary dates for transferring employees and when they received long service leave. I have considered that evidence but do not consider that it assists in ascertaining the objective meaning of the clause.

Relational common sense considerations

[46] As I indicated above, Fonterra's arguments about business common sense need to be viewed within context, particularly where, as here, the clause at issue is designed to recognise loyal service to the company (engaging what I describe as relational common sense considerations). The point is that no employer in New Zealand is statutorily required to provide long service leave to its employees. The provision is gratuitous and comes at a financial and operational business cost, although it may have some broader spin off benefits for the employer. At its heart it is a provision designed to recognise, reward and benefit the employee. That is, to my mind, relevant to the way in which the clause is to be objectively interpreted.

[47] In this case, Fonterra has chosen to grant long service leave entitlements, couched in terms of a recognition of service. That the leave must be taken on mutually convenient dates may be said to reflect the timeframes the parties intended to put in place for such leave to be taken, with any untaken leave to be paid out on resignation (as cl 6.4 makes clear). The underlying purpose (to recognise long service) is not undermined by reading the clause as conferring such recognition on an employee who

has given 15 years of continuous loyal service to the company and subsequently becomes covered by a collective agreement which recognises such service via the grant of leave.

[48] The fact that the company also confers long service recognition on employees on individual employment agreements is part of the relevant context, as Fonterra says. There is an inherent awkwardness in someone in Mr Le Gros' position, having been rewarded for 10 years of service under the directive while on an individual employment agreement, then being rewarded for 15 years served under an individual agreement after having subsequently moved to collective agreement coverage. However, the approach advocated by Fonterra does not resolve this awkwardness. As I understood it, there would be no issue if Mr Le Gros had come under coverage of the collective employment agreement a day before or day of the 15th anniversary of his continuous service to the company. In such circumstances he would have received the $1,000 for his first 10 years (which he would not be eligible for under the collective agreement) and then received two weeks of leave to recognise that first 10 years and the following five years, all of which (bar one day) were worked under the individual agreement.

[49] As I have said, it remains open for Fonterra to revisit the directive that applies to individual employees to resolve this awkwardness and the broader issues identified above.

Conclusion

[50] The wording of cl 6.4 could be clearer; a point that the parties appear to agree on, given the clause has recently been reworded. This dispute involves the interpretation of cl 6.4 as previously drafted. It will be apparent from the foregoing that I consider that the plain and ordinary meaning of cl 6.4 when read in context is that it confers two weeks' long service leave on an employee who has completed over 15 years of continuous service for Fonterra. An employee in Mr Le Gros' position is eligible for such recognition, despite not being covered by the collective agreement at the time his 15 year anniversary clocked over. He is entitled to a declaration accordingly.

[51] I do not anticipate any issue of costs to arise but if I am wrong about that I will receive memoranda, with the plaintiff filing and serving within 20 working days of the date of this judgment, and any reply within a further 15 working days.

Christina Inglis
Chief Judge

Judgment signed at 3.40 pm on 8 November 2023