IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 2
WRC 38/08

	IN THE MATTER OF	proceedings removed from the Employment Relations Authority
	BETWEEN	NATIONAL DISTRIBUTION UNION INC Plaintiff
	AND	CAPITAL AND COAST DISTRICT HEALTH BOARD Defendant

Hearing: 9 June 2009
(Heard at Wellington)

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

Judgment: 18 January 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The issue in this proceeding removed by the Employment Relations Authority for hearing in this Court at first instance is whether an additional week's annual leave for long-serving employees is in addition to, or subsumed by, the statutory entitlement of employees to a minimum of 4 weeks' annual leave after 1 April 2007.

[2] This is one of two very similar cases heard on consecutive days involving the same employer although different plaintiffs and interpreting different collective agreements. Counsel for the parties were the same in each case and some of their submissions were cross-referenced between the two. Although considered separately and the subject of separate judgments, the decisions have been released at the same time. The other case referred to is *Robinson v Capital and Coast District Health Board*[1]. The judgments should be read together.

[1] [2010] NZEmpC 3

[3] The union and the defendant were parties to a collective agreement which came into force on 1 January 2007 and expired on 31 December 2007. The collective agreement was settled after the passing into law of the Holidays Amendment Act 2004 which provided that from 1 April 2007 all employees would be entitled to minimum annual holidays of 4 weeks, an increase from the previous statutory minimum of 3 weeks.

[4] The relevant terms of the collective agreement are 10.2.1 and 10.2.2 as follows:

> 10.2.1 On the anniversary of the commencement of your employment you will be entitled to an annual holiday of 3 weeks (from 1 April 2007 4 weeks) on holiday pay calculated in accordance with the Holidays Act 2003. …
>
> 10.2.2 Subject to the outcome of the 2007 settlement agreement between the union and employer parties: After the completion of seven years continuous service the employee will be entitled to an additional week of annual holiday for the seventh year and succeeding years.

[5] The "2007 settlement agreement" was that the parties would seek a ruling of the Employment Relations Authority and the Employment Court as to whether the "additional week" in the remainder of clause 10.2.2 after 1 April 2007 provided a total of 4 or 5 weeks' annual holidays for long-serving employees. The parties also agreed that if the Court determines this question in the union's favour it will be unnecessary to alter the wording of a new collective agreement settled subsequently.

[6] This 2007 settlement agreement was expressed in the following words:

> 3) Annual Leave: Clause 10.2.2
>
> It is agreed that to resolve the employer claim to remove the existing section 10.2.2. ("additional week" of annual leave – to avoid any possibility from the employer point of view that it might be seen to provide a total of 5 rather than 4 weeks leave) the section will remain in the Collective on the understanding that an Employment Authority/Court ruling will be sought by the parties as to whether or not, on the wording of the previous expired Collective and subsequent to 1 April 2007 Holidays Act changes, the section would have legally provided a total of 4 or 5 weeks leave.
> The parties agree that section 10.2.2 of the new Collective will be read as if the Authority/Court ruling applied directly to it, i.e. if the ruling is that the "additional week" would have delivered a total of 5 weeks then there will be no need to alter the wording in the new Collective (the old s 10.2.1 reference to 3 weeks holiday having now been updated to 4 weeks in accordance with

> Holidays Act changes) and an "additional week" will mean additional to 4 weeks making a total of 5. However if the ruling is that a total of only 4 weeks would have applied then section 10.2.2 of the new Collective will be read as being null and void and immediately removed by agreed variation.

[7] Before 2007 the union and the employer were parties to an earlier 1-year collective agreement that operated from 1 January to 31 December 2006. Relevant terms of the 2006 collective agreement were:

> 10.2 **Annual Leave**
>
> 10.2.1 On the anniversary of the commencement of your employment you will be entitled to an annual holiday of 3 weeks on holiday pay calculated in accordance with the Holidays Act 2003. …
>
> 10.2.2 After the completion of seven years continuous service the employee will be entitled to an additional week of annual holiday for the seventh year and succeeding years.

[8] In bargaining for the 2007 collective agreement, the parties reached a stalemate on the question now at issue in this proceeding. To enable the collective agreement to be concluded, the parties agreed to a process for the interpretation of the relevant clause in the 2006 collective agreement.

[9] The parties have now entered into a further collective agreement that began on 1 January 2008 and expired on 30 June 2009. The holidays provisions in this last collective agreement are identical to those set out in the 2007 agreement that I have copied earlier in this judgment. The parties agree that the outcome of the case will apply to that collective agreement's provisions.

Long service rewards/incentives

[10] Rewarding employees for long service, including providing incentives to reach that status, is a well established fact of employment in New Zealand that benefits mutually employees and employers. Long service will tend to give employees greater security of employment. Employees will generally work most efficiently. It will also reduce the costs faced by an employer in replacing employees who leave. Such rewards/incentives can take a variety of forms including increased pay but also, pertinently for the purposes of this case, more holidays, whether as a one-off reward upon attaining a specified longevity or an annual reward of a holiday after passing a

milestone or milestones. It should go without saying that to be effective as a reward or incentive, such an arrangement must differentiate the relevant terms and conditions of a long-serving employee from those of an employee who has not yet attained the status.

The *Tramways* case

[11] Two judgments in serial litigation are relevant to the decision of this case. The first is the judgment of the majority of the Court of Appeal (Glazebrook and Baragwanath JJ) in *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd*[2]. The second judgment is that of the Employment Court on referral back by the Court of Appeal. That is *New Zealand Tramways and Public Transport Employees Union Incorporated v Transportation Auckland Corporation Limited and Cityline (New Zealand) Limited*[3].

[12] First, the judgment of the majority in the Court of Appeal. The collective agreement in that case provided the employees with 3 weeks' annual holidays 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 for the Court of Appeal was whether additional holidays agreed to be in recognition of the nature of the work performed were absorbed by, or were in addition to, minimum annual leave when the entitlement to this was increased from 3 to 4 weeks. The judgment of the majority favoured an interpretation that, with 21 months to run before the statutory increase from 3 to 4 weeks took effect, the contracting parties accepted that the total of 4 weeks (3 weeks plus 1 week made up as described previously) did not require a change part-way through the term of the collective agreement. Put another way, the parties regarded the former total (and subsequently the statutory minimum) of 4 weeks as sufficient to accommodate the disadvantageous nature of the shift work performed by the employees.

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[2] [2008] ERNZ 229
[3] [2008[ERNZ 584

[13] Upon referral back, the Employment Court reviewed its previous reasoning and, following the guidance of the majority of the Court of Appeal in aligning the terms in the Holidays Act "enhanced" and "additional", decided as follows. The Employment Court concluded that the question whether an agreement provides an enhanced or additional entitlement and the scope of the entitlement is dependent not on the Act but on the wording of the agreement. The Employment Court concluded, as a matter of interpretation of the collective agreement in issue in that case, that the parties had provided for a total of 4 weeks' annual holidays. The Court did 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. In that case the Court found the parties had not agreed to 5 weeks' annual holidays as they could have. Nor did they agree that employees would be entitled to an additional week of annual holidays on top of any increases to the statutory annual holidays entitlement. As the agreement in that case had provided 4 weeks' annual holidays as interpreted, it met the statutory minima provided for all employees by the Holidays Act 2003. There was no automatic increase to 5 weeks' annual holidays as a result of the increase to the statutory minimum of 4 weeks' annual leave.

The *Silver Fern* case

[14] This is a subsequent judgment addressing similar, if not identical, issues, delivered on 20 April 2009 (*NZ Meat Workers and Related Trades Union Inc v Silver Fern Farms Ltd (formerly PPCS Ltd)*[4]). Leave to appeal has been granted by the Court of Appeal but the employer's appeal is as yet unheard and/or undecided.

[15] The clause at issue in that case was materially the same as in this. It provided for an additional week of annual holiday after 6 years' concurrent service. Although the clause described this as "the fourth week's holiday" and said that it could be taken in conjunction with, or separately from, "the first three weeks holiday", the agreement referred correctly to an entitlement to 4 weeks' annual holiday at the end of each year of employment with the company in accordance with the Holidays Act 2003.

[4] (2009) 6 NZELR 484

[16] In *Silver Fern*, the additional week's leave was part of the relevant collective agreement's clause 10 dealing with annual holidays. Clause 11 provided for another form of leave, "long service leave", recognising more than 12 years' service by employees. This provided for a holiday of 2 weeks after completion of 12 years' continuous service, a holiday of 3 weeks after completion of 20 years' continuous service, a holiday of 4 weeks after the completion of 25 years' continuous service, a holiday of 5 weeks after the completion of 30 years' continuous service, and holidays of 6 weeks after completion of 35 years', 40, 45, 50, 55 and 60 years' continuous service. The parties clearly left nothing to chance and the case for some extra holidays after 60 continuous years' work in a meat works is difficult to counter.

[17] In *Silver Fern*, the employer's argument for subsumation relied heavily on the use by the parties of the additional holiday as being the fourth week's holiday to be taken in conjunction with, or separately from, the first 3 weeks' holiday and that these terms were used by the parties knowing of the effect of the Holidays Act 2003 to make 4 weeks the minimum. The employer in that case relied on the parties' categorisations of annual holidays in clause 11 and long service leave in clause 12 of the relevant collective agreement.

[18] Judge Shaw in *Silver Fern* held that although the additional holiday clause was labelled "an annual holiday", the collective agreement treated it differently from annual leave. It was natural, the Judge found, that, because it represented another week of holidays each year, it was included with and referred to as an annual holiday. The Judge differentiated this from the long service entitlements of clause 11, being one-off extra holidays when each specified service anniversary was reached. She held that long service leave was not a holiday taken annually.

[19] The Court concluded that the intent of clause 10 in that case was to provide annual holidays to all employees as required by statute and to recognise continuous service of eligible employees by granting another week's holiday each year in addition to the minimum statutory and actual contractual entitlements. The additional week of annual holiday, although so called, was not intended to be an annual holiday as in the Holidays Act 2003. That was for a number of reasons including that it was not given for the purpose of rest and recreation described in s

3(a) of the Holidays Act. This contrasted with the position dealt with by the Court of Appeal in the *Tramways* case in which the purpose of a leave provision was to recognise the nature of the work and to allow for rest and recreation. In the *Tramways* case the purpose of the extra leave provision was consistent with the statutory purposes of annual holidays. In *Silver Fern*, Judge Shaw concluded that the purpose of the additional week's leave was to recognise continuous service and was not universal to all employees. Further, in *Silver Fern*, the provision contemplated the cashing up of the additional week of leave, something not contemplated by the Holidays Act 2003, and indeed arguably prohibited by the legislation in respect of minimum annual holidays: s 16(1).

So, in *Silver Fern*, the Court concluded that the long service leave holiday of 1 week a year was not annual leave within the meaning of subpart 1 of Part 2 of the Holidays Act and was in addition to, and not part of, the 4 weeks' annual holidays conferred by that Act after 1 April 2007.

The relevant legislative provisions

[20] Subsection (2) of s 6 of the Holidays Act 2003 ("**Relationship between Act and employment agreements**") permits an employer to provide an employee with enhanced or additional entitlements to annual holidays, whether these are specified in an employment agreement or otherwise, on a basis that is agreed with the employee. The additional annual holidays rewarding long service are enhanced or additional entitlements and are not affected by the Act so long as its minimum annual holiday requirements are met as they were intended to be by the provision of, originally, 3 weeks' and, subsequently, 4 weeks', annual leave.

Decision

[21] There is no question that the Holiday Act's minimum statutory annual holidays entitlements have been met by the parties in each of their relevant collective agreements. In these circumstances it becomes a question of interpretation of the relevant agreement as to what was intended by the parties when they referred to an

additional week's annual holiday for employees with more than 7 years' continuous service with the employer.

[22] Essentially, the employer's position is that the parties intended that long-serving employees would receive one week's annual holiday in addition to the 3 weeks' annual holiday provided for all employees. The union's essential argument is that the parties intended to provide long-serving employees with a week's annual holidays more than were enjoyed by employees who had less than 7 years' continuous service with the employer. So, in terms of the 2006 collective agreement, the employer's position is that from 1 April 2007 long-serving employees continued to receive 1 week's annual holiday more than the 3 weeks previously provided to all employees. It says that, although long-serving employees may thereby have lost relativity, no absolute loss of annual holidays was incurred by them because they continued to receive 4 weeks' annual holidays as previously.

[23] In favour of the employer's position is that it was known to the parties before they negotiated and settled the 2006 collective agreement that, as from 1 April 2007, the minimum annual holidays for all employees would increase from 3 to 4 weeks. Mr Kynaston submitted that it was significant in these circumstances that the parties referred to the general annual holidays allowed for in the 2006 agreement as being 3 weeks and not, for example, by a formula such as "the minimum annual holidays provided under the Holidays Act 2002".

[24] The dominant and inescapable element that determines the case, however, is the clear intention of the parties to differentiate the annual holiday entitlements of long-serving employees. Whether as a reward for long service or an incentive to remain in employment or a combination of both, it is clear that the parties intended those employees with more than 7 years' continuous service to have 1 week's holiday more per year than those employees yet to attain that longevity.

[25] While in one sense the purpose of the long service leave may be said to be the same as the "purpose" of the statutory minimal annual leave, there is a different rationale for it. So, while the "purpose" of both leaves is to allow the employee rest and recreation, the rationale for the two periods of leave are distinct. The employer

must, by statute, provide all employees irrespective of length of service beyond 12 months with at least 3, and now 4, weeks of paid leave for rest and recreation. However, the long service leave exists as both an incentive for employees to remain in employment with the same employer long-term and to reward those employees for their loyalty and longevity in a tangible way. So it may be inaccurate to distinguish leaves by reference only to their purpose. Rather, the distinction may lie more accurately in an analysis of the reasoning behind their existence.

[26] In this sense, the case is distinguishable from the *Tramways* case and, despite the awkward way in which the entitlement was expressed at the time of transition from 3 to 4 weeks' minimum annual holidays under the legislation, I am satisfied that the intention of clause 10.2.2 was to continue to differentiate by 1 week the annual holiday entitlements of employees having less or more than 7 years' service.

[27] The plaintiff succeeds with its interpretation of the collective agreement and is entitled to costs which, if they cannot be agreed between the parties, can be the subject of a memorandum to be filed by the plaintiff by 1 February 2010 with the defendant having the further period of 1 month to respond by memorandum.

[28] I regret the delay in issuing this judgment. That has been as a result of a combination of other caseload and a hope that a judgment from the Court of Appeal in the *Silver Fern* case may have assisted in the decision of this, although that has not eventuated.

GL Colgan
Chief Judge

Judgment signed at 2.00pm on 18 January 2010