

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Julie Anne Barclay and New Zealand Amalgamated Engineering  
Printing & Manufacturing Union (Inc) (EMPU) (Applicants)

**AND** Air New Zealand Limited (Respondent)

**REPRESENTATIVES** Tony Wilton for the Applicants  
Kevin Thompson for the Respondent

**MEMBER OF AUTHORITY** P R Stapp

**INVESTIGATION MEETING** Wellington 19 October 2006

**DATE OF DETERMINATION** 23 November 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

1. The EMPU and Air New Zealand Limited (the company) have an issue on the interpretation in part of their collective employment agreement, following which Ms Julie Anne Barclay's circumstances can be considered.

**The facts**

2. The EMPU and the company were a party to a collective agreement that was extended to expire on 30 June 2004: the ground staff collective employment agreement covering ground staff employees of the company who were also members of the union.
3. Bargaining took place between the union and the company but an added complexity involved the commencement of the Holidays Act 2003, which came into force from 1 April 2004. Terms of settlement were reached between the union and the company and then put to the union's members for ratification, which occurred shortly after 1 December 2004. The Union took the terms of settlement reached between the parties to ratification. In a document for ratification the union recorded the following:

**Relevant daily pay**

*The first 5 days of your sick or domestic leave will be paid at RDP. All accumulation over 5 days will be paid at ordinary time.*

4. For completeness, the provisions in the previous collective agreement for sick leave and domestic leave were as follows:

*49.1 After 3 months continuous service a permanent or temporary employee will be granted 10 days sick leave each year paid at ordinary rates, which excludes penal, overtime and other non-composite allowances.*

*49.2 Unused sick leave may be accumulated up to 160 days.*

**Clause 50 – Domestic Leave**

*50.1 An employee may use up to 5 days of unused sick leave in any one year for domestic leave in the event of sickness of an immediate family members.*

5. The terms of settlement for the new collective agreement included a change to the sick leave (now including ‘domestic leave’ under the Holidays Act) clause. The sick leave clause was renumbered and reads as follows:

**Clause 49.1 Sick Leave**

*After 3 months continuous service, a permanent or temporary employee will be granted 10 days sick leave each year. Sick leave taken which is above the minimum entitlement of the Holidays Act 2003 shall be paid at ordinary rates, which excludes penal, overtime and other non-composite allowances.*

6. The ‘domestic leave’ clause was retitled and changed to read as follows:

**Clause 50 sickness of spouse or dependent**

*50.1 An employee may use unused sick leave in the event of sickness of a spouse or a person who depends on the employee for care, up to the level of the minimum sick leave*

*entitlement under the Holidays Act 2003 – i.e. 5 days per annum accumulating to a maximum of 20 days over 4 years.*

7. For completeness, the entitlements of the Holidays Act 2003 read as follows:

***Entitlement to sick leave and bereavement leave***

**63 *Entitlement to sick leave and bereavement leave***

*(1) An employee is entitled to sick leave and bereavement leave in accordance with this sub-part –*

*(a) After the employee has completed 6 months' current continuous employment with the employer; or*

*(b) If, in the case of an employee to whom subsection (1) (a) does not apply, the employee has, over a period of 6 months, worked with the employer for –*

*(i) At least an average of 10 hours a week during that period; and*

*(ii) No less than 1 hour in every week during that period or no less than 40 hours in every month during that period.*

*(2) Sick leave and bereavement leave must be provided –*

*(a) To an employee to whom subsection (1)(a) applies, for –*

*(i) The twelve-month period of continuous employment beginning at the end of the six month period specified in that subsection; and*

*(ii) Each subsequent twelve months of current continuous employment;*

*(b) To an employee to whom subsection (1)(b) applies, for –*

*(i) The twelve-month period of employment beginning at the end of the six-month period specified in that subsection; and*

*(ii) Each subsequent twelve-month period of employment as long as the circumstances referred to in sub-paragraph (i) and (ii) of that subsection continue to apply.*

***Sick leave*****65 *Sick leave***

- (1) *An employee may take sick leave if –*
  - (a) *The employee is sick or injured; or*
  - (b) *The employee’s spouse is sick or injured; or*
  - (c) *A person who depends on the employee for care if sick or injured*
- (2) *An employee is entitled to 5 days’ sick leave for each of the twelve-month periods specified in section 63 (2).*

**66 *Sick leave may be carried over***

- (1) *An employee may carry over, to any subsequent twelve-month period of employment, any sick leave that has not been taken by the end of the period to which the leave relates.*
- (2) *For the purposes of subsection (1), an employee may carry over up to 15 days’ sick leave to a maximum of 20 days’ current entitlement in any year.*
- (3) *To avoid doubt, subsection(2) does not prevent an employer from allowing an employee to carry over any enhanced or additional sick leave entitlement.*

***Payment for sick leave and bereavement leave*****71 *Payment for sick leave and bereavement leave***

- (1) *An employer must pay an employee an amount that is equivalent to the employee’s relevant daily pay for each day of sick leave or bereavement leave taken by the employee that would otherwise be a working day for the employee.*

8. The domestic leave provision under the previous collective employment agreement was changed. The parties were required to amend the clause(s) to ensure that it, and other clauses, complied with the Holidays Act 2003. The parties set up a group of experts for the purpose of

drafting changes during the bargaining negotiations. The wording which became clause 50.1 was drafted by Air New Zealand, presented to the EMPU as part of a “*draft terms of settlement*” and eventually included in terms of settlement signed by the parties and ratified by EPMU members. There is a disagreement about whether the change represented a substantive change by way of negotiation. The words are certainly different. The union say that it did accept the change to the words for clause 50.1 on the basis that it was necessary for compliance with the Holidays Act, not because it had agreed to reduce any level of access to unused sick leave for “*domestic leave*” purposes. The union say that on its interpretation of the clause, its members may use up to 5 days of unused sick leave in any year for “*domestic leave*” purposes (accumulating to 20 days over 4 years to the extent not used for those purposes) provided that the employee has the amount of unused sick leave in hand. In other words, an employee is entitled to claim “*domestic leave*” at relevant daily pay if there is any unused sick leave in that pool. The union also says that should there be no unused sick leave in that pool, then the member can draw on unused sick leave in hand that would be paid at ordinary time rates if it has been accumulated under the collective agreement..

9. Air New Zealand, on the other hand, says that the clause means an employee is allocated sick leave in two ways. The sick leave due and paid pursuant to the entitlement under the Holidays Act which it would entitle an employee, after the qualifying period, to 5 days’ sick leave per year, which is able to be accumulated up to 20 days in total and paid at relevant daily pay. The second basis is the additional sick leave allocated under the contract provisions which allow accrual up to 160 days but which, above the minimum entitlement under the Holidays Act 2003 is paid at ordinary rates. The company says that “*domestic leave*” is available from unused sick leave up to the level of the minimum sick leave entitlement under the Holidays Act 2003, i e the leave paid at relevant daily pay. There is no entitlement in the company’s opinion to any sick leave for the purposes of domestic leave under the contractual term paid at ordinary time.
10. There is no dispute on the principles that apply to interpretation. The parties accepted that unless the clause can be interpreted without any ambiguity then the plain meaning of the words require interpretation. I accept that if there is any ambiguity, the Authority can resort to considering extrinsic evidence to assist in the interpretation of the words.

## **Decision**

11. It is my decision that the plain meaning of the words can settle this matter. In particular I find that the provision in the collective employment agreement means what it says ie:

50.1 *An employee may use unused sick leave in the event of sickness of a spouse or a person who depends on the employee for care, up to the level of the minimum sick leave entitlement under the Holidays Act 2003 – i.e. 5 days per annum accumulating to a maximum of 20 days over 4 years.*

12. That is an employee, so long as they have unused sick leave, can use their sick leave *in the event of sickness of a spouse or a person who depends on the employee for care, up to the level of the minimum sick leave entitlement under the Holidays Act 2003 – i.e. 5 days per annum accumulating to a maximum of 20 days over 4 years.* From the information provided to me the Air New Zealand provision provides for sick leave to be provided in terms of relevant daily pay and ordinary pay, and in my opinion where both are available then the entitlement can be used from the combined pool available to the employee for “*domestic leave*” purposes. In Ms Barclay’s case there is an issue about 3 days, of which if she was given it, it would take her to the permissible 5 days, since she had previously used 2 days. Otherwise she would have to take leave without pay, even although she had ordinary time extra sick leave available. The extra days would have to be paid as ordinary pay because she had no unused sick leave available from the entitlement under the Holidays Act.
13. If sick leave is used *in the event of sickness of a spouse or a person who depends on the employee for care, up to the level of the minimum sick leave entitlement under the Holidays Act 2003 – i.e. 5 days per annum* and it is accumulated then it is implicit that more than just 5 days could be taken because the sick leave clause is a general clause. This is no more than a qualification or explanation of the entitlement. The accumulation provision of “*i.e. 5 days per annum accumulating to a maximum of 20 days over 4 years*” qualifies the statutory entitlement that would relate to any sick leave in the pool for relevant daily pay. The provision for such leave remains a separate provision under the collective agreement although it purports to comply with the general provision of the Holidays Act. As such this is a not a distinguishing feature.
14. The clause provides that an employee may use up to 5 days of unused sick leave “*provided only that the employee has that amount of unused sick leave in hand*” (Union submission). That includes the full pool. An employee can clearly draw up to 5 days if they have it, including from the pool that may be used and paid at ordinary pay, if the entitlement provided under the Holidays Act paid at relevant daily pay has been used.
15. Therefore I find in favour of the union claim.

16. Costs are reserved.

Paul Stapp  
Member of Employment Relations Authority