**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

Determination Number: AA 185/07
File Number: 5087613

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| BETWEEN | NEW ZEALAND DAIRY WORKERS UNION<br>Applicant |
| AND | FONTERRA BRANDS (TIP TOP) LIMITED<br>Respondent |

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| Member of Authority: | R A Monaghan |
| Representatives: | Helen White, Counsel for Applicant<br>Phillipa Muir, Counsel for Respondent |
| Investigation Meeting: | 15 June 2007 at Auckland |
| Determination: | 20 June 2007 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The New Zealand Dairy Workers Union ("the union") and Fonterra Brands (Tip Top) Limited ("Tip Top") are parties to the 'Tip Top Ice Cream Company and Dairy Workers' Union Collective Employment Agreement 2005 – 2007' ("the cea") and a series of predecessor agreements.

[2] The parties are in dispute over the meaning and application of clauses which effectively provided shift workers and workers who had completed five years' continuous service with Tip Top with four weeks' annual leave per year in the period to 1 April 2007. In particular, there is a dispute about the application of the relevant clauses in the light of the Holidays Act 2003, and the coming into force on 1 April 2007 of the statutory increase in employees' minimum annual leave entitlement from three weeks to four weeks. The central issue is whether that means the employees already receiving four weeks' annual leave become entitled to five weeks' annual leave.

[3] The union asks in effect that the dispute be determined by answering 'yes' to the above question, and seeks orders for compliance.

**The cea**

[4] The relevant cea came into force on 1 July 2005 and was to continue in force until 30 June 2007.

[5] Material provisions in the annual holidays clause read:

> "17.1 Annual holidays shall be paid in accordance with the Holidays Act 2003.
> 17.2 Each worker shall be entitled to three weeks' holiday per year.
> 17.3 …
> …
> 17.6 All workers, on completing five years' continuous service with the Employer, shall be entitled to four weeks' holiday per year.
> 17.7 Any worker who works in excess of 100 shifts in any year (between 1 July and 30 June) with less than 5 years service, shall receive an additional week's holiday as detailed in clause [17.6][1] for that year.
> The intention of this clause is to provide shift workers with less than five years' service an additional week's holiday.
>
> NOTE Should the government amend the Holidays Act such that it has potential affect on clauses [17.6] and [17.7] then the union and the company will meet to discuss any issues arising."

[6] Other leave provisions include special holidays for long service (cl 18), sick and domestic leave (cl 19), bereavement and tangihanga leave (cl 20), parental leave (cl 21), jury service (cl 22), tuition leave (cl 23), and union training leave (cl 24).

[7] Clause 9 makes provision for shift work. It defines shift workers as those who work all or part of their normal work pattern outside the ordinary hours of work set out in clause 8.[2] It further defines morning, afternoon and night shifts, and provides for the payment of shift allowances. A special provision for six day shifts also incorporates a provision for annual leave, but is not part of the present dispute.

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[1] The quoted clause contains reference to other provisions in the cea which were wrongly identified as a result of drafting errors. The parties agreed on the correct references, which are incorporated in the quoted text and identified by the use of square brackets.

**A history of the material provisions**

[8] The parties provided information about leave provisions in the predecessor agreements dating back to an award registered in June 1988. The respective company and union negotiators involved variously in those and in subsequent negotiations gave evidence.

[9] In the 1988 award, annual leave was expressed to be allowed in accordance with the Holidays Act 1981. In practice that meant that, unless otherwise stated, employees were entitled to an annual holiday of three weeks on holiday pay. Clause 14 of the 1988 award provided shift workers with one extra day's annual holiday for each continuous 10 weeks on shift work, and an annual holiday of four weeks instead of three weeks for all workers on the completion of six years' continuous service with the employer.

[10] Those provisions were still present in a 1993 collective agreement. Their effect was that shift workers who completed six years' continuous service would be entitled to the annual holiday of four weeks enjoyed by everyone with that length of service, but they would also retain the 'extra day's annual holiday for each continuous 10 weeks on shift work'. The latter accumulated to a further week over a year, so that shift workers with long service would receive five weeks' leave per annum. Tip Top found this created rostering difficulties with its shift patterns.

[11] Accordingly, during the next round of negotiations in 1994 it sought to 'buy out' the fifth week of leave for long serving shift workers. The result was the removal of the entitlement based on one extra day's holiday for each continuous 10 weeks on shift work, and an agreement to a payment of $2 per shift. That was reflected in the 1994 agreement by replacing the provisions in question with provisions substantially similar to the present clauses 17.6 and 17.7 (taking into account a reduction to the qualifying period of service under cl 17.6), and adding:

> "15.8 The extra week's holiday to which all shift workers were entitled until 01.07.94 has been removed in lieu of an extra payment of $2.00 per shift …"

[12] The company's intention was that all shift workers (and other long serving employees) would have four weeks' leave per annum but no-one would have more than four weeks' leave.

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[2] Being the 8 hours per day, 40 hours per week, 7.00 am – 5.30 pm, Monday – Friday span.

[13] The union's list of claims prepared for negotiations in 2000 included the deletion of clause 15.8. Tip Top said that claim was rejected because the company did not wish to open itself up to a claim for annual leave on top of the entitlements to four weeks per annum. Eventually, however, the provision was deleted to recognise the lack of any intention to deliver further extra payments of $2 per shift.

[14] The material provisions were addressed again in the course of the next two rounds of negotiations, but they remained unchanged. According to Tip Top the company did not wish to facilitate any attempt to negotiate annual leave entitlements in excess of four weeks. The union said its claims were intended merely to tidy up the wording of the clauses.

[15] It was during the 2003 negotiations that the 'NOTE' appearing at the foot of clause 17.7 was included. Bargaining was initiated in June 2003. As at that date the Holidays Bill had been introduced and contained a minimum entitlement to three weeks' annual leave,[3] but the question of whether there should be a statutory minimum entitlement to four weeks' annual leave was under discussion. When the Transport and Industrial Relations Select Committee reported on the Bill in November 2003 it recommended the insertion of the provision which became Schedule 1 of the Act. Hence at about the time of the negotiations the parties were in the state of uncertainty indicated by the 'NOTE'.

[16] Schedule 1 of the Act was headed 'Modifications to subpart 1 of Part 2 to increase minimum entitlement to annual holidays from 1 April 2007.' The modifications effected the increase in employees' minimum entitlements from three weeks' annual holidays to four weeks' annual holidays, on and from 1 April 2007.

[17] Thus by the advent of the 2004 negotiations the Holidays Act 2003 had come into force, but the modifications implementing the increase in the minimum entitlement to annual leave had not come into effect. For the purposes of the negotiations the union claims included a claim for the deletion of the word 'four' from what is now clause 17.6 and its replacement with the words 'an extra'. Again the company rejected the claim because it did not want to move above an entitlement to four weeks' annual leave for any employee. The parties also discussed whether the word 'additional' should be removed from what is now clause 17.7. The union did not agree to that because it believed the removal would amount to a reduction in employees' entitlements. For lack of agreement, the provisions remained unchanged.

[18] As for the 'NOTE', although an amendment of the kind anticipated had been passed, the parties were still uncertain of its effect and had been unable to resolve the matter through their negotiations. They decided to await the development of case law which they could apply to their circumstances. On that basis the 'NOTE' was retained.

[19] The uncertainty was continuing when the parties began negotiations in 2007.

[20] The union's position on employees' entitlements, as stated to Tip Top in a letter from the union organiser dated 21 September 2006, was:

> "… the Collective provides for the Holidays Act minimum of three weeks annual leave and then an additional weeks leave is provided for service and/or shift entitlements as per 17.6 and 17.7 … so logically, now that the Holidays Act provides for four weeks annual leave, then the service and/or shift additional leave would take workers to five weeks leave per annum."

[21] Tip Top's position, as set out in a reply dated 1 November 2006, was:

> "17.6 …
> … the Collective clearly states the entitlement is to four weeks holiday per year. As this will be in line with the Holidays Act 2003, the Company will be meeting its obligations under the Act to provide four weeks holiday per year. There is no obligation to provide an extra week over and above what is provided for in the Holidays Act.
> …
> 17.7 …
> The intention of clause 17.7 is to provide shift workers with less than 5 years service a fourth week of leave in line with employees with more than 5 years service who work shifts.
> The Holidays Act 2003 will from the 1st of April 2007 provide four weeks of annual leave. Providing an additional week e.g a fifth week to workers with less than 5 years service who work in excess of 100 shifts in any year will be inequitable to other employees, particularly to shift workers who have more than 5 years service."

**Determination**

[22] The judicial authority most directly relevant to the determination of the present dispute is a decision of the full court of the Employment Court in **New Zealand Tramways etc Union Inc**

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[3] On 18 February 2003

**& Anor v Transportation Auckland Limited and Cityline (New Zealand) Limited**.[4] To adopt the approach taken in that case, although the present task is to construe the cea it is also necessary to assess the relevant provisions against the minimum entitlements in the Act.

[23] The court identified s 6 as the pivotal section for its purposes. It referred to the creation in s 3 of four minimum entitlements - particularly the entitlement to annual holidays to provide the opportunity for rest and recreation - and pointed out that s 6(2) reads:

> "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."

[24] The court went on to say that the word 'enhanced' means enhancement of one or all of the four minimum entitlements. Since an 'enhancement' acts on something already present, it was implicit that to increase the statutory minimum of three weeks' annual holidays to, say, four weeks would be an enhancement.[5]

[25] An 'additional' entitlement is something extra or supplementary. The court said an additional entitlement is an entitlement other than one of the four entitlements specified in s 3. It said 'additional' entitlements would include long service leave or rewards, and gave other examples.[6]

[26] Applying the court's approach to clause 17 here, I conclude that clauses 17.2 and 17.6 read together mean the fourth week's holiday per year was intended as an enhancement of the minimum entitlement of three weeks of holidays. The purpose of the enhancement was to recognise the service of the employees concerned.

[27] In reaching that conclusion I distinguish the provision of a fourth week's holiday every year after completing a specified period of service (an enhancement) from clauses which provide special holidays for long service (an additional entitlement). Clauses of the latter kind tend, as clause 18 does here, to provide one-off, non-cumulative entitlements to a special holiday of a stated number of weeks to be taken within a defined period after the completion of a specified

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[4] 27 November 2006, AC 61A/06. However the Court of Appeal granted leave to appeal on a question about whether the leave at issue in that case was absorbed by or was in addition to the new minimum entitlement of four weeks, in **NZ Tramways etc Union Inc & Anor v Transportation Auckland Corporation Limited and Cityline (New Zealand) Limited** [2007] NZCA 116.

[5] At [29]

length of service. Here the qualifying periods occur in five-year blocks commencing after the completion of 10 years' service. Clearly that kind of entitlement is not a minimum entitlement of the kind set out in s 3 of the Act. I interpret the court's reference to additional entitlements to long service leave as a reference to clauses providing special entitlements of the kind just described.

[28] The court commented, further, that:

> "If it were the parties' intention that the extra week in the cea was to be an enhancement of first the minimum entitlement of 3 weeks up until 1 April 2007 and subsequently the minimum entitlement of 4 weeks after that date (thereby increasing annual holidays or annual leave to 5 weeks per annum after that date) then clause 21.1 would have expressly referred to the new Act."[7]

[29] The parties here have addressed that issue directly in the course of their negotiations. The union effectively intends an outcome of the kind set out above, but the employer does not. The parties cannot agree. Thus not only is clause 17.2 silent on which Act forms the basis of the entitlement to three weeks' holiday per year, but there is direct evidence that there is no mutual intention to further increase the minimum entitlement of four weeks' holiday in force from 1 April 2007.

[30] Since I construe the four weeks of leave provided for in clause 17.6 as an enhancement of the minimum entitlement in clause 17.2, then the fourth week is also treated as an annual holiday under the 2003 Act. In that respect the cea complies with the 2003 Act and there is no agreement, or other reason to conclude, that employees covered by clause 17.6 are entitled to a fifth week's leave from 1 April 2007.

[31] Clause 17.7 raises another question because it formulates the entitlement as being to 'an additional week's holiday as detailed in clause [17.6].' Then the clause states its intention as being to provide shift workers with less than five years' service an 'additional week's holiday'.

[32] If the word 'additional' has the same meaning in the cea as the one the court gave it in construing s 6 of the Act then there is an argument that the week in question must be added to the minimum entitlement in place from 1 April 2007, giving an entitlement under cl 17.7 of five weeks' leave in total.

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[6] At [30]
[7] At [36]

[33] There are some difficulties with such an argument, however. The first is that the entitlement is expressed as being 'as detailed in clause [17.6].' I have concluded that the entitlement in clause 17.6 is an enhanced minimum entitlement, not an entitlement in addition to the minimum and which must be preserved from 1 April 2007. The reference to clause 17.6 must be intended to link the types of leave provided under the two provisions, rather than to distinguish them.

[34] The second is that, despite the use of the word 'additional' in the intention provision, the evidence showed a move in 1994 away from the notion of 'extra' leave for shift workers who had completed six years' continuous service, a negotiated buy out, and an agreement to the effect that all shift workers should receive four weeks' leave a year. In other words Tip Top at least has drawn a line in the sand over the maximum amount of annual leave to which it will agree.

[35] The third is that giving the word 'additional' the meaning it has in the Act would mean shift workers with less than five years' service would receive five weeks' leave a year, which would be lost once five years' service was completed and clause 17.6 applied. That is an absurd result and was not the intention of the parties.

[36] That leaves me with the conclusion that, in clause 17.7, the word 'additional' has a similar meaning to 'enhanced'. In turn the fourth week's holiday available to the specified shift workers is also treated as an annual holiday under the 2003 Act. In that respect the cea complies with the 2003 Act and there is no agreement, or other reason to conclude, that employees covered by the clause are entitled to a fifth week's leave from 1 April 2007.

[37] I turn finally to the view, urged by the union in evidence, that the parties intended a 'relativity' in the leave entitlements of various classes of employees and that relativity should be preserved. It was also emphasised in submissions that the scheme of the leave provision was to provide an increased entitlement to shift workers and those who had completed five years' service, and that entitlement should be preserved. It is not being preserved under Tip Top's interpretation.

[38] That is indeed correct to a point, being that Tip Top was insistent that it has never intended to provide anyone with more than four weeks' annual leave. Its position is supported by the 'buy out' in 1994 of the fifth week to which certain shift workers became entitled.

[39] It is probably true, too, that the 'relativity' in the leave entitlements was intended to recognise respectively the loyalty shown by employees who completed five years' continuous service with the company, and the arduous nature of shift work.

[40] The court in the **TACL** case addressed a related submission that incorporating the further weeks' leave as a way of satisfying requirements from 1 April 2007 would reduce the contractual entitlement and thus breach s 6(3). [8] It found there was no such breach.

[41] It also addressed a submission that the entitlement to four weeks' leave had to be revisited in the light of the changing entitlement to a minimum of four weeks' annual holidays, thereby increasing the total entitlement under the cea to five weeks.[9] The court concluded it was implicit in that argument that failure to increase the total annual leave to five weeks per annum would be a breach of the minimum entitlement to annual holidays under the Act. As already indicated, it went on to find there was no breach.

[42] My conclusions about the construction of the cea and the application of the Act mean I find there has been no breach here either. I do not believe I can go any further. To the extent there is substance in the union's concern about the preservation of relativity in leave entitlements, it would be necessary to amend the cea to re-establish such relativity. The Employment Relations Authority cannot make that kind of order.[10]

[43] For the above reasons I find the amendments to the Holidays Act 2003, which came into force on 1 April 2007, do not operate on the cea to provide shift workers and employees who have completed five years' service with an entitlement to a fifth week of annual leave. There is no need to consider whether any order for compliance should be made.

**Costs**

[44] Costs are reserved.

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[8] At [41]
[9] At [17]
[10] Employment Relations Act 2000, s 163

[45] If the parties seek a determination on the matter from the Authority they shall have 28 days from the date of this determination in which to file memoranda setting out their positions.

R A Monaghan

Member of the Employment Relations Authority