IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 116/07
5080279

	BETWEEN	LYTTELTON ENGINEERING LIMITED Applicant
	AND	NEW ZEALAND ENGINEERING , PRINTING AND MANUFACTURING UNION Inc First Respondent
	AND	MANUFACTURING AND CONSTRUCTION WORKERS UNION Second Respondent

Member of Authority:	Philip Cheyne
Representatives:	Penny Shaw, Counsel for Applicant Jills Angus-Burney, Counsel for First Respondent Phil Yarrell Advocate for second respondent
Investigation Meeting:	6 September 2007 at Christchurch
Determination:	26 September 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a dispute about whether certain employees are now entitled to five weeks annual holidays given the provisions in the applicable collective employment agreement and the effect of the Holidays Act 2003.

[2] The only disputed facts relate to things said or done during the bargaining for the current and earlier versions of the collective agreement. I will return to that if appropriate. First though, it will be useful to set out the relevant parts of the employment agreement and the correct approach to interpretation.

The collective agreement

[3] The current agreement covers two unions and one employer. It is expressed to come into force on 1 April 2005 and to continue in force until 31 March 2008. Lyttelton Engineering operates a substantial engineering workshop. The current collective employment agreement follows on from earlier awards, collective contracts and collective employment agreements. As previously, it is a comprehensive document setting minimum terms and conditions of employment for employees of Lyttelton Engineering. Part 1 is an intent/objects statement and the following parts deal with coverage, definitions, hours of work, leave, terms of employment, safety & welfare, employee representation, grievances and disputes, savings and rates of remuneration.

[4] Part V *Leave Provisions* contains the disputed clause. That part first stipulates the public holidays to be observed. Provision is made for payment for public holidays. Clause 14 deals with annual holidays. Next, provision is made for one-off special holidays for long service. There is a sick leave clause, a domestic leave clause, a parental leave clause, provision for bereavement leave, tuition leave and finally leave without pay.

[5] Clause 14 *Annual Holidays* reads as follows:

> *(a) Each Lyttelton Engineering Ltd employee shall, on completion of each year's continuous service, be entitled to three weeks' annual leave.*
>
> *(b) No period during which an employee is unable to work because of sickness or injury shall be treated as part of any annual leave to which they may become entitled.*
>
> *(c) Annual leave shall be paid on the basis of the employee's average weekly earnings during the year of entitlement provided that this is not less than the employee's ordinary rate of pay at the time the annual leave is taken.*
>
> *(d) Unless the annual leave period is fixed by mutual agreement between the employer and the majority of employees, employees shall, where practicable, have at least two months notice before leave is to be taken.*

(e) All Lyttelton Engineering employees, on completing six years continuous service with Lyttelton Engineering shall be entitled to an additional week of annual leave per year for the sixth and each subsequent year.

(f) Shift employees shall receive an additional week's holiday per year: Provided that employees working more than one month but less than 12 months on shifts shall receive a pro rata proportion of the extra week's holiday.

(g) No annual holidays can be forfeited or exchanged for monetary value.

(h) …

(i) ….

[6] Sub-clauses (a), (e) and (f) have been written in this form since the 2000 collective employment agreement. Before then, sub-clause (a) included a reference to the Holidays Act 1981 and sub-clause (e) entitled those with qualifying service to *four weeks holiday per year*.

[7] The provision for *an additional week's holiday* for shift workers in the present agreement and its predecessors is unutilised because Lyttelton Engineering does not operate shifts in a way that would cause it to have effect.

[8] Somewhat fewer that half Lyttelton Engineering's employees currently get the benefit of sub-clause (e).

Interpretation

[9] A similar problem came before a full court of the Employment Court in *New Zealand Tramways and Public Transport Employees Union Incorporated & anor v Transportation Auckland Corporation Limited & Cityline (NZ)*, AC 61A/06, 27 November 2006. There, the Court stated that the starting point is to examine the words used by the parties to see whether they are clear and unambiguous and to construe then according to their ordinary and natural meaning. Regard may be had to the circumstances of entering the transaction 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.

[10] In that case the Court held that the agreement had to be construed in the context and purpose of the Holidays Act 2003. The pivotal section is section 6 dealing with the relationship between the Act and employment agreements. Section 6(1) states that each entitlement provided by the Act is a minimum. Section 6(2) permits an employer to provide enhanced or additional entitlements to those provided in the Act. The Court distinguished *enhanced* from *additional* by finding that the former relates to the four minimum entitlements provided by the Holidays Act 2003 while the latter is an entitlement other than the four there specified. Section 6(3) states that an employment agreement that excludes, restricts or reduces an employee's entitlement under the Act has no effect.

[11] The decision of the Full Court was applied by the Authority in *New Zealand Dairy Workers Union v Fonterra Brands (Tip Top) Limited* AA185/07, 20 June 2007. In that case, the annual holidays clause stated that *each worker shall be entitled to three weeks' holiday per year*. A later sub-clause provided an entitlement to *four weeks' holiday per year* after completion of 5 years' service. The next sub-clause entitled certain shift workers to *receive an additional week's holiday* with a cross reference to the immediately preceding sub-clause. The Authority concluded that the entitlement to *four weeks' holiday per year* was an enhancement of the minimum entitlement. The consequence of that finding was that the contractual entitlement to *four weeks' holiday per year* counted towards compliance with the new statutory minimum entitlement to four weeks' holiday. The Authority addressed the use of the word *additional* in the shift workers' clause recognising that applying the meaning of that word from the *Tramways* case would result in those employees initially getting five weeks' holiday. However, the cross reference in the sub-clause, the absurdity otherwise arising and the negotiation history caused the Authority to conclude that *additional* in the agreement was a synonym of *enhanced* as defined by the Full Court.

[12] In the present collective agreement, Clause 14(a) gives each employee an entitlement to *three weeks' annual leave*. It is ineffective to the extent that it purports to restrict or reduce an employee's entitlement under the Holidays Act 2003 to not less than 4 weeks' paid annual holidays. There is no dispute that Lyttelton Engineering employees with less than 6 years service are now entitled to 4 weeks paid annual holidays. The dispute centres on whether, for employees with 6 or more years' service, the entitlement under clause 14(e) is included for the purposes of satisfying the statutory minimum entitlement to paid annual holidays.

[13] Turning to the words used in the agreement, the phrases *annual leave* and *annual holidays* appear to be used as synonyms. For example, sub-clauses (a) and (e) refer to *annual leave*, the heading refers to *Annual Holidays* and sub-clauses (f) and (g) refer to *holidays* and *annual holidays* respectively. Of more significance is the use of the word *additional* in sub-clauses (e) and (f). The word should bear the same meaning in this agreement as the Full Court found it to have in the Holidays Act 2003. On that analysis, the *week of annual leave* provided at sub-clause (e) is *additional* to and should not be counted towards satisfying the employee's entitlement to a minimum four weeks' annual holidays. However, I note that the disputed clause in the *Tramways* case was introduced with the phrase *In addition to* but the Full Court nonetheless found the provision to be an enhancement to the previous minimum statutory entitlement to annual holidays. Reference must be had to the context of the bargain to resolve the problem.

[14] The terms of settlement, dated 4 April 2005, from which the new collective agreement emerged make it clear that the parties considered the effect of the Holidays Act 2003. They agreed to *Delete references to Holidays Act 1981 and replace with Holidays Act 2003* …and introduced into the agreement some of the definitions contained in the new Act. They must have known that clause 14(a) would be affected by the change from three to four weeks' annual holidays during the term of their agreement. Despite that, there was no change or claim for any change in the wording of clause 14(a) or 14(b).

[15] As in the *Fonterra* case, it would be necessary to define *additional* as used in this agreement as a synonym of *enhanced* and different from *additional* as used in the Act for there to be a finding that the sub-clause (e) entitlement in the agreement counted towards meeting the statutory minimum entitlement to fours weeks' annual holidays. The reasons in *Fonterra* that compelled a different meaning do not apply in this case. There is no cross reference to an *enhanced* provision and no absurdity to avoid. There is some evidence about the parties' claims and subjective intentions during earlier negotiations but that is not material that can affect an objective interpretation of the natural and ordinary meaning of the clause. I find that *additional* in this agreement must have the same meaning as *additional* in the Holidays Act 2003. It follows that sub-clause (a) of the agreement purports to have the effect of reducing or restricting employees' entitlement to a minimum of 4 weeks' annual holidays under the Holidays Act 2003 and is of no effect.

Conclusion

[16] All employees at Lyttelton Engineering are entitled to fours weeks' annual holidays despite sub-clause (a) and those with qualifying service are entitled to an *additional* or a fifth weeks' annual leave under sub-clause (e).

[17] Costs are reserved in case any party thinks they should be entitled to a contribution despite the test case nature of this dispute.

Philip Cheyne
Member of the Employment Relations Authority