IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 251/08
5096180

	BETWEEN	EASTERN BAY INDEPENDENT INDUSTRIAL WORKERS UNION Applicant
	AND	NORSKE SKOG TASMAN LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Lou Yukich for Applicant Kylie Dunn for Respondent
Investigation Meeting:	29 May 2008 at Rotorua
Further submissions received	25 June 2008 from the Applicant 27 June 2008 from the Respondent
Determination:	16 July 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant union is seeking a declaration as to the interpretation of the annual holiday provisions in the Eastern Bay Independent Industrial Workers Union ("EBIIWU"), Control Systems, Collective Employment Agreement for employees of Norske Skog Tasman Mill, Kawerau ("NST").

[2] The Union is seeking clarification as to whether the entitlements provided at clause 14.5 and clause 14.7 of the collective agreement are subsumed by the requirement of the Holidays Act 2003 s.41 to increase the entitlement for annual holidays contained at clause 14.2 of the collective agreement from three to four weeks.

Background

[3] The Holidays Act 1981 was replaced by the Holidays Act 2003 which came into force on 1 April 2004. The Act was amended to provide for a fourth week of statutory annual leave for all employees with effect from 1 April 2007.

[4] The amendments to the Holidays Act do not expressly address the position of employees who had a contractual entitlement to a fourth week of annual leave.

[5] Section 6(1) of the Act provides that entitlements in the Holidays Act are minimum entitlements. Section 6(2) provides that the entitlements can be enhanced or an employer may agree to additional entitlements. Section 6 of the Act came under scrutiny by the full bench of the Employment Court in *New Zealand Tramways & Public Transport Employees Union Incorporated & Anor v Transportation Auckland Corporation Ltd & Anor* [2006] 1 ERNZ 1005.

[6] In that case the Employment Court took additional entitlements to mean entitlements additional to the four minimum entitlements already specified (that is annual leave, public holidays, sick leave, and bereavement leave). The Court found that the words "enhanced" and "additional" were inserted into the section for a specific purpose and so must be given separate and distinct meanings. The Court found that "enhanced" meant the enhancement of one or all of the four minimum entitlements (that is annual leave, public holidays, sick leave, and bereavement leave).

[7] The Court found that it was implicit that an enhancement acts on something already in existence. The example they gave was that to increase the statutory minimum of three weeks' annual holidays already specified in the Holidays Act to four weeks would be an enhancement. The Court found that "addition" was the act or process of adding or being added and "additional" is added, extra or supplementary.

[8] That decision was the subject of an appeal to the Court of Appeal in *New Zealand Tramways and Public Transport Employees Union Inc and Anor v Transportation Auckland Corporation Ltd and Anor* [2008] NZCA 159.

[9] The majority of the Court found, as the Employment Court did, that the concept of enhancement is a form of improvement. However, the majority found that the terms "enhanced" and "additional" overlap.

[10] In the majority's view the Employment Court over-analysed the statutory language and drew an absolute distinction that the Holidays Act 2003 did not actually make.

[11] Because the majority could not be sure of the effect of the error upon the Employment Court's interpretation of the CEA and that it would have reached the same conclusion had it interpreted s6(2) Holidays Act correctly they referred the case back to the Employment Court for reconsideration of its decision in light of their judgment.

[12] Chambers J did not agree with the majority's findings that the Employment Court had over analysed the statutory language. He felt the Employment Court had simply been making the point that in determining the status of the weeks' leave in clause 21.2 the purpose of the week had to be looked at as well as how the parties had described it.

[13] In his view the reasoning of the Employment Court was one that was open to it and was correct. Chambers J found the majority had over-emphasised the importance of the "enhanced-additional" dichotomy to the Employment Court's reasoning.

[14] Chambers J, held that the ratio of the decision was the importance of analysing the purpose of the particular holiday in terms of s3 Holidays Act 2003. If the parties' described the holiday as part of "annual leave" and its purpose was consistent with the statutory purpose of annual leave holidays then it was part of annual leave.

Discussion

[15] NST employs 33 EBIIWU members, both day workers and shift workers. The applicable collective agreement came into force on 1 July 2002. That agreement was due to expire on 30 June 2005. On 7 December 2004 by way of written variation, the collective agreement was amended to provide for an expiry date of 7 February 2007.

[16] The relevant terms of the collective agreement relating to annual holidays and to which this matter relates are (verbatim):

> 14. Annual Holidays
>
> 14.1 Annual holidays shall be paid in accordance with the Holidays Act 1981 and its amendments.
>
> 14.2 Each employee shall be entitled to annual holiday of 127.5 work hours per year (equivalent to three 42.5 hour weeks for day employees).
>
> 14.3 While on holiday an employee shall continue to receive normal salary.

14.4 An employee's holiday shall be taken at a time mutually agreed by the company and the employee. Holiday leave shall not accrue from one leave year to the next without the written approval of the company, except for amounts of leave smaller than 8.5 work hours which will automatically accrue into the next leave year.

14.5 Upon completion of FOUR (4) continuous years service with the company, each employee shall for the FOURTH and subsequent years of continuous service be entitled to an additional 42.5 work hours annual holiday per year (equivalent to one 42.5 hour week for day employees).

14.6 Time served as an apprentice with the company shall count as time served for the purpose of this clause.

14.7 Shift employees shall be entitled to an additional annual holiday of 42.5 work hours per year.

[17] Along with provisions for sick and bereavement leave, the collective agreement also makes provision for other types of leave such as long service leave, Jury/Court Leave.

[18] The issue for this determination is whether the annual holidays provided for in clauses 14.5 and 14.7 are over and above the minimum statutory entitlement of four weeks.

[19] Mr Yukich submitted that Norske Skog are proposing to meet its minimum requirements under the Holidays Act by way of the pre-existing additional annual holidays. EBIIWU contends the increased minimum entitlement provided for in the Holidays Act has the affect of increasing the minimum entitlement provided for in the collective agreement at clause 14.2 from three weeks to four weeks.

[20] Norske Skog says the entitlement to a fourth or fifth week of annual leave under the collective agreement to recognise shift work or service is an enhanced annual leave entitlement, not an additional entitlement to leave of another kind, and accordingly its current approach to providing those weeks of leave is compliant with the Holidays Act 2003 and its amendments.

[21] The result the EBIIWU is seeking is for the overall entitlement under clause 14.2 of the collective agreement to read "four" weeks instead of "three" and for employees with more than four years service or those who work shift work to receive five weeks annual leave. This will also have the impact that those employees who have worked for more than four years **and** who work on shift work will receive six weeks leave instead of five weeks leave.

[22] The wording in the collective agreement is different to the wording in the *Tramways* (cited above) agreement. Also, the terms and conditions relating to Annual Leave were negotiated and agreed prior to and during the currency of the Holidays Act 1981.

[23] However, the EBIIWU collective agreement was varied in December 2004. The variation extended the date of expiry of the agreement from 2005 to February 2007. The negotiations also included agreement around provisions relating to public holidays, specifically to bring the collective agreement in line with the new statutory provisions in the Holidays Act 2003. Both the Union and NST were aware at the time of their negotiations for the variation in December 2004 of the pending change to the minimum entitlement to annual leave and chose not to address any changes to the wording of clause 14. I have concluded that there were no issues arising from the wording of clause 14 at that time, in respect of whether NSTL would be meeting its minimum obligations under the Holidays Act in April 2007 when the minimum entitlement changed from three weeks to four weeks.

[24] The Respondent's evidence is that all new employees currently receive four weeks annual leave, but new employees employed as shift workers under the collective agreement receive five weeks leave from commencement. This is in recognition of the burden shift work places on employees. In taking this action NST has elected to maintain the relativities between shift employees, in its discretion and has not been taken as a concession regarding the interpretation of the clause.

[25] For its purposes the EBIIWU relies on section 6(3) of the Act which provides for any clauses in an employment agreement which excludes, restricts, or reduces an employee's entitlements under the Act to have no effect. That section renders clause 14.2 ineffective to the extent that it reduces an employee's entitlement under the Act as it only provides for three weeks annual leave and not the four weeks required. However, I have balanced that with the finding of the Employment Court that there is no automatic increase to annual leave entitlements and that such benefits must be negotiated by the parties.

[26] For the purposes of applying s.6 to the facts of this case, I have followed the Court of Appeals finding that enhancements and additional entitlements may at times overlap. On that basis I am satisfied that the entitlements expressed in

clauses 14.5 and 14.7 are enhancements to the minimum entitlement specified in clause 14.2.

[27] Considering clause 14 as a whole, the plain meaning of the words establishes a minimum entitlement to annual holidays which NST has enhanced for its shift workers, and had, up until 1 April 2007 enhanced for its employees who had more than four years service.

[28] When tested against the minimum entitlement set by the 2003 Act all employees are entitled to a minimum of four weeks annual holidays. NST meets that minimum requirement for all its employees.

The entitlements provided at clause 14.5 and clause 14.7 of the collective agreement are subsumed by the requirement of the Holidays Act 2003 s.41 to increase the entitlement for annual holidays contained at clause 14.2 of the collective agreement from three to four weeks.

Costs

[29] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority