IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA176/09
5091526

	BETWEEN	SERVICE & FOOD WORKERS' UNION NGA RINGA TOTA Applicant
	AND	CEREBOS GREGGS LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Peter Cranney, Counsel for Applicant Jane Latimer, Counsel for Respondent
Investigation Meeting:	29 July 2009 at Christchurch
Determination:	15 October 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant union (the Union) seeks a declaration from the Authority that its members should receive a further holiday of one week upon the completion of six or more years of current, continuous service making a total of five weeks annual holiday, four weeks conferred by the Holidays Act 2003 with effect from 1 April 2007 and the further week conferred by force of the collective employment agreement.

[2] The respondent (the company) resists the Union's claim and contends that the maximum annual leave to which a worker is entitled is four weeks and that the effect of a combination of the statutory amendment effective 1 April 2007 and the contractual provision is to provide for four weeks' annual leave without employees having to wait six years in order to have that entitlement.

[3] The Union represents members employed by the company and the parties have a collective employment agreement between them.

[4] That collective employment agreement (the agreement) provides at clause 17 for *annual holidays*. For the purposes of the present dispute, the relevant sub-paragraphs are clause 17.1 and clause 17.4. Clause 17.1 is in the following terms:

> *At the end of each year of employment with Cerebos Greggs you are entitled to three weeks annual holidays …*

[5] Similarly, clause 17.4 is in the following terms:

> *Upon the completion of six years current continuous service you will for the sixth and subsequent years be entitled to an additional one week of annual holiday.*

[6] The Union invites me to follow the Employment Court decision in *New Zealand Meat Workers' and Related Trades Union Inc v. Silverfern Farms Ltd*, WC7/09, 20 April 2009 (*Silverfern*). The Union says that *Silverfern* is *materially indistinguishable* from the instant case.

[7] In particular, the Union refers to the factual similarities between *Silverfern* and the present case and the adoption in *Silverfern* of a passage from the Employment Court's decision in *New Zealand Tramways & Public Transport Employees' Union Inc et al v. Transportation Auckland et al*, AC48/08, 12 December 2008 (*Tramways 2*). In *Tramways 2*, the Full Court summarised the law in the following way:

(a) Since 1 April 2007 the Holidays Act has provided for a statutory minimum of four weeks' annual leave for all employees;

(b) The Holidays Act contemplates, pursuant to s.6, that employers may provide enhanced or additional holiday benefits by agreement;

(c) The question of whether an agreement does provide such an additional entitlement and its scope is dependent on the wording of the agreement.

[8] In *Silverfern*, the Court decided that effectively two different kinds of leave were being contemplated, annual leave on one hand and service leave on the other. The Court decided that the intention of the parties was both to comply with the relevant statutory provision and to provide an additional benefit to long serving workers. As to the former, the Court was influenced by the fact that in *Silverfern* there was no express agreement about what the total annual leave entitlement would

be, whereas in *Tramways 2*, the parties had agreed to a provision which read *making a total of four weeks*.

[9] The Court in Silver Fern reasoned that the provision in respect of annual leave in the agreement was simply out-of-date, referring as it did to three weeks' annual leave rather than four weeks. As to the service leave provision, the judgment makes it clear that this is a different category of leave designed to recognise service and is thus able to be distinguished from the statutory minima provided in respect of annual holidays. In essence, the Court had decided there were two freestanding provisions, one a statutory minima providing for four weeks' annual leave (which in effect overrode the inaccurate reference in the agreement to three weeks' annual leave), and a further and separate provision which provided an additional week's leave (that is additional to the annual leave already provided for) in respect of long serving employees.

[10] Those principles, it is suggested, ought to apply directly in the present case with the result that there would be two freestanding provisions, one providing for the statutory minima of four weeks' leave (overriding the out-of-date provision in the agreement to three weeks' leave), and a further and separate provision giving one week's *additional* leave to long serving employees.

[11] The company contends that the only change in the position is to allow workers to not have to wait six years to obtain four weeks' holiday. In the last negotiations of the agreement, the company says there was no agreement to amend the wording of clause 17.1 in the agreement from three weeks' annual holiday to four weeks' annual holiday, but that the company had always maintained its position that it did not agree to five weeks' annual holidays. Furthermore, the company refers to an introductory provision at the beginning of the section in the agreement relating to leave which simply records that the entitlements in clause 17, amongst others, are *inclusive of* the entitlement provided in the Holidays Act. The company also says that, by virtue of the fact that clause 17.4 is included under the general heading *annual holidays*, and refers within the subclause itself to *annual holiday*, it is not the position that the additional week can be defined as something other than annual leave.

[12] Further, the provision at clause 17.1 of the agreement does not refer at all to the Holidays Act; it simply provides for three weeks' annual holiday. According to the company, clause 17.4 adds another week, again of annual holiday, making a total

of four weeks. Those facts, coupled with the reality that the parties did not agree to five weeks' annual leave during the last negotiation (as they might have), ought to encourage one to conclude that the total agreed to was always four weeks and not five weeks.

[13] The company further contends that clause 17 of the agreement, taken as a whole, complies with the requirements of the Holidays Act but no more than that. This is because, amongst other things, the Holidays Act does not require employment agreements to specify four weeks paid annual holidays. The Act simply requires that every employee receives four weeks holiday as a minimum entitlement. The company claims that the provision in clause 17.4, far from being a service-related provision as the Union contends, is in fact simply an add-on to the annual leave requirement as long service leave is separately provided for, as is extra leave for those employees working shifts.

Determination

[14] I have reached the conclusion that the law stated in the *Tramways 2* case is the law that I ought to apply in the present case. While I accept that there are similarities between the *Silverfern* case and the present case, I note that the company seeks to distinguish *Silverfern*. For my part, it suffices to apply the law as set out in *Tramways 2*.

[15] I consider the essential problem with the company's interpretation of clause 17 is that it does violence to the actual words, in particular, the word *additional* in clause 17.4. The clear terms of that subclause provide for an additional week of annual holiday after the completion of six years continuous current service. The operative question, so far as I am concerned, is additional to what?

[16] For me, the reference in clause 17.1 of the agreement to three weeks' annual leave is simply no longer an accurate statement of the law. The company itself makes the point (correctly) that the effect of the amendment to the Holidays Act is not to change provisions such as clause 17.1, but to nonetheless legislate a statutory minima. In effect, in my opinion, clause 17.1 ought to be read as referring to four weeks rather than to three weeks by virtue of the change to the provision of annual leave with effect from 1 April 2007. Whether the *Silverfern* judgment is distinguishable or not is

neither here nor there; the fact is that the Court in *Silverfern* applied precisely the same logic to the like provision in that case as I apply here.

[17] I am not attracted by the company's argument that clause 17.4 in the agreement is simply a generalised addition to the annual holidays provision. Again, it seems to me that that submission does violence to the actual words which provide that *upon the completion of six years current continuous service* … employees will be entitled to an additional week's annual holiday. That provision is clearly a special provision not applicable to all workers but applicable to those workers who have served six years or more and who, by virtue of that length of service, get an additional week's annual leave. It is a provision which the parties agreed to for the specific purpose, I hold, of recognising and valuing continuity of service and providing an additional annual holiday benefit for those workers who serve the company for an extended period. In my judgment, it does violence to the purpose and meaning of that provision to say that it is simply part of a wider provision for annual holidays at large which provides the same leave for everybody, irrespective of length of service.

[18] I consider that clause 17.4 provides an enhanced benefit for long serving staff such that they enjoy an advantage in respect of annual leave over their less long serving colleagues and that it is provided by the parties in the agreement for that specific non-statutory purpose.

[19] Finally, I note a distinction drawn in the *Tramways 2* decision between leave capable of being enforced by a Labour Inspector and leave only able to be pursued by the employee him or herself. It seems to me that clause 17.1 is a statutory entitlement which a Labour Inspector could enforce, whereas clause 17.4 provides an entitlement which comes under s.6 of the Holidays Act and thus can only be enforced by the applicable employee because it is not part of the statutory minima.

[20] I declare that the further annual holiday of one week upon the completion of six or more years of current, continuous service as provided by clause 17.4 of the agreement is additional to and not part of the four weeks' annual holiday conferred by the Act (after 1 April 2007).

[21] The parties have not asked me to consider the implementation of my decision and accordingly I do not do so. If further orders are required in that regard, leave is reserved for the parties to revert to me.

Costs

[22] Costs are reserved also.

James Crichton
Member of the Employment Relations Authority