

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 217/09  
5091537

BETWEEN                      SERVICE & FOOD  
WORKERS' UNION NGA  
RINGA TOTA  
Applicant

AND                              SEALORD GROUP LIMITED  
Respondent

Member of Authority:      James Crichton

Representatives:            Peter Cranney, Counsel for Applicant  
   Rob Towner, Counsel for Respondent

Investigation Meeting:      30 July 2009 at Christchurch

Determination:               17 December 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      The applicant union (the Union) seeks a declaration from the Authority that its qualifying members should receive a further holiday of one week upon the completion of five or more years of current continuous service, making a total of five weeks 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 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 five 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. That collective agreement

(the agreement) provides at clause 29 for *annual holidays*. For the purposes of the present dispute, the relevant subparagraphs are (a), (b) and the beginning of (c).

[4] The relevant provisions just referred to are in the following terms:

29. **ANNUAL HOLIDAYS**

- (a) *Annual holidays shall be allowed in accordance with the Holidays Act 2003.*
- (b) *An additional week's leave entitlement will be given to employees after the completion of five years continuous service. The additional week may be taken in conjunction with or separately from the first three weeks each year as agreed between the employee and their immediate supervisor or manager.*
- (c) *In addition to the annual holidays provided for in (a) above, and the service holiday provided for in (b) above if applicable, ...*

[5] The Union's position is that the meaning of the relevant provisions just set out is clear and that members have an entitlement to two separate classes of leave for two different situations. In the alternative, the Union argues that if there is ambiguity in the meaning of the words in question (which is denied), then that ambiguity ought to be resolved so as not to extinguish the right to a service holiday.

[6] For its part, the Company argues that clause 29 of the agreement has a long history and was only ever intended to give a maximum of four weeks leave inclusive of any entitlement to service leave. The Company relies on intrinsic evidence to demonstrate the intention of the parties over a significant period of time and encompassing a relatively large number of negotiations to demonstrate its view that the relevant clause had always been interpreted in the same way.

[7] In that regard, I am referred to a significant number of decisions of various Courts, both in this country and in other jurisdictions, where emphasis is placed on deriving the intention of the parties at the time the agreement was entered into and giving effect to that intention. By way of example only, is the dicta of Thomas J in *Gibbons Holdings Ltd v. Wholesale Distributors Ltd* [2008] 1 NZLR 277:

*I hold firm to the view that the contract must be interpreted to give effect to that intention. At no time is it legitimate for the Courts to impose an intention on the parties contrary to their actual intention.*

[8] And later on in the same judgment, His Honour asks this question: *What did they mean by their contract at the time they entered into it?*

[9] Again, in a decision of the English Court of Appeal in *Portsmouth City Football Club Ltd v. Sellar Properties (Portsmouth) Ltd* [2004] EWCA CIV760:

*The correct approach as it seems to me, is to construe the amended clause in the light of the background knowledge reasonably available at the time when the amendment is agreed; but to recognise of course that the background knowledge includes the knowledge that the new clause is to take the place of an existing clause.*

[10] Of course, the starting position for any consideration of this kind must be an examination of the words of the disputed clause. On this basis at first blush, the meaning seems plain enough. Subparagraph (a) refers to annual holidays and provides that they shall be taken in accordance with the Holidays Act 2003. There is no limitation on the number of weeks as is seen in some other like documents. By comparison for example, a recent decision of mine in CA176/09, *Service & Food Workers' Union Nga Ringa Tota v. Cerebos Greggs Ltd*, ERA Christchurch 15 October 2009, I considered a provision in the relevant collective employment agreement which referred specifically to three weeks *annual holidays*. No such limitation appears here.

[11] However, in the succeeding subparagraph, which plainly deals exclusively with service leave, there is a reference to *the first three weeks* of leave. The purpose of this reference is clear enough; having provided separately for service leave, the subclause goes on to allow the joining of the two periods of leave together by agreement between employee and employer.

[12] However, lest there be any doubt about the nature of the two earlier provisions and the kind of leave that they refer to, that is, in my judgement, clarified satisfactorily by the opening words of subclause (c). Those words simply make clear that subpara.(a) is relating to annual holidays and subpara.(b) is relating to service holidays.

[13] It follows then that the issue for determination in the present case is whether, by providing as it does in subclause (a) for annual holidays to be taken simply *in accordance with the Holidays Act 2003*, the agreement necessarily imports the

statutory minima. Of course, as a matter of fact, when the relevant provision in the agreement was negotiated, the statutory minima was three weeks whereas it is now four weeks.

[14] I am satisfied that there are two separate provisions in the relevant clause, one pertaining to annual leave and one pertaining to service leave. These two provisions create separate entitlements based on their own circumstances. That leaves the question of whether the provision in respect of annual holidays must automatically be construed as conferring whatever statutory minima then applies.

[15] I conclude that such a proposition, without more, cannot be accepted. Amongst other things, I rely on the dicta of the Full Bench of the Employment Court in *New Zealand Tramways etc Union v. Transportation Auckland Ltd et AL* [2008] ERNZ 584 at [37]:

*We do not accept that any reference to annual holidays in an agreement must mean the statutory minima in every case. Each agreement must be interpreted on its own terms.*

[16] However, that conclusion does not of itself dispose of the issue because, in reaching a conclusion about the meaning of the clause in question, it will be important that that conclusion does not do violence to the meaning of other provisions. In this regard, I refer particularly to the conclusion the Authority has already reached that the two provisions under scrutiny contained as they are in subparas.(a) and (b) of the clause, relate to different kinds of leave and constitute quite different entitlements. If, in interpreting the annual leave entitlement, the Authority were to do violence to the entitlement to service leave, that, I conclude, would not be in accord with the parties' intention.

[17] The Company urges on me the proposition that the parties' intention was never for affected workers to have an entitlement to more than four weeks annual leave per annum but with respect to that submission, it rather overlooks the plainly evident intention of the parties that there be a special provision for service leave and that service leave creates a special entitlement which is extra to the entitlement occasioned by the annual leave provisions. The effect of the Company's contention would be that employees affected by this clause would cease to derive any benefit from the service leave provision so that the provision itself would effectively become meaningless.

[18] In that particular regard, I accept the submission of the Union that intention is very relevant but that it is, in effect, important to ask the right question. The Union's submission is that the central issue for determination is whether the parties ever agreed to convert the additional non-statutory leave (that is, the service leave portion) to annual leave as the latter is defined by the Holidays Act 2003. If the answer to that question is in the negative, then the Union must succeed.

[19] Despite the able efforts of counsel for the Company, I am not persuaded there is any evidence before the Authority that the intention of the parties in designing this clause was to effectively convert the non-statutory leave provided for in subclause (b) to annual leave as provided in subclause (a) of clause 29. I accept it is appropriate for the Authority to consider the *surrounding circumstances* in considering the actual words of the clause being interpreted. As His Honour the Chief Judge puts it in *ASTE v. Chief Executive of Bay of Plenty Polytechnic* [2002] 1 ERNZ 491, the Court or Tribunal looks at the surrounding circumstances ... *to make sure that the first impression of the meaning (of the subject clause) is correct and nothing in the circumstances requires modification of that most natural meaning of the words.*

[20] In the same judgment, His Honour goes on to emphasise that an objective approach by the Tribunal is required and that the test is not what the parties say they intended but ... *what a reasonable person in the field, knowing all the background, would take them to mean.*

### **Determination**

[21] I have concluded that clause 29 subparas.(a) and (b) describe and identify two separate kinds of leave, the first being holiday leave derived from and provided by statute and the second being service leave (provided on a particular basis), the latter emanating exclusively from the parties' own negotiations over time.

[22] While I accept that the law is that the Authority cannot simply import the statutory minima into the annual leave provision because *each agreement must be interpreted on its own terms* (the *Tramways* case supra) alternative interpretations do violence to the parties' self-evident intention.

[23] In particular, it is plain from successive agreements that the parties have decided to reward service by providing to affected employees additional leave entitlements which relate exclusively to their service. The practical effect of

concluding that the parties never intended that more than four weeks leave would be achievable under subparas.(a) and (b), is that the service provision, which as I say derives from the parties' own negotiation and not from statute, would be otiose.

[24] There can be no reasonable basis on which the objective observer could conclude that subparas.(a) and (b) refer somehow to two kinds of annual leave. The words seem to me to enunciate two clearly different kinds of leave. Indeed the only linking provision is the reference in subpara.(b) to *the first three weeks*, plainly a reference to the provision then obtaining in respect of annual leave when the document was negotiated. The conclusion that I reach is, in my judgement, supported by the words in subpara.(c) which specifically delineates between the two preceding subclauses and, I suggest, makes it very difficult for the objective observer to somehow conclude that those first two subclauses should be interpreted so as they run together and provide a total of four weeks' annual leave. I conclude, as I did in the earlier *Cerebos Greggs* decision (supra para 18), that clause 29(b):

*... 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 ... it is provided by the parties in the agreement for that specific non-statutory purpose.*

[25] Accordingly, I declare that:

- (a) The proper interpretation of clause 29(a) of the agreement is that that subclause ought to be read as referring to four weeks' leave for annual holidays for affected employees by virtue of the change to the statute with effect from 1 April 2007; and
- (b) Subclause 29(b) of the agreement is to be interpreted according to its tenor, that is that employees who complete five years of continuous service are eligible for a further week's leave to recognise that service and that, by agreement between the parties, that additional week may be taken together with or separately from the same employee's annual leave entitlement.

[26] The Authority has not been asked to deal with questions of implementation of this decision and accordingly I do not do so. Leave is reserved to the parties to come back to the Authority should that be necessary.

**Costs**

[27] Costs are reserved as well.

James Crichton  
Member of the Employment Relations Authority