

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 428/09
5156932**

BETWEEN NEW ZEALAND DAIRY WORKERS
 UNION TE RUNANGA WAI U
 Applicant

AND TATUA CO-OPERATIVE DAIRY
 COMPANY LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Helen White, Counsel for Applicant
 Garry Pollak, Counsel for Respondent

Investigation Meeting: 3 November 2009

Submissions Received: 10 November 2009
 16 November 2009

Determination: 30 November 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant NZ Dairy Workers Union Te Runanga Wai U ("the Union") seeks compliance with a clause of a collective employment agreement the *Tatua Dairy Workers Collective Employment Agreement 2008 - 2001* ("the Collective"). The respondent Tatua Co-Operative Dairy Company Limited ("Tatua") disputes the Union's interpretation of the Collective.

[2] The parties were unable to resolve the differences between them by the use of mediation.

The facts

[3] The Collective commenced as from 15 November 2008 and continues until 14 November 2011.

[4] Clause 17 of the Collective provides:-

17. Special Holidays for Long Service

17.1 Entitlements

A worker shall be entitled to special holidays as follows:

17.1.1 One special holiday of 80 hours after the completion of 10 years and before the completion of 20 years of continuous service with the employer.

17.1.2 One special holiday of 120 hours after the completion of 20 years and before the completion of 20 years of continuous service with the employer.

17.1.3 One special holiday of 160 hours after the completion of 30 years and before the completion of 20 years of continuous service with the employer.

17.1.4 One special holiday of 240 hours after the completion of 40 years and before the completion of 20 years of continuous service with the employer.

I shall refer to this long service special holiday hereafter as "the entitlement". I refer to it as an "enhanced"¹ entitlement compared to that provided under the previous collective.

[5] Clause 17 of the previous collective employment agreement provided:-

17. Special Holidays for Long Service

17.1 Entitlements

A worker shall be entitled to special holidays as follows:

17.1.1 One special holiday of 40 hours after the completion of 10 years and before the completion of 20 years of continuous service with the employer.

17.1.2 One special holiday of 80 hours after the completion of 20 years and before the completion of 20 years of continuous service with the employer.

17.1.3 One special holiday of 120 hours after the completion of 30 years and before the completion of 20 years of continuous service with the employer.

17.1.4 One special holiday of 200 hours after the completion of 40 years and before the completion of 20 years of continuous service with the employer.

[6] Clause 1.6 of the Collective provides:-

¹ I use "enhanced" deliberately having the meaning given to it by the Employment Court in *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd* [2008] ERNZ 584 Travis, Shaw JJ. See also *NZ Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd* [2008] ERNZ 229 (CA).

1.6 Previous contracts of employment

It is a condition of this Agreement that it shall supersede all previous terms and conditions of employment contained in any relevant Collective Agreement and/or, all terms and conditions of employment by way of an Individual Employment Agreement, verbal or written, agreed between the parties.

No worker shall be disadvantaged by the coming into effect of this Collective Agreement. Individuals who have entitlements over and above this agreement shall retain those additional terms and conditions.

The merits

[7] The Union's statement of problem says that Tatua is not allowing all employees to take the amount of leave specified in the Collective if they have a current entitlement to leave under clause 17.

[8] The central issue involves clarifying which employees are entitled to the enhanced entitlement under the Collective. As I advised the parties at the investigation meeting, accepting as I do that there is a genuine dispute between them, a compliance order is not appropriate. I therefore confine the Authority's intervention to a resolution of the central issue identified.

Principles of interpretation

[9] The dispute requires application of the principles of contractual interpretation.

[10] The starting point must be the words used in the context of the agreement as a whole². The full Employment Court in *NZ Tramways Public Transport Employees Union Inc & Others v Transportation Auckland Corporation Ltd & City Line (NZ) Ltd*³ confirmed that where the wording in a contract is clear and unambiguous, it is to be construed according to its ordinary meaning⁴:

The starting-point is to examine the words used to see whether they are clear and unambiguous and to construe them according to their ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of the entering into the transaction may be taken into account, not to contradict or

² *ASTE v Chief Executive BOP Polytechnic* [2002] 1 ERNZ 491 (EC).

³ [2006] 1 ERNZ 1005.

⁴ See also *Melanesian Mission Trust Board v AMP Soc* [1977] 1 NZLR 391, at pp 394-395 and *Lowe Walker Paeroa Ltd v Bennett* [2006] 1 ERNZ 361(CA) and especially *Hansells (NZ) Ltd v MA* unreported, Employment Court, Auckland, ARC21/07, 14 September 2007, Travis J.

vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis and, objectively, the aim of the transaction.

[11] If I understand the Union correctly, it says that an employee who has taken their entitlement before the commencement of the Collective, there is no entitlement to the enhanced entitlement of the Collective. Further, it says that an entitlement partially taken prior to the commencement of the Collective entitles the employee to the enhanced entitlement of the Collective.

[12] Tatura says that the enhanced entitlement applies only to those employees who qualify for it on or after the commencement of the Collective. By its statement in reply, it says that an employee who takes their entire entitlement under the previous collective, has no right to the enhanced entitlement of the Collective. It says too that an employee who takes a partial entitlement before the commencement of the Collective receives the enhanced entitlement.

[13] Clause 17.2 provides that the entitlement may be taken in one or more periods and at such time or times as may be agreed by the employer and the worker. Clause 17.2.1 provides that at the request of the worker, the long service special holiday may be paid out in lieu. But there is no forfeiture at all and I disagree with both parties in this regard.

[14] It is my view that the wording of clause 17 is clear and unambiguous, and it is to be construed according to the ordinary natural meaning of the words. There is no ambiguity I therefore decline to enquire into pre-contractual negotiations or the subjective intentions of the parties.

[15] I disagree with the interpretation taken by both parties. A return to basic principles is required. The provisions of the Collective superseded those of the previous Collective. The enhanced entitlement applied to all employees and there is no further qualification additional to that of service as explicitly stipulated in the clause.

[16] Qualifying for the entitlement and the taking of the entitlement are two separate and unrelated things. Whether or not long service special leave is partially or wholly taken prior to the Collective is entirely irrelevant. There is nothing in the wording of the clause which requires any consideration of whether long service special leave has already been either wholly or partially taken previously.

The determination

[17] Clauses 1.6 and 17 of the Collective are clear and there is nothing ambiguous about them. The ordinary natural meaning of the words is to be given effect according to the objective assessment of them as interpreted now by the Authority and there is nothing which requires any enquiry as to the pre-contractual negotiations between the parties or of their subjective intention. The Authority's reasoning above translates as follows in terms of the table tendered by the parties:-

Employee	Start date	Service	Leave	Entitlement
A	15.11.95	10+ yrs	Unused	80 hours
B	15.11.95	10+ yrs	Used	40 hours
C	15.11.95	10+ yrs	20 hrs used	60 hours
D	14.11.98	10 yrs, 1 day	Unused	80 hours
E	15.11.98	10 yrs	Unused	80 hours
F	14.11.88	20 yrs, 1 day	Unused	120 hours
G	15.11.88	20 yrs	Used	40 hours

The resolution

[18] There will be no compliance order but the determination above is to be regarded as the Authority's resolution of the matter. The investigation will remain open for 28 days from the date of this Determination. During that period the parties have leave to apply for further direction in respect of any further intervention by the Authority.

Leon Robinson
Member of Employment Relations Authority