

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 483
5334976**

BETWEEN SERVICE AND FOOD
WORKERS UNION NGA RINGA
TOTA INC.
First Applicant

AND NEW ZEALAND NURSES'
ORGANISATION
Second Applicant

AND OCEANIA CARE COMPANY
(No 2) LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Tim Oldfield and Jock Lawrie, Counsel for Applicants
Kylie Dunn and June Hardacre, Counsel for Respondent

Investigation Meeting: 8 September 2011 at Auckland

Submissions received: 13 September 2011 from Applicant
16 September 2011 from Respondent

Determination: 08 November 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicants, Service and Food Workers Union Nga Ringa Tota Inc (“SFWU”) and the New Zealand Nurses’ Organisation (“NZNO”) (collectively “the Unions”), state that there is a dispute with the Respondent, Oceania Care Company Limited (“Oceania”), in relation to the interpretation of the annual leave clause which was provided in the Qualcare Eastern 2006 Collective Agreement (“2006 Collective Agreement”) and copied into the Qualcare Eastern 2007 Collective Agreement (“2007 Collective Agreement”).

[2] Specifically the Unions claim that clause 2.6.2 of the 2006 Collective Agreement between the Unions and Oceania provided for an additional week of annual leave entitlement for employees with five or more years service, such that employees with five or more years’

service should have had a leave entitlement of five weeks annual leave with effect from 1 April 2007.

[3] Oceania disagrees with this interpretation and denies that employees who were covered by either the 2006 Collective Agreement or the 2007 Collective Agreement and who had achieved five or more years' service became entitled to a leave entitlement of five weeks per annum from 1 April 2007.

[4] Oceania further claims that even if an entitlement to a fifth week of annual leave was to be determined by the Authority, any such entitlement ended when the Multi Employer Multi Union Collective Agreement ("MEMUCA") between the parties came into effect on 1 April 2009.

Issues

[5] The issues for determination are:

- Whether employees who had achieved five or more years' service and who were covered by the 2006 Collective Agreement were entitled to five weeks' annual leave with effect from 1 April 2007
- If it is determined by the Authority that such an entitlement exists, whether settlement of the terms and conditions of the MEMUCA on 1 April 2009 and which was ratified and signed in July 2009 ended such entitlement.

Background Facts

[6] Oceania owns and manages retirement villages, rest homes and hospitals, predominantly for the elderly. The Unions represent members who are employed as nurses, health care assistants and support workers by Oceania.

[7] The Qualcare New Zealand Limited group of companies ("Qualcare"), which amalgamated under Part 13 of the Companies Act 1993 on 30 May 2008 to become Oceania, was divided into four regions, Northern, Eastern, Southern and Green Gables.

[8] Prior to the amalgamation, each Qualcare region negotiated separately which involved the same company advocate, Mr Phil Maguire, at that time General Manager Human Resources for Qualcare and subsequently Oceania following Qualcare's amalgamation into

the Oceania Group in May 2008. There were different union bargaining advocates at the regional negotiations and each Qualcare Collective Agreement had a one year term.

2006 Negotiations

[9] In mid 2006 Qualcare and the Unions negotiated and concluded the 2006 Collective Agreement for the Eastern Region.

[10] Clause 2.6.2 of the 2006 Collective Agreement, a clause the origins of which predated the 2006 Collective Agreement by some years, concerned annual leave entitlements and stated:

Annual Leave

- (a) *An annual holiday of three weeks shall be allowed and paid for in accordance with the Holidays Act 2003.*
- (b) *An additional week of annual leave shall be allowed for the fifth and subsequent years of entitlement arising from current continuous service with Qualcare Eastern*
- (c) *Annual holidays shall be allowed at a time that has regard for the employee's needs for rest and recreation but necessarily is suitable to the work requirements of Qualcare Eastern.*
- (d) *Night shift holidays – Nurses regularly and continuously employed in private hospitals on night shifts shall be entitled to four weeks' holiday on completion of one year's service as a night shift worker*

2007 Negotiations

[11] Mr Maguire stated that in the bargaining sequence for the collective agreements which were to be in force from mid 2006 to mid 2007, the Qualcare Northern collective agreement was negotiated first, followed by the Eastern collective agreement, the Green Gables collective agreement and then the Southern collective agreement.

[12] On 1 April 2007 annual holiday entitlement under the Holidays Act 2003 increased from three to four weeks. All employees employed under the 2006 Collective Agreement were to receive four weeks annual leave with effect from 1 April 2007, pursuant to the changes in the Holidays Act 2003, however employees already in receipt of a total of four weeks' annual leave derived from clause 2.6.2 of the 2006 Collective Agreement did not receive an increase to five weeks' annual leave.

[13] Mr Maguire said that during the negotiations leading up to settlement, the Unions had tabled a claim for an increase from four weeks' to five weeks' annual leave for employees

who had completed five years' service, and that he had advised the Unions that Qualcare would not agree to increase the annual leave entitlements to five weeks' leave after five years' service, thereby rejecting the claim.

[14] Mr Maguire explained that his view in relation to clause 2.6.2 was that each sub-paragraph within the clause referred to the previous sub-paragraph and that by retaining clause 2.6.2 Qualcare was reflecting the change in legislation, but was not changing the entitlement to annual leave in the collective agreement.

[15] The Unions had a different view of what had occurred during the 2007 negotiations. Mr Thomas O'Neill, Union Organiser for SFWU and lead Unions advocate in the Qualcare Eastern negotiations, said that what was agreed between the parties was accurately stated in the Terms of Settlement 1 July 2007 – 30 June 2008 which summarised the position reached by the parties involved in the bargaining process. In regards to annual leave the Terms of Settlement stated:

In relation to Clause 2.6.2 The parties agree the issue of additional annual holidays over and above any specified current legal minimum entitlement, will be discussed between the parties as soon as possible following the findings and decision regarding the case currently being taken to the Court of Appeal by the Union/s.

[16] Ms Robyn Haultain, Industrial Advisor for NZNO, explained that the additional week of annual leave had been agreed to when the Qualcare companies were owned by Presbyterian Support Coast East, a religious organisation. Ms Haultain said that in her experience, the religious and welfare sector collective agreements had clauses providing additional leave entitlements for long service, and she explained the reason for the additional week of annual leave as being attributable to the fact that it was difficult to recruit and retain employees in the area of residential care where pay rates were low. As such, it was to be viewed as an incentive to encourage the retention of experienced employees.

[17] Ms Haultain said that the additional week of annual leave after five years' service entitlement for SFWU and NZNO members under clause 2.6.2 of the 2006 Collective Agreement had surfaced as an issue during the 2007 negotiations, and that the Unions had been annoyed that Qualcare Eastern had tabled a claim to take the entitlement away from the Unions' members. Ms Haultain stated that her advice to the union advocates had been that the entitlement should not be bargained away.

[18] The 2007 Collective Agreement was agreed and settled in mid 2007. It had been agreed to continue the existing annual leave entitlements, with clause 2.6.2 forming part of

the 2007 Collective Agreement, and that the matter would be discussed once the decision of the Court of Appeal on a similar issue was released. The litigation referred to was the case of *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Limited*¹ (“Tramways”)

[19] Mr Maguire explained that following completion of the Qualcare Eastern negotiations, there were negotiations with Qualcare Green Gables and Qualcare Southern. In the Green Gables Collective Agreement, it had been agreed by the Unions and Qualcare to amend the annual leave clause to refer to an entitlement of four weeks’ annual leave. The Qualcare Southern Collective Agreement was agreed with its equivalent to clause 2.6.2 remaining in the agreement.

MEMUCA Developments

[20] Mr Maguire explained that during the term of the 2007 Collective Agreement, the Qualcare and Eldercare groups of companies merged to form Oceania. At the time of the merger, the MEMUCA which Oceania were negotiating with the Eldercare group of companies was widened to include the Qualcare group of companies.

[21] As a result of these negotiations, Mr Maguire said that all existing collective agreements between the parties were frozen. The Memorandum of Understanding, which was signed by Mr Guy Eady, Acting Chief Executive for Qualcare, Mr Alastair Duncan, National Bargaining Coordinator for the SFWU, and Ms Jackie McGrath, Organiser for the NZNO, was dated 12 May 2008 and confirmed this position stating that:

All current EC and QC employees will continue to be employed on the terms and conditions of the relevant Collective Agreement expired or still in force as the case may be (or the relevant Individual Agreement) for such time as is legally required or for the period of the employees’ continuous employment until replaced by a new Collective Agreement covering those employees.

[22] Mr Maguire said he was the advocate for Oceania in the MEMUCA bargaining process, however neither Ms Haultain nor Mr O’Neil took part in these negotiations. Mr Maguire said that at no stage in the bargaining process did the Unions table a claim for five weeks’ annual leave.

[23] Ms Haultain explained that negotiating the MEMUCA had been a protracted and significant undertaking, taking a considerable amount of time. During the process there were

¹ [2008] NZCA 159

many meetings with affected union members, some of which were joint employer/union presentations.

[24] At one of the later presentations held on 12 February 2009 to address the key features of a proposed settlement, the presentation slide notes do not include a reference to annual leave entitlements, but do refer at page 11 to 'Long Service Leave'. The notes outline:

- *One weeks paid bonus or leave at average earnings every five complete years of employment*
- *Any existing other provision will expire except on a one off basis where an employee is within 2 years of entitlement*
- *Service with predecessor employers will be recognised*
- *The provision will apply from 1 April 2009 (except where already provided in an agreement)*

[25] The Terms of Settlement for the MEMUCA were signed on 31 March 2009. The MEMUCA was ratified and signed by the parties in July 2009. Clause 18.2 of the MEMUCA referred to annual leave stating:

*After the end of each completed twelve months current continuous employment with the employer, the employee is entitled to **four (4) weeks** annual holidays in accordance with the Holidays Act 2003 and its amendments.*

[26] Clause 18.3 of the MEMUCA headed "**Long Service Leave**" stated:

Permanent employees will be entitled to long service leave equivalent to one week's average earnings after completing each five years continuous employment with Oceania and its predecessors.

This long service leave can be taken as a one off, one week's additional holiday or as a lump sum payment in the sixth year of employment.

[27] Mr Maguire said that just prior to the final settlement of the MEMUCA, an issue had been raised by Mr David Wait of the NZNO that a number of allowances specific to various collective agreements had not been included or grandparented in the MEMUCA.

[28] The Unions and Oceania had accordingly agreed to the Unions consulting their members over a period of three to four weeks in order to put forward any further allowances which they wished Oceania to consider in relation to the finalised version of the MEMUCA.

[29] Following agreement between Oceania and the Unions regarding allowances to be grandparented for specific union members, Mr Maguire said that these allowances were attached as a schedule dated 31 March 2009 and headed 'Schedule of additional Grandparented Conditions' to the MEMUCA.

[30] Mr Maguire said it was at this point that clause 37 of the MEMUCA was included. Clause 37 of the MEMUCA headed "SAVINGS" stated:

Nothing in this Agreement shall operate to reduce any individual entitlements of employees as specified in an individual employee's Savings Terms and Conditions Letter date 2009.

[31] Mr Maguire explained that Oceania had written to all of the relevant employees explaining what allowances had been grandparented specific to them.

[32] The schedule of grandparented allowances attached to the MEMUCA specifies an additional week's leave for night shift employees, but does not make reference to an additional week of annual leave after five years' service.

Court of Appeal decision

[33] Mr Thomas said that following the Employment Court's judgment in *Tramways*² he had written to Mr Maguire on 13 February 2009. In that letter Mr O'Neill referred to the relevant clause in the Terms of Settlement and continued to state:

I understand that the Court of Appeal directed the Employment Court to reconsider the matter, and that in December 2008 the Employment Court said it comes down to the wording in the agreement.

In the Unions' view this means that employees should get 5 weeks annual holidays after 5 years continuous service.

[34] Mr Maguire said that Qualcare had responded to this letter on 17 February 2009, denying the claim that employees should receive five weeks' annual leave after five years' continuous service.

[35] At this stage Mr O'Neill said he had passed the matter over to Mr Tim Oldfield, the SFWU Legal Officer. On 27 July 2009 Mr Oldfield had written to Ms Rebecca Kroon, who was representing Qualcare, restating the Unions' position that the Qualcare Eastern employees with five or more years' service were entitled to five weeks' annual leave. Ms Kroon replied on 4 August 2009 rejecting the claim.

² [2008] NZCA 159

Clause 37 of the MEMUCA

[36] Mr Maguire said that an issue had arisen in October 2009 regarding the interpretation of clause 37 of the MEMUCA. Following mediation, a letter had been sent to all members asking them to identify any individual condition, allowance or pay that had been lost as a result of the MEMUCA.

[37] The resulting list covered many queried areas relating to conditions, allowances or elements of pay, but did not include any query relating to an additional week of annual leave after five years' continuous service.

[38] Ms Haultain explained this omission as due to the fact that the relevant union members had been informed that the parties were in dispute on this issue. Mr O'Neill and Ms Haultain further stated that while it was correct that certain conditions had been expressly grandfathered in the MEMUCA, the reason for the omission of additional leave for employees with over five years' service was explained by the fact that the parties were in dispute as to whether the Qualcare Eastern Collective Agreement provided for an additional week of leave for employees with five or more years' service.

[39] Mr O'Neill further stated that clause 37 of the MEMUCA was a savings clause which provided additional grandfathering and as such, additional leave should have been preserved by this clause.

[40] On 16 February 2011 a Statement of Problem was filed in the Authority.

Determination

The Law

[41] The Holidays Act 2003("the Act") states at s3 (a) that the purpose of the Act is provide annual holidays for "*rest and recreation*"; and at s 6:

1. *Each entitlement provided by an employee by this Act is a minimum entitlement.*
2. *This Act does not prevent an employer from providing an employee with enhanced or additional entitlements (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.*
3. *However, an employment agreement that excludes, restricts, or reduces an employee's entitlements under this Act-*

- a. *Has no effect to the extent that it does so; but*
- b. *Is not an illegal contract under the Illegal Contracts Act 1970*

Were employees who were covered by the 2006 Collective Agreement and had achieved five or more years' service entitled to five weeks' annual leave from 1 April 2007?

[42] The additional week of annual leave in clause 2.6.2 of the 2006 Collective Agreement is identified in s 2.6.2 (b) as being service related; and it applied only to those employees with five years' continuous service with Qualcare Eastern. It is defined in s 2.6.2 (c) as being for the purpose of "*rest and recreation*", words which mirror those in the Act as describing the purpose of annual leave.

The Tramways decisions

[43] In the first of the *Tramways* decisions³ the Employment Court considered the interpretation of the annual leave requirements of a collective agreement. The relevant collective agreement provided for three weeks' annual holiday entitlement and in addition "*a further holiday of one week per annum in recognition of the nature of the work making a total of four weeks' leave per year*".

[44] With effect from 1 April 2007 the annual minimum holiday entitlement for all employees in New Zealand increased to four weeks pursuant to s 41 of the Holidays Act 2003. In deciding of whether the further holiday would continue to apply post-1 April 2007, the full Court held that the relevant provisions of the collective agreement should be construed in the context of the scheme and purpose of the Act.

[45] The Employment Court further held that in applying the dictionary definitions of "*enhanced*" and "*additional*" the employees in question were not entitled to a further holiday over and above the new statutory minimum from 1 April 2007.

[46] The decision was appealed. The Court of Appeal judgment in *Tramways*⁴ held that the Employment Court had over-analysed Parliament's language, and the matter had been referred back to the Employment Court .

³ *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corp Ltd* [2006] ERNZ 1005

⁴ [2008] NZCA 159

[47] The Employment Court judgment in the *Tramways*⁵ case on referral from the Court of Appeal was delivered on 12 December 2008, the Employment Court stated:⁶

The question of whether an agreement does provide such an enhanced or additional entitlement and the scope of the entitlement is dependent not on the Act but on the wording of the agreement.

[48] The conclusion of the Employment Court was that, based on the interpretation of the relevant collective agreement, the parties had provided for four weeks' annual holiday leave. It was not accepted by the Court that any reference to "annual holidays" in an agreement must mean the statutory minima in every case⁷.

The Silver Fern Farms decisions

[49] The decision of the Employment Court in *NZ Meat Workers and Related Trades Union Inc v Silver Fern Farms Ltd (formerly PPCS Ltd)*⁸ ("*Silver Fern Farms*") was issued on 20 April 2009

[50] The case addressed very similar facts to those which were the subject of the *Tramways* litigation. In that case Judge Shaw held that although clause 10 of the applicable collective agreement, which provided for an "*additional*" week of annual leave after six years' concurrent service, described it as "*the fourth week's holiday*" which could "*be taken separately in conjunction with or separately from the first three weeks holiday*", the collective agreement treated it differently from annual leave.

[51] Judge Shaw concluded that the intention of clause 10 was to provide all the employees with the statutory entitlement to annual leave, and to recognise the service of those employees with six or more years' concurrent service by granting an additional week's holiday each year.

[52] In reaching her decision Judge Shaw explained:⁹

[41] Although the continuous service leave is called an additional week of annual holiday it was not intended to be annual holiday as contemplated by the Holidays Act 2003 for the following reasons.

[42] It is not given for the purpose of rest and recreation as described in s3(a) of the Holidays Act. This in contrast to the New Zealand

⁵ [2008] ERNZ 584

⁶ Ibid as para [15]

⁷ Ibid at para [37]

⁸ [2009] ERNZ 149

⁹ Ibid at paras

Tramways case which it was found the leave was to recognise the nature of the work and for the purpose of rest and recreation. In that case the purpose of the extra leave was consistent with the statutory purpose of annual holidays. In the present case the purpose of clause 10.4 is different from the statutory purpose. It is to recognise continuous service and it is not universal to all employees.

[53] The Court of Appeal upheld this decision¹⁰, and also noted that the approach of the Employment Court in *Silver Fern Farms* was consistent with that taken by the Chief Judge in two cases, *National Distribution Union Inc v Capital and Coast District Health Board*¹¹ and *Robinson v Capital and Coast District Health Board*¹². In both these cases, the issue for decision was whether the clauses in the collective agreements which provided for an additional week's annual holiday for long-serving employees was in addition to, or subsumed, by the statutory increase to four weeks' annual holiday after 1 April 2007.

[54] In both cases Chief Judge Colgan found that it was clear that the parties intended employees who had seven years or more continuous service to have one week's holiday per year more than those employees who had yet to achieve that length of service. The Chief Judge stated in *National Distribution Union Inc v Capital and Coast District Health Board*¹³

The dominant and inescapable element that determines the case, however, is the clear intention of the parties to differentiate the annual holiday entitlements of long-serving employees.

Clause 2.6.2 of the 2006 Collective Agreement

[55] Clause 2.6.2 (a) of the 2006 Collective Agreement provided three weeks of annual leave. Clause 2.6.2 (b) provided an additional week of annual leave for the fifth and subsequent years of current and continuous service with Qualcare Eastern. In total this entitled those employees with five or more years' service to four weeks annual leave. On a plain reading of the clause subsections (a) and (b) the entitlement for the employees complied with the statutory minima as applicable from 1 April 2007

[56] This conclusion of compliance with the statutory minima is strengthened by Clause 2.6.2. (c) which defines annual holidays as being for the purpose of 'rest and recreation' which is specifically referred to in s 3(a) of the Holidays Act 2003 as the purpose of annual holidays. In *Silver Fern Farms* Judge Shaw expressly referred to 'rest and recreation' as being indicative of whether the purpose of the extra leave was consistent with the statutory purpose of annual holidays.

¹⁰ [2010] NZCA 317

¹¹ [2010] NZEmpC 2

¹² [2010] NZEmpC 3

¹³ [2010] NZEmpC 2 at para [24]

[57] However clause 2.6.2. (b) which precedes this definition of annual holidays expresses the additional week of annual leave in clause 2.6.2 (b) as being dependent on the employee having completed a minimum of five years' service, and is not therefore applicable to all employees..

[58] In *National Distribution Union Inc v Capital and Coast District Health Board*¹⁴ (“NDU”) Chief Judge Colgan said:

[25] While in one sense the purpose of the long service leave may be said to be the same as the “purpose” of the statutory minimal annual leave, there is a different rationale for it. So, while the ‘purpose’ of both leaves is to allow the employee rest and recreation, the rationale for the two periods of leave are distinct. The employer must, by statute, provide all employees irrespective of length of service beyond 12 months with at least 3, and now 4, weeks of paid leave for rest and recreation. However the long service leave exists as both an incentive for employees to remain in employment with the same employer long term and to reward those employees for their loyalty and longevity in a tangible way. So it may be inaccurate to distinguish leaves by reference only to their purpose. Rather, the distinction may lie more accurately in an analysis of the reasoning behind their existence.

[59] In *Robinson v Capital and Coast District Health* (“Robinson”) the applicant was employed as a hospital orderly, an industry profession not dissimilar to that of the employees represented by the Unions in the present case. As was recognised in *Robinson*, hospital service staff would have “*an even higher turnover rate*” without an incentive to stay. This situation is analogous to that in the aged care sector where there is also a high employee turnover as referred to in her evidence by Ms Haultain.

[60] In *Robinson* the Chief Judge described¹⁵ the additional week's leave for long-serving employees as having a significant benefit to the employer by obviating the need for administration in new appointment, costs of retraining, costs in productivity in addition to other employment costs and the benefit to the employer of having long-term, loyal, employees.

[61] Ms Haultain in her evidence referred to the rationale for the additional week of annual leave entitlement for longer serving employees as being to provide an incentive leading to retention of employees. I find this argument to be persuasive in the context of the aged care sector, and to be consistent with the Chief Judge's reasoning as to the beneficial

¹⁴ [2010] NZEmpC 2

¹⁵ Ibid at para [14]

cost-saving effect to the employer of additional long service leave in both *Robinson* and *NDU*.

[62] In reaching the conclusion that the rationale behind clause 2.6.2 of the 2006 Collective Agreement was to provide long serving employees with an incentive to remain in the company's employment, thereby bringing a tangible cost benefit to the employer, I find that the entitlement to an additional week of annual holiday pursuant to clause 2.6.2 (b) is a matter of contract and additional to the statutory entitlement.

[63] I determine that employees who were covered by the 2006 Collective Agreement and to whom clause 2.6.2 (b) applied were entitled to a total of five week's annual leave from 1 April 2007.

Did the terms of settlement of the MEMUCA signed on 31 March 2009, and the finalised MEMUCA ratified and signed in July 2009, end the entitlement to 5 weeks' annual leave for employees covered by the 2006 Collective Agreement?

[64] The parties disagree as to what was discussed between them during the 2007 negotiations. In respect of pre-contractual negotiations the Employment Court has consistently held these to be inadmissible¹⁶, however the Terms of Settlement document signed by the parties on 12 October 2007 clearly summarised the position as being that the issue of additional annual holidays in excess of the statutory minimum entitlement would be discussed by the parties following the findings of the Court of Appeal in *Tramways*.

[65] On 12 May 2008 at the commencement of the negotiations for the MEMUCA, Qualcare and the Unions had entered into a Memorandum of Understanding which stated that employees would continue to be covered by the terms and conditions of the relevant collective agreements employment: "*until replaced by a new Collective Agreement covering those employees*".

[66] I find this to be a clear and unequivocal statement of the intention of the parties that the terms and conditions of the MEMUCA would replace the terms and conditions of the previous relevant collective agreements, and therefore, that of Qualcare Eastern.

[67] The Court of Appeal judgment was issued on 11 June 2008 and the subsequent judgment of the Employment Court in the referral was issued on 12 December 2008. On 13 February 2009 Mr O'Neill wrote to Mr Maguire expressing the view that in light of the

¹⁶ Cf: *Hansells NZ Ltd v Ma* [2007] 637 at para [35]

Employment Court judgment, the Unions' view was that employees should have five weeks' annual leave after five years' service. The response from Qualcare on 17 February 2009 had been to disagree with the Unions' view.

[68] By the time the *Silver Fern Farms* decision was issued on 20 April 2009, the negotiations for the MEMUCA had commenced. On 27 July Mr Oldfield wrote to Oceania via Ms Kroon, restating the Unions' view regarding the additional week of annual leave. The response from Oceania sent on 4 August 2009 rejected the Unions' view of the additional week of annual leave, noted that the MEMUCA had been signed on 14 July 2009 and expressed the view that:

This document now governs the annual holidays entitlement for all Oceania employees who are SFWU members and whose work is covered by the coverage clause within that Agreement.

[69] I consider that this observation by Mr Maguire is in accordance with the intention of the parties as expressed the Memorandum of Understanding dated 12 May 2008, and I find that the entitlement to an additional service related week of entitlement of annual leave for Qualcare Eastern employees had been superseded by the agreement of the parties to the terms and conditions of the MEMUCA.

[70] However I shall proceed to consider the interactions between the parties during the course of the MEMUCA negotiations and that aftermath as being relevant to the issue of whether the 'Savings' clause in the MEMUCA had the effect of 'grandparenting' the provisions of clause 2.6.2 of the 2006 Collective Agreement.

[71] The negotiations for the MEMUCA were protracted. Mr Maguire stated in evidence that at no stage in the bargaining did the Unions table a claim for five weeks' annual leave. At the joint Unions/Oceania presentation on 12 February 2009 it was clear that there would be a service related bonus or leave entitlement and that any existing other provision would expire "*except on a one off basis where an employee is within 2 years of entitlement*".

[72] Ratification took place on 31 March 2009. Clause 18.2 of the MEMUCA referred to employees being entitled to four weeks' annual leave, and clause 18.3 referred to a long service leave provision after five years' continuous employment with Oceania and its predecessors. There is no proviso in these clauses to indicate that there is a dispute which may impinge on these provisions, in contrast to the relevant clauses in the *Silver Fern Farms* collective agreement which were accompanied by the statement: [*"Subject to Court Final Decision*"].

[73] Clause 37 of the MEMUCA entitled 'Savings' had been included following a three to four week consultation by the Unions with their members with the intention of identifying and grandparenting various entitlements which had previously been included in the various collective agreements covering members prior to the merger to form Oceania.

[74] The Savings clause had been supplemented by the 'Schedule of additional Grandparented Conditions' dated 31 March 2009. The Schedule itemises the grandparented conditions by facility. Under the Qualcare Eastern facility an "*Additional week's leave for night shift employees*" is included, but there is no reference to an additional weeks' annual leave for other Qualcare Eastern employees included, and no reference to an existing dispute in relation to such an entitlement.

[75] Following the raising by the Unions of an issue regarding the interpretation of clause 37, mediation had taken place between the parties in October 2009, some months after the correspondence between Mr Oldfield and Oceania about the disputed entitlement. However, despite letters being sent to all employees asking them to identify any missing conditions, allowances, or pay, the Qualcare Eastern members had not identified an additional week of annual leave entitlement for employees with five years' or more service as having been lost as a consequence of the MEMUCA.

[76] Ms Haultain explained this omission as being explained by the fact that the members knew there was a dispute between the parties. Further that any dispute regarding entitlements under clause 2.6.2 in the 2006 Collective Agreement continued notwithstanding the MEMUCA because there had been a process agreed between the parties.

[77] I find that any process agreed between the parties is as stated in the Terms of Settlement signed on 12 October 2007 which notes that the issue of additional annual holidays "*will be discussed between the parties*" following the Court of Appeal decision. Such discussion as there was resulted in Oceania stating clearly that it disagreed with the Unions' view, the letter to Mr O'Neill dated 17 February 2009 preceding the settlement and ratification of the MEMUCA on 31 March 2009.

[78] Oceania further refuted the Unions' view in August 2009 and despite this, the process following mediation did not result in the disputed entitlement being identified in the list drawn up of the omitted conditions, nor was it identified on the Schedule of additional Grandparented Conditions.

[79] Moreover, I consider it more credible an explanation for the 'lost' additional week of entitlement not having been raised by the Qualcare Eastern employees, that these employees accepted that the MEMUCA outlined their terms and conditions of employment and superseded any contained in a previous collective agreement.

[80] In conclusion, I do not find that the annual leave entitlements under clause 2.6.2 of the 2006 Collective Agreement were saved and grandparented under clause 37 of the MEMUCA. There had been ample opportunity for this issue to have been identified and flagged in the MEMUCA, the fact that it was not I find attributable to the parties having agreed at the outset of negotiations that the MEMUCA would supersede any previously existing terms and conditions of employment.

[81] I determine that ratification and settlement of the MEMUCA on 1 April 2009, as supplemented by the further steps taken in relation to grandparented terms and conditions, operated to end the entitlement to 5 weeks' annual leave for employees covered by the 2006 Collective Agreement

Costs

[81] Costs are reserved. Given the extent to which both parties have been successful I am of a mind that costs should be moderate, however, 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, they may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions to be lodged with 14 days of receipt. I will not consider any application outside that timeframe.

Eleanor Robinson
Member of the Employment Relations Authority