IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 527
5330781

	BETWEEN	NZ AMALGAMATED ENGINEERING, PRINTING & MANUFACTURING UNION INC Applicant
	AND	CHUBB NEW ZEALAND LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Anne-Marie McInally, Counsel for Applicant Paul Diver, Advocate for Respondent
Investigation Meeting:	On the papers
Submissions received:	15 September 2011 from Applicant 4 October 2011 from Respondent
Determination:	13 December 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, the NZ Amalgamated Engineering, Printing and Manufacturing Union ("EPMU") has applied to the Authority to resolve a dispute about the interpretation and operation of a long service holiday provision in a collective agreement.

[2] Specifically the EPMU claims that employees who had attained 10 years continuous service but had yet to attain 15 years continuous service on the date the 2007-08 Collective Agreement ("2007-08 CA") came into force are entitled to the one week special holiday provided by clause 20 of the 2007-08 CA.

[3] The Respondent, Chubb New Zealand Limited ("Chubb"), claims that it has correctly applied the long service provisions of the 2007-08 CA by treating the provision as a new condition for employees who were approaching 10 years' continuous service, rather than a

back-dated provision for employees who had already attained 10 or more years' continuous service.

[4] The parties agreed to the Authority determining this issue 'on the papers' based on the Statements of Problem and in Reply and on submissions from the parties.

Issues

[5] The issue for determination is whether employees who had attained 10 years' continuous service but had yet to attain 15 years' continuous service when the 2007-08 CA came into force on 24 September 2007 are entitled to the one week special holiday provided by clause 20 of the 2007-08 CA.

Background Facts

[6] Chubb is a company offering fire and security services and solutions, employing approximately 500 employees in New Zealand.

[7] The EPMU and Chubb are parties to a collective agreement, the Chubb Systems and Services Collective Agreement 2009-11 ("2009-11 CA"), covering the period 24 September 2009 to 25 September 2011 which applies to services, trade and technical services personnel for Chubb Electronic Security and Chubb Fire Services.

The 2009-2011 CA

[8] The 2009-11 CA at clause 14 sets out the employees' annual leave entitlement, and in sub-clause 14.2 states:

> **14.2**
>
> *Each employee shall be entitled to four weeks holiday per year. Provided that on the completion of six years continuous service, each employee shall be entitled to four weeks for that and each subsequent year.*

[9] The 2009-11 CA at clause 15 also contains a provision entitled 'SPECIAL HOLIDAYS FOR LONG SERVICE'. Clause 15 includes the following sub-clauses:

> ***15.1*** *Special holidays for continuous service are provided on the following basis:*
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> | | |
> |---|---|
> | *After 10 years and before 15 years* | *1 special holiday of 1 week* |
> | *After 15 years and before 20 years* | *1 special holiday of 2 weeks* |

After 20 years and before 30 years	*1 special holiday of 3 weeks*
After 30 years and before 40 years	*1 special holiday of 4 weeks*
After 40 years	*1 special holiday of 5 week*

15.2 *Provided that all Plumbing and Electrical employees with more than 15 years service as at June 1992 shall receive long service leave entitlements as per the expired Plumbing Award (document 1940:1992) and Electrical Award (document 941:1991)*

[10] Clauses identical to clauses 14 and 15 appeared in the preceding collective agreements, Chubb Systems and Services Collective Agreement 2008-09, and in the Chubb Systems and Services Collective Agreement 2007-08 ("2007-08 CA"), in which they are numbered 19 and 20.

[11] The Chubb Systems and Services Collective Agreement 2006-07 ("2006-07 CA") set out the annual leave entitlements at clauses 19 and 20, and in sub-clause 19.2 stated:

19.2
Each employee shall be entitled to three weeks holiday per year. Provided that on the completion of six years continuous service, each employee shall be entitled to four weeks for that and each subsequent year.

[12] The 2006-07 CA also contained a 'SPECIAL HOLIDAYS FOR LONG SERVICE' provision at clause 20; sub-clause 201 set out the detail, however there is no provision for a special holiday before completion of 15 years' continuous service.

[13] On 1 April 2007 the statutory annual leave entitlement increased from three weeks 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.

[14] During negotiations for the 2007-08 CA the EPMU had tabled a claim for a further week of holiday to provide a fifth week of annual leave for those employees with more than six years' continuous service.

[15] The response to this claim was the insertion into clause 20 of the 2007-08 CA of an entitlement to a special holiday after 10 years and before 15 years of continuous service. The Terms of Settlement dated 16 November 2007 set out in relation to clauses 19 and 20:

(4) Clause 19.2

Change the word "three" to "four"

(5) Clause 20

After Clause 20.1 "After 10 years and before 15 years – 1 special holiday of 1 week

Add Clause 20.5: "Employees shall only be entitled to the special holiday after 10 years service on the proviso that they have not been subject to disciplinary action in the 12 months prior to the entitlement date. Such special holiday may be taken either as paid leave or may be paid in lieu when taken with another two week period of leave".

[16] The 2007-08 CA was signed by the parties in November and December 2007 respectively.

[17] On 3 September 2010 Mr Mike Kirkwood, EPMU Organiser, wrote to Chubb on behalf of two employees, Mr Richard Devine and Mr Warren Nisbet, claiming on their behalf the special holiday for employees with 10 years' but less than 15 years' continuous service. Mr Nisbet had commenced employment on 29 May 1995 and Mr Devine on 1 July 1996.

[18] EPMU said that it had received a verbal response to its letter of 3 September 2010 to the effect that Chubb did not accept the claim. EPMU followed up the letter of claim with an email dated 4 October 2010 sent to Ms Robyn Pope, Human Resources Director for Chubb, requesting a formal response.

[19] Ms Pope replied the same day, attaching a copy of a letter she said she had previously sent and which was dated 23 September 2010. The letter stated:

Dear Mike,

10 YEAR SERVICE HOLIDAY

Thank you for your letter of 3rd September 2010. Not surprisingly Chubb New Zealand maintain our position and do not agree with your views on this matter.

All conditions negotiated and reached are for the period ahead of the time of negotiations and not historic. Therefore should an employee have reached the 10 year milestone when there was no additional week's leave in place he or she is not entitled to have that new condition back dated retrospectively as if it was in place at the time.

The discussions, intentions and agreements in regard to the additional week's service leave were to apply upon completion of 10 years service. Quite simply, the provision was not in place when those employees reached their 10 year milestone and therefore this

> *additional benefit did not apply to them. In our view it is not possible to go back and apply new conditions to previous Agreements and service.*

Determination

The Law

[20] In the recent case of *NZ Amalgamated Engineering, Printing and Manufacturing Union* v *Amcor Packaging (New Zealand) Limited*[1] Judge Ford introduced a summary of the law regarding the interpretation of collective agreements as follows:[2]

> *The leading authority on contract interpretation in this country is the decision of the Supreme Court in Vector Gas Ltd v Bay of Plenty Energy Ltd*[3] *That decision related to the construction of a commercial contract but the Court of Appeal in Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc*[4] *made it clear that the principles of interpretation prescribed in Vector had equal application to employment agreements.*[5] *The court is required to apply a principled approach to the interpretation of employment agreements and disputes as to meanings must be determined objectively. Vector highlighted the significance of the awareness of context as a necessary ingredient in ascertaining the meaning of contractual words emphasising commercial substance and purpose over semantics and the syntactical analysis of words.*

[21] In *NZ Meat Workers & Related Trades Union Incorporated v Silver Fern Farms Ltd (formerly PPCS Ltd)*[6]*("Silver Fern Farms")* Judge Shaw referred to the principles of construction in interpreting collective agreements as having been summarised by the Employment Court in *New Zealand Tramways and Public Transport Union Inc v Transportation Auckland Corporation Ltd*[7]. The Employment Court in that case had observed that:[8]

> *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 entering into the transaction may be taken into account, not to contradict or 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 …*

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[1] [2011] NZEmpC 135
[2] Ibid at para 12]
[3] [2010] NZSC 5, [2010] 2 NZLR 444
[4] [2010] NZCA 317
[5] See [36]-[37]
[6] [2009] ERNZ 149
[7] [2006] ERNZ 1005
[8] Ibid at para [16]

[22] In *Silver Fern Farms* Judge Shaw had also referred to the Court of Appeal decision in *Pyne Gould Guiness Ltd v Montgomery Watson (NZ) Ltd*[9] in which the Court of Appeal had referred to the use of the surrounding circumstances to ensure the correctness of the natural meaning of the words as 'cross-checking'.

[23] Judge Shaw had further approved of the view of Judge Colgan (as he then was) expressed in *ASTE v Chief Executive of Bay of Plenty Polytechnic*[10] that the interpretation of a collective agreement should not be narrowly literal but should accord with business common sense, stating at para [23] that:

> *The interpretation, rather than being based simply on dictionary meanings and grammar, should fulfil the purpose of the contract. Even if the drafting is inept, the Court should be able to give effect to the underlying intent. Moreover, if a literal interpretation gives rise to nonsense in practice, the Court should endeavour to find a more liberal interpretation which satisfies business common sense and fulfils the parties' purpose.*

[24] The starting pointing in analysing the dispute between the EPMU and Chubb is to examine the words of the clauses regarding the special leave entitlement to see whether they are clear and unambiguous. I find that, on a plain meaning of sub-clause 20.1 of the 2007-08 CA, as carried forward into the succeeding collective agreements, the words are clear and unambiguous. The wording of the sub-clause states that employees with 10 or more years' continuous service but less than 15 years' continuous service are entitled to 1 special holiday of 1 week.

[25] This entitlement is subject only to the proviso that the employee has not been subject to disciplinary action in the preceding 12 months prior to the entitlement date.

[26] This does not however prevent the Authority from examining the surrounding circumstances in determining the correct interpretation of the sub-clause, as observed by Judge Ford in *New Zealand Professional Firefighters Union & Ors v The New Zealand Fire Service Commission*:[11]

> *.the Court should not readily accept any suggestion that there is, nevertheless, an error in that interpretation but it is still necessary to*

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[9] [2001] NZAR 789 (CA)
[10] [2002] 1 ERNZ 491 at 500
[11] [2011] NZEmpC 149 at para [29]

> *carry out the contextual cross-check Justice Tipping referred to in Vector in order to affirm that the plain and unambiguous meaning has not been altered by context.*

[27] Chubb submit that there are three grounds that need to be addressed in order to ascertain the correct interpretation of sub-clause 20.1. These grounds are the negotiations which occurred prior to the sub-clause taking effect with reference to the intention of the parties, the subsequent conduct of the parties, and whether the sub-clause makes business common sense.

Intention of the parties

[28] Prior to the commencement of the 2007-08 CA, employees who had completed six years' continuous service were entitled to an extra week of annual leave in addition to the statutory minima, i.e. to four weeks' annual leave. On 1 April 2007 annual holiday entitlement under the Holidays Act 2003 increased from three to four weeks for all employees.

[29] In the affidavit filed by Ms Pope she states that the EPMU had put forward a claim during negotiations for the 2007-08 CA that annual holiday entitlement should be increased by a further week of annual leave for those employees who had completed 6 years' continuous service. Ms Pope said that this claim, if accepted, would have made a significant addition to leave conditions for part of Chubb's workforce, and that Chubb had counter-offered with the proposal of 1 special holiday of one week at the 10 year anniversary.

[30] Ms Pope's affidavit evidence, and that of Mr Diver, an employment relations consultant engaged by Chubb as their advocate at the collective negotiations between themselves and the EPMU, is that it was Chubb's view that the intention of the new sub-clause was to offer an additional incentive to help retain those employees who had not reached 10 years continuous employment, but that it was not to apply either to those employees who had already achieved their 10 year anniversary of continuous employment as they had already received the benefit of a fourth weeks' leave after 6 years service, nor was it to apply to those employees who had been subject to disciplinary action in the preceding 12 months prior to the entitlement date.

[31] In respect of pre-contractual negotiations the Employment Court has consistently held these to be inadmissible[12], however the Terms of Settlement document signed by the parties on 16 November 2007 clearly summarised the position as being that there would be an entitlement to 1 special holiday of 1 week after 10 years' continuous service and before 15

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

years' continuous employment, subject to the proviso that the employee had not been subject to disciplinary action in the preceding 12 months prior to the entitlement date.

[32] There is no reference in the Terms of Settlement to the effect that those employees who had already achieved their 10 year continuous employment anniversary were to be excluded from the entitlement.

[33] The affidavit evidence of Ms Pope and Mr Diver is of a subjective nature, although I note that Mr Diver's handwritten note makes no reference to any exclusion being considered, and I do not find the affidavit evidence to accord with the intention of the parties as evidenced in the signed Terms of Settlement.

The subsequent conduct of the parties

[34] In support of their position that the intention of the parties was that the provision of 1 special holiday of 1 week for employees with 10 but less that 15 years' continuous employment service was not to apply to those employees who had already achieved their 10 year continuous employment anniversary, Chubb referenced the Chubb New Zealand Locksmith's Collective Employment Agreement 2008-2009 ("the Locksmith's CA).

[35] The Locksmith's CA is signed and is dated in May 2008, some 5 months after the 2007-08 CA. Clause 16 headed 'Long Service Leave' states:

> *16.1 Special holidays for continuous service are provided on the following basis:*
>
> | | |
> |---|---|
> | *After 10 years and before 15 years* | *1 special holiday of 1 week** |
> | *After 15 years and before 20 years* | *1 special holiday of 2 weeks* |
> | *After 20 years and before 30 years* | *1 special holiday of 3 weeks* |
> | *After 30 years and before 40 years* | *1 special holiday of 4 weeks* |
> | *After 40 years* | *1 special holiday of 5 week* |
>
> ** Only applies to employee's (sic) who don't have 10 years service at the date of this agreement.*

[36] The exclusion noted in sub-clause 16.1 of the Locksmith's CA in relation to the provision of a special holiday for employees in the 10 to 15 years qualification bracket is not to be found in the 2007-08 CA signed in November 2007.

[37] Conversely, unlike clause 20 of the 2007-08 CA in which sub-clause 20.5 sets out the exclusion relating to those employees who have been subject to disciplinary action in the

preceding 12 month period, there is no reference to such an exclusion in clause 16 or any other clause of the Locksmiths CA.

[38] I do not on this basis accept that the inclusion of an exclusion sub-clause in respect of the provision of 1 special holiday of 1 week to those employees who did not have 10 years' continuous employment service at the time the Locksmith's CA came into effect in May 2008 implies that the parties intended the same exclusion to apply to the 2007-08 CA.

[39] Rather I find that the differences in the two collective agreement long service provision wordings to be attributable to the usual process of an agreement reached between the parties during the relevant negotiations

[40] The 2007-08 CA came into effect on 24 September 2007. The claim in respect of Mr Nisbet and Mr Devine was not raised until 3 September 2010. Although this is a significant period of time, there is no evidence that any employees claimed and were denied the entitlement to 1 special holiday of 1 week prior to this date. In the circumstances I do not find that the date of the claims being raised to be indicative of the fact that EPMU accepted that there was an exclusion on the provision which applied to employees who did not have 10 years' continuous employment at the time the 2007-08 CA came into force

Business Common Sense

[41] Chubb submits that an interpretation which entitled employees who had completed 10 years' continuous employment service on the date when the 2007-08 CA came into force to a 1 week special holiday would have the effect of allowing those employees to "double-dip" since they would have received the benefit of an additional week of leave over and above the statutory minimum after 6 years' continuous employment, and that this would not be business common sense.

[42] I do not accept that the interpretation held by the EPMU does not make business common sense. The entitlement after 6 years' continuous employment referred to in sub-clause 19.2 of the 2006-07 CA was to four weeks' annual leave entitlement in that and subsequent years, that is, employees had an ongoing entitlement to an additional week of annual leave above the statutory minima after completing 6 years of continuous employment. This entitlement to an additional week of annual leave came to an end pursuant to the amended sub-clause 19.2 in the 2007-08 CA.

[43] The EPMU claim during bargaining for the 2007-08 CA was for an additional week of annual leave entitlement, i.e. to 5 weeks annual leave, which would, on the basis as previously applied, be an ongoing entitlement once achieved.

[44] This claim was rejected by Chubb and agreement was reached on an entitlement to 1 special holiday of 1 week after the employee completed 10 years' continuous employment Significantly, the employee was not entitled to another special holiday entitlement until such time as the employee completed 15 years' continuous employment.

[45] I find that in the situation in which an employee had previously received an on-going entitlement to an extra week of annual leave in addition to the statutory minima, to reject a claim for a continuance of the extra week of annual leave for employees on completion of 6 years' service, and agree to a clause which gave a one-off entitlement to 1 week of holiday leave in what is a 4 year period, i.e. a net saving of 3 weeks' holiday payment, makes good business sense for the employer.

[46] I determine that employees who had completed 10 years' continuous employment but had yet to complete 15 years' continuous employment on the date when the 2007-08 CA came into effect on 24 September 2007, are entitled to the 1 week special holiday provided by clause 20 of the 2007-08 CA, subject to their not having been subject to disciplinary action in the preceding 12 months prior to the entitlement date.

Costs

[45] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority