

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 35
3175546

BETWEEN	ADRIAN LE GROS Applicant
AND	FONTERRA CO-OPERATIVE GROUP LIMITED Respondent

Member of Authority:	Sarah Blick
Representatives:	Emily Griffin, counsel for the applicant Anmol Shankar counsel for the respondent
Investigation Meeting:	26 October 2022
Submissions received:	At the investigation meeting
Determination:	26 January 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Adrian Le Gros is a long-serving employee of the respondent Fonterra Co-Operative Group Ltd (Fonterra). He is represented by E tū Incorporated (E tū) in this matter. Mr Le Gros works as a Maintenance Planner at Fonterra's Hautapu maintenance site and was subject to an individual employment agreement (IEA) until his role became covered by the Business Centred Maintenance collective agreement (the BCM collective) in 2021. Fonterra and E tū were parties to the BCM collective.

[2] Mr Le Gros says upon his employment being covered by the BCM collective he became entitled to two weeks' long service leave (LSL) in recognition of his 15-year anniversary with Fonterra. Mr Le Gros is now covered by a subsequent collective agreement (the current collective) which contains the same LSL provision. A dispute

has arisen between the parties because Mr Le Gros reached his 15-year anniversary in 2018, when he was still subject to his IEA and a couple of years before the BCM collective came into force.

[3] E tū submits on Mr Le Gros' behalf that he is entitled to LSL for his 15-year anniversary under the relevant clause, which is clause 6.4 under both collectives. It says the proper interpretation and application of clause 6.4 is that LSL is available to workers after reaching 15 years continuous service and before reaching 25 years continuous service. It seeks a determination that Mr Le Gros is entitled to LSL of two weeks and a compliance order.

[4] Fonterra says the proper reading of the clause results in Mr Le Gros' not being entitled to the two weeks of LSL. It says Mr Le Gros' role was not covered by the expired collective at the time he reached his 15-year anniversary, and it was his 15-year anniversary which would have activated the entitlement.

The Authority's process

[5] Witness statements were filed for Mr Le Gros and Fonterra's Quality Assurance Lead in its payroll team, Ms Denise Gibson. They answered questions under affirmation from the Authority and representatives.

[6] At the start of the investigation meeting, I raised with the parties that another registered company, Canpac International Limited (Canpac), is party to the BCM collective. I asked counsel for the applicant if s 129(2) of the Employment Relations Act 2000 (the Act) had been complied with, namely that Canpac had notice of the existence of the dispute. It did not appear notice had formally been given to Canpac. However, counsel for Fonterra did not take issue with proceeding with the investigation meeting, noting the very close associations between the two companies.

[7] As permitted by s 174E of the Act this determination does not record all the evidence and submissions I received and considered during my investigation, but it states findings of fact and law and expresses conclusions on issues necessary to dispose of the matter.

Issues

- [8] The following are the issues for investigation and determination:
- a. Under clause 6.4 of the BCM collective is Mr Le Gros entitled to two weeks' LSL and payment for his 15th year of continuous service?
 - b. If Mr Le Gros is entitled to the two weeks LSL, should a determination be made and compliance order issued in relation to that entitlement?

Relevant background

History of employment relationship

[9] Mr Le Gros started working for Fonterra back in October 2003. He later became a Lead Maintenance Planner. Planner roles at Hautapu plant did not fall within coverage of any collective agreement. He and other planners were employed on IEAs which did not contain an LSL entitlement. They were however entitled to long service benefits under Fonterra's Recognition of Long Service Directive (the Directive). In 2013, on Mr Le Gros' 10th anniversary he received a one-off payment in accordance with an entitlement under the Directive.

[10] Mr Le Gros reached 15 years' service with Fonterra on 20 October 2018. At that point he was still employed under an IEA. He was not entitled to any long service benefits at 15 years' service under the Directive.

BCM collective and restructuring of BCM team

[11] The BCM collective applied from 1 April 2020 and expired on 31 March 2022.

[12] In 2021 there was a review of the BCM Planning Team structure resulting in the disestablishment of Mr Le Gros' Lead Planner role. Mr Le Gros was offered a Maintenance Planner role. In July 2021 Fonterra wrote to him advising his commencement date was recognised for service purposes as being 20 October 2003. Mr Le Gros accepted redeployment into the Maintenance Planner role in August 2021. He therefore came under coverage of the collective after 18 years' service.

[13] Mr Le Gros's IEA at the time allowed for "reasonable" sick leave of which there was no balance to transfer. Mr Le Gros negotiated a "fair and reasonable" sum of sick leave on transfer to the expired collective. He further negotiated a later start date in the

Planner role. This enabled him to participate in a full year of Fonterra's Short-Term Incentive payment (STI) for the 2020-21 financial year, a bonus type payment. The STI was not a benefit Mr Le Gros would have been entitled to in the same form in his new role under the BCM collective.

[14] Mr Le Gros says he did not query his entitlement to LSL for his 15 year anniversary as he thought the wording of clause 6.4 was clear that he was entitled to it. He says he only became aware of Fonterra's position after seeing his payslip did not show an LSL entitlement after starting in the Maintenance Planner role. He then queried it and that ultimately led to this application.

Clause 6.4

[15] Clause 6.4 of the BCM (and current) collective states:

6.4 Long Service Leave

In recognition of long service, employees are entitled to a special holiday as follows:

- 2 weeks after 15 and before 25 years continuous service
- 3 weeks after 25 and before 35 years continuous service
- 4 weeks after 35 and before 40 years continuous service
- 5 weeks after 40 years continuous service.

Long service leave shall be taken in one or more periods at a time mutually agreed with the manager. An employee who resigns from the Co-operative will be paid in lieu of any outstanding long service leave entitlement. In the case of waged employees, the allocation shall be forty-two hours per week (to be applied from the date of ratification in 2021) of long service leave and paid at the higher of average earnings or the ordinary hourly rate.

Relevant law

[16] In *Kiwirail Limited v Mobbs* Judge Corkill cited the legal principles relating to the interpretation of employment agreements:¹

[24] In *The Malthouse Ltd v Rangatira Ltd*, the Court of Appeal provided a convenient summary of the correct approach to contractual interpretation, as stated by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*, and *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*. The Court stated:

“[19] Briefly, these authorities confirm that New Zealand courts take an objective approach to contractual interpretation which does not limit the background material available to interpret the contract. That material must however be reasonably relevant, and it must be objective; evidence of a party's individual subjective intentions is inadmissible to interpret the contract.

¹ *Kiwirail Limited v Mobbs* [2020] NZEmpC 139 at [24].

[20] *Vector* established that there need not be any ambiguity in the meaning of a contract before regard can be had to extrinsic evidence to shed light on its meaning. That conclusion put to bed the need for counsel to prove that contracts had such ambiguities, and instead emphasised the need for courts to take a contextual approach that inquired into the meaning of contracts against the background information known to the parties.

[21] As the Supreme Court later clarified in *Firm PI*, the text of the contract remains ‘centrally important’. The Court there noted that: ‘If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant.

[22] The provisional meaning derived from the language of the contract is cross-checked against the contractual context. As Tipping J explained in *Vector*:

[24] In some recent cases it has been suggested that contractual context should be referred to as a ‘cross-check’. In practical terms that is likely to be what happens in most cases. Anyone reading a contractual document will naturally form at least a provisional view of what its words mean, simply by reading them. That view is, in a sense, then checked against the contractual context. This description of the process is valid, provided the initial view is provisional only and the reader is prepared to accept that the provisional meaning may be altered once context has been brought to account. The concept of cross-check is helpful in affirming the point made earlier that a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult of achievement ...

[23] It follows that, though there is in principle no limit to the amount of ‘red ink’ a court can use in interpreting a contract (as Lord Hoffman famously said in *Chartbrook Ltd v Persimmon Homes Ltd*), there is a practical need for the party seeking to rely on the red pen to point to clear evidence justifying its use. As Tipping J explained in *Vector*, the exercise ‘is and remains one of interpretation’. There are limits to what the courts can do under the guise of interpretation, and words can only be construed with meanings that they can reasonably bear (subject, as Tipping J recognised, to considerations of rectification, private dictionary use by the parties, and similar).”

(Footnotes omitted)

The parties’ positions

Mr Le Gros

[17] Mr Le Gros says there is no ambiguity in clause 6.4 and therefore no need to discover or determine the intent of the parties who concluded the terms of the collective.

[18] Mr Le Gros says that because his continuous service record dates from 2003 he is entitled to the LSL in the amount of two weeks as provided for in the BCM collective. He says LSL does not only apply if an employee is covered by the collective at the date of the 15-year anniversary but also after the date of the 15-year anniversary.

[19] Mr Le Gros submits that when the worker is 'entitled' to LSL is set out in the timeframes of the clause, and that when the special holiday occurs is not. It is submitted the only requirement is that the special holiday shall be 'mutually agreed' with a manager.

[20] Mr Le Gros says clause 6.4 makes no mention of the "service anniversary" being the only point at which the entitlement is activated. He further submits there is no requirement in the clause that eligibility rests on being covered by the BCM collective at the time of the anniversary date. Rather, the entitlement commences from a date (in this case after 15 years of service) and ends at a time 10 years in the future. Mr Le Gros submits the entitlement crystallised at the point he became covered by the BCM collective, being 1 August 2021. He says once he was covered by the BCM collective all of the clauses and benefits of it applied to him unless they were specifically excluded. He says the only question is whether he has a service record of between 15 and 25 years on the day he became covered.

[21] I note E tū has not disputed Fonterra's claim the interpretation issue has never been dispute before. Mr Le Gros submits the fact that this interpretation issue has never been disputed does not mean the correct interpretation of the meaning of this clause cannot now be determined.

[22] Mr Le Gros submits in principle it is correct that the BCM collective cannot be applied retrospectively, but says there is nothing retrospective about his position. Mr Le Gros says he became entitled upon gaining coverage under the collective and he has met the requirements of more than 15 years continuous service and less than 25 years.

[23] Mr Le Gros submits Fonterra's position is illogical and inconsistent, and asks why should he be entitled to a special holiday after 25 years and not after 15 years? He cannot see why the situation after 25 years would be any different from the situation after 15 years.

[24] Lastly, Mr Le Gros says if Fonterra's position is accepted, he would be deprived of other conditions of employment by virtue of coming under the coverage of the collective after 18 years' of service. By way of example, Mr Le Gros says if his position

was made redundant tomorrow, because the redundancy clause in the BCM collective is based on years of service, by Fonterra's logic he would not be eligible for compensation relating to his full 18 years' service. Rather, he would only be eligible for the years he has been a member of E tū covered by the collective.

Fonterra

[25] Fonterra submits clause 6.4 provides an entitlement of two weeks' LSL to any employee that is covered by the BCM collective *at the time* of their 15-year anniversary. Mr Le Gros was not covered by the BCM collective at the time that he reached his 15-year anniversary of service and therefore he is not entitled to the special holiday.

[26] Fonterra says its interpretation is the natural and ordinary meaning of clause 6.4. It says the reference at clause 6.4 to "after 15 and before 25 years" means that the employee becomes entitled to the special holiday of two weeks on the fifteenth anniversary of their commencement date and the employee needs to use the entitlement within the next ten years.

[27] Fonterra says the phrase "after 15 and before 25 years" provides clarity regarding the period of time in which the employee is to use the leave – the relevant year range. It submits it is illogical for Fonterra to have agreed to a clause which would allow an employee to bank their LSL, as that leave would then sit as a liability in its accounts until the employee wished to take it at their discretion or until their employment with Fonterra ended. It submits it is logical that Fonterra would have sought to incorporate limits on the banking of leave in its contractual leave entitlements.

[28] Fonterra says it is unrealistic to suggest E tū and/or Fonterra would have included this wording for the purpose of covering the contingency of an employee becoming covered by the BCM collective at some point after their fifteenth year of service with Fonterra. It says this is a reasonably rare situation and it is highly unlikely that either party would have been contemplating this situation when agreeing to this clause, especially considering there is very little coverage overlap between the various collective agreements Fonterra is a party to. Fonterra submits if this was the intent of the parties, more specific words would have or should have been used to convey this intention.

[29] Fonterra says Mr Le Gros' interpretation is reliant on the literal definition of the word "after", which is "in the time following". It says the word "after" has variable meanings in the BCM collective and provides the example of a meal break clause which states meals shall be taken "after" four and a half hours.² The word "after" in the clause is not intending to indicate a break can be taken any time after four and a half hours of work. Instead, it is indicating that the break should be taken "on the completion of" four and a half hours of work. It says this is consistent with Fonterra's interpretation of the word "after" in clause 6.4.

[30] Fonterra says should the Authority consider there is a lack of clarity in the wording of clause 6.4, the surrounding circumstances show Fonterra's interpretation gives effect to the intention of the parties. This is because it creates consistency with other long service recognition provided to Fonterra employees and is consistent with how the clause has been historically interpreted.

[31] Fonterra notes it established a long service framework to provide all employees with some form of recognition for long service. It refers to two current collective agreements with other unions which state LSL will be provided "*after the completion of*" the relevant service. Fonterra submits the phrase "*after the completion of*" in these clauses indicates the leave crystallises on the relevant anniversary date. Similarly, Fonterra submits the word "after" in clause 6.4 is being used to convey that the leave is provided "on the completion of" the relevant service and is not being used to mean "*in the time following*".

[32] Fonterra provided a number of examples of employees' LSL histories.³ In each case where an employee has moved to a collective agreement from another type of employment agreement, they were not retrospectively provided with the long service entitlement they would have become entitled to had they been covered by the relevant collective on the relevant anniversary date. Fonterra submits it would remove consistency and fairness if only one group of its employees - those covered by the BCM collective - received additional LSL. It also says the fact that clause 6.4 has been applied consistently with Fonterra's interpretation is a relevant surrounding circumstance that should be taken into account by the Authority.

² Clause 13.3 of the collective.

³ No names of employees were provided to the Authority. Examples were cited simply as "Example A" etc.

[33] Fonterra says Mr Le Gros' interpretation creates absurdities and is inconsistent with business common-sense to such a degree that it could not have been the parties' intention. It says it would create difficulties for payroll to manage, which has an automated pay rule which credits LSL to leave balances as soon as the relevant anniversary is reached. It has done this in relation to the BCM collectives as well as collectives with other unions which contain LSL clauses.

[34] Fonterra's evidence was that payroll would need to implement a different system for employees covered by the BCM collective compared to all other employees employed by Fonterra, and payroll would be required to ensure that any retrospective entitlements were not missed. This system would require payroll to manually check an employee's anniversary dates whenever they moved from an IEA to the BCM collective and/or another collective agreement to the BCM collective and consider whether they are entitled to LSL. Fonterra submits this would be contrary to good business practice, as it would result in more work for payroll and would layer an additional manual process over the current automated system.

[35] Fonterra accepts Mr Le Gros' service with Fonterra prior to being covered by the BCM collective was treated as continuous service. It says, however, that Fonterra did not attempt to retrospectively provide him with the additional annual leave entitlement of one week per year that he would have received had he been covered by the BCM collective for the duration of his service with Fonterra. It says it is unclear why long service entitlements would be treated differently.

[36] Fonterra also expressed concern Mr Le Gros' interpretation would permit an employee to "game" the system and obtain multiple long service recognition awards, providing an employee with a significant windfall compared to an employee who remained on the same collective agreement or IEA for the duration of their employment.

[37] Lastly, Fonterra submits clause 6.4 has featured in previous collective agreements dating back to Fonterra's formation in 2000. It says in over two decades of the clause being in operation, to the best of its knowledge there has never been any claim for an alternative interpretation or application, or any confusion regarding the clause.

Discussion

Provisional meaning

[38] The starting point is to reach a provisional meaning of the words used in clause 6.4 and then to cross check that provisional view against relevant contextual matters.

[39] Clause 6.4 relevantly says “employees are entitled to a special holiday as follows: 2 weeks after 15 and before 25 years continuous service”. Mr Le Gros’ interpretation of the word “after” does appear to be based on its literal meaning, being “in the time following”. I accept the wording of the entitlement and applicable date range could have worded in a more precise way. However, on my provisional interpretation, I do not consider Mr Le Gros’ is the correct interpretation.

[40] I prefer and provisionally accept Fonterra’s interpretation that the word “after” in the context of the clause more than likely means “on the completion of”. Indeed, the entitlement to the LSL can only be reached once an employee has completed 15 years’ service – that is the entitlement date. I also provisionally accept the phrase “before 25 years” means the employee is to take their leave before their 25th anniversary.

[41] Accordingly, the reference at clause 6.4 to “after 15 and before 25 years” appears to mean that the employee becomes entitled to the special holiday of two weeks on the fifteenth anniversary of their commencement date and the employee is to use the entitlement within the next ten years.

Cross-check against contractual context

[42] I have carefully considered the contractual context outlined by the parties. It has not ultimately altered my provisional interpretation of clause 6.4.

[43] Clause 6.4 is a very long-standing clause used in consecutive collective agreements. I accept the fact clause 6.4 has been applied consistently over many years in accordance with Fonterra’s interpretation supports its reading of the clause. It also provides evidence of the parties’ intention in relation to the clause. Had E tū held a long-standing and different view of the clause, it is surprising a dispute would not have arisen earlier than in this matter.

[44] I accept Fonterra's submission that had the parties intended for the wording used in clause 6.4 to cover an employee in Mr Le Gros' situation, more specific words would have or should have been used to convey that intention. This is because his appears to be a reasonably rare situation.

[45] Fonterra's evidence at the investigation meeting was that once an LSL entitlement is reached, it does not expire and would be paid out on termination even if the relevant timeframe had passed. Although in practice Fonterra may not require employees to take all LSL within the relevant timeframe, it is still logical and common business sense that Fonterra would seek to incorporate limits on the banking of LSL by providing the timeframes in which LSL is to be taken (here "before 25 years").

[46] I accept that applying clause 6.4 in the manner Mr Le Gros suggests has a retrospective component to it, while all other provisions of the collective do not unless expressly stated. In the redundancy example cited by Mr Le Gros, the entitlement to redundancy compensation is triggered at the date of redundancy. The provision is clear and provides a table for calculating the level of compensation against the period of employment. The removal of consistency and fairness for one group of employees, those covered by the BCM collective, would be contrary to good business common sense.

[47] While I consider Fonterra's extreme example of an employee being able to "game" the system by switching between employment agreements and obtaining multiple long service recognition awards to be an unlikely scenario, even some level of switching and creating a windfall situation supports Fonterra's interpretation rather than Mr Le Gros' interpretation. While I would not say that situation would reach the level of absurdity, it would certainly appear contrary to business common sense.

[48] Mr Le Gros has suggested it is illogical and inconsistent that he should be entitled to LSL after 25 years and not after 15 years. I do not agree that is the case. At the time Mr Le Gros reached his 15-year anniversary, he was not covered by the BCM collective and clause 6.4 did not apply to him. Assuming he remains covered by a BCM collective and clause 6.4 remains in place, at the time Mr Le Gros reaches his 25th year anniversary he will have an entitlement because at the time he reaches it he will be covered by the collective.

[49] Mr Le Gros says if Fonterra's position is accepted, he would be deprived other conditions of the BCM collective by virtue of coming under it after 18 years' service. Mr Le Gros used redundancy as an example. I note if Mr Le Gros' role were to be made redundant, the redundancy compensation provisions within the current collective would apply. This is because at the time of the redundancy he would be covered by the relevant collective and the express entitlements it provides for compensation according to his current continuous service. There is no basis to suggest Mr Le Gros has or will be deprived of any other conditions by interpreting clause 6.4 in the way Fonterra suggests.

Outcome

[50] I find clause 6.4 provides an entitlement of two weeks' LSL to any employee covered by the BCM collective at the time of their relevant anniversary. Mr Le Gros was not covered by the BCM collective at the time that he reached his 15-year anniversary of service and therefore he is not entitled to the special holiday.

[51] The question is therefore answered in favour of Fonterra. No declaration or compliance order is to be made.

Costs

[52] The Authority's practice note on costs indicates certain matters will generally not be subject to the daily tariff, including for example, disputes about the application, interpretation or operation of a collective agreement. In cases of this type, which the parties acknowledge, the presumption is that parties bear their own costs.

[53] Accordingly, this is a matter where costs should lie where they fall.