IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2024] NZERA 402
3244179

	BETWEEN	NZ TRAMWAYS AND PUBLIC PASSENGER TRANSPORT EMPLOYEES UNION WELLINGTON Applicant
	AND	WELLINGTON CITY TRANSPORT LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Kevin O'Sullivan, advocate for the Applicant Andrew Caisley, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	14 March and 3 May 2024 from Applicant 22 April 2024 from Respondent
Determination:	5 July 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (union) raises a question about the interpretation of a clause in the collective agreement between the parties (collective) relating to protected seniority. It says the impact of this clause is that existing un-used sick leave should be retained when an employee resigns with protected seniority and then returns to work in accordance with that clause. The union further says protected seniority also extends to encompass the rate at which annual leave and sick leave are accrued by a returning employee, and that employees who return to work in accordance with this clause are entitled to annual

leave at an enhanced rate consistent with their total service, and sick leave calculated on the basis of their total service rather than be treated as if they were new employees. In the union's view, this is the intent of the clause.

[2] The respondent (WCT) denies the claim in full, and says that the relevant clause does not provide for sick leave or annual leave to be treated in the way that the union contends.

The Authority's investigation

[3] For the Authority's investigation a written witness statement was lodged on behalf of the union from Mr Morris Dawson. WCT chose not to file witness statements given the scope of the issues. Both parties then provided written submissions, so that the matter could be determined "on the papers".

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[5] The issues requiring investigation and determination were:

(a) Does clause 15 of the collective setting out an "Option to Return with Protected Seniority" require that, when an employee returns to work in accordance with this clause:

i. They retain any existing un-used sick leave entitlement available as of when they resigned;

ii. They accumulate sick leave from the anniversary of their original employment/on the basis of total service, not from the date of recommencing their employment; and

iii. Their annual leave entitlement will be calculated on the basis that they are entitled to 5 weeks annual leave (which employees are contractually entitled to when they have completed 2 years

current continuous service) rather than as if they were new employees?

The Collective

[6] Clause 15 of the collective provides as follows:

> **Option to Return with Protected Seniority**
>
> (i) Employees who have been with the business for 5 years can apply for an 'Option to Return with Protected Seniority'.
>
> (ii) If granted, the employee will be allowed to resign, but will be given an offer of re-employment commencing 12 months (or such other date as may be agreed) after the resignation date. If the employee takes up the offer, they shall return with the same seniority as they had on the date of their resignation.
>
> (iii) NZ Bus has the right to approve or deny any application, but the employer's agreement will not be unreasonably withheld.
>
> (iv) Where an employee applies for, and is granted, an 'Option to return with protected seniority', then:
>
> > (a) a date will be set for employment to recommence. The date shall be 12 months after the date of resignation (or such other date as may be mutually agreed).
> >
> > (b) Prior to the resignation occurring the employee will be given a letter confirming:
> >
> > > (i) the offer, and
> > > (ii) the date on which notice of return needs to be given; and
> > > (iii) the date on which employment will recommence
> >
> > (c) On resignation, the employee will be paid all outstanding pay, holiday pay and other entitlements.
> >
> > (d) If the employee intends to take up the offer of re-employment, then the employee must notify NZ Bus at least 1 month prior to recommencement date. A failure to notify NZ Bus shall mean that the offer automatically lapses;
>
> (v) The principle is that the Full Time or Part Time status of the employee will be the same on return as it was prior to taking Protected Seniority. However, if there is not a full-time shift available, the employee will undertake part time shifts until a full time shift is available. The employee will not be entitled to a top up payment while they perform the part time duties.
>
> (vi) At the next reschedule when drivers are able to reapply for new shifts the driver will be able to use their seniority to apply for the appropriate block/shift.
>
> (vii) The year of leave will not count as service for the purposes of calculating Long Service Leave, advancement on pay rates as defined in years or any other service based entitlement.

> (viii) Where an employee applies and is granted the option to return within 3 months or less, then their shift will not be advertised for 3 months from the resignation date. An employee intending on returning within 3 months will resume their employment on that shift.

[7] As will be apparent, there is no provision in this clause (or elsewhere in the collective) that protects and retains an employee's existing un-used sick leave balance if they resign with an option to return with protected seniority. There is likewise no provision in this clause that provides for a returning employee's sick leave to begin accruing immediately, as if employment had not ceased.

[8] There is provision in this clause describing how annual leave will be treated, namely, that holiday pay will be paid out in full, and that the time taken as leave will not count as service for the purpose of calculating any service-based entitlement. There is no provision that a returning employee's service will be treated as "continuous" or words to that effect that would ensure a returning employee is able to rely on their previous duration of service to qualify for 5 weeks' annual leave after a deemed period of at least 2 years service as contended for by the union.

[9] Accordingly, what the union is asking the Authority to do is to read such additional terms into the plain wording of clause 15. The union states that this should be done because clause 15:

a. Effectively allows for the employee's employment to only cease 12 months after taking the option to return with protected seniority should they decide not to return[1]; and
b. Protects seniority which is the same as service, and one cannot exist without the other[2]; and
c. Sets out a principle that the status of the employee will be the same on return as it was prior to taking protected seniority, which must logically include the retention of sick and annual leave[3].

[10] The heart of the disagreement between the parties is summed up in the union's position that seniority is the same as service, and when clause 15 provides for protected seniority, it actually provides to protect an employee's service (and all the rights that stem from service). WCT's position is that seniority and service are two different

[1] As per the applicant's submissions in reply.
[2] As per the applicant's submissions in reply and the evidence of Mr Dawson.
[3] As per the applicant's submissions.

things, and protected seniority is defined in clause 15 (and to a lesser extent clause 16) of the collective.

[11] When interpreting clause 15 of the collective, the starting point is the plain meaning of the words used. Clause 15 does not protect service, it protects seniority. The two words do not have the same meaning, and one can exist without the other. Subclauses (v) and (vi) define what is meant by protected seniority, first that the returning employee will have the right and benefit of returning to their previously held full or part time status, and second that when they are able to apply for shifts, their previous seniority will be deemed to apply. This is a real benefit to the employee, as clause 16 of the collective provides that the employee with the most seniority will get the first pick of available shifts, the second most senior employee gets the second choice, and so on. Clause 15 expressly preserves this benefit in favour of the employee, which would otherwise be lost on resignation.

[12] I consider that if it had been intended to protect "service" and service-related entitlements, this language would have been used. It was not. Instead, the language of "protected seniority" is used, which is a reference to a specific contractual right with relation to shift choice as set out in the very next clause of the collective. It is not necessary to read the word "seniority" as "service" to make sense of clause 15. If this were done, it would undermine the connection to clause 16 and the very real benefit to the employee that this provision creates.

Calculation of annual leave entitlements on the basis of total length of service

[13] I will first consider the union's argument that there is an implied term that annual leave must be calculated as if from the employee's original start date, rather than from the date they return with protected seniority. It is a well-established principle that a term may not be implied into a contract where that would be inconsistent with an express term of that contract.

[14] Here I find that the express terms of clause 15 when read both singularly and together, are inconsistent with such an implied term.

[15] Clause 15 makes it clear that the benefits in it eg the "option to return with protected seniority" only apply after the original employment agreement has terminated. This is because the option to return with protected seniority can only apply once the employee has resigned their employment, as set out in subclauses (ii) and (iv).

[16] There are other indications in the clause that this is to be a genuine ending of the employment relationship. As well as using the language of "resignation", the employee is to receive payment in full of all outstanding holiday pay and other entitlements which could not happen if employment was ongoing. In addition, the clause provides that the employee will be given an offer of "re-employment" which would not be necessary if employment was on-going, and that the employee has the ability to turn down the offer at their discretion, which refusal of work would not be consistent with (and arguably not possible in) an ongoing employment relationship.

[17] Clause 15(viii) specifically provides that the year of leave will not count as service for the purposes of calculating any service based entitlements, which reinforces that this is a genuine "break" in the employment relationship between the parties.

[18] Finally, I turn to consider the alternatives. If an employee expressly wanted to take leave without pay thus preserving their existing duration of service for the purposes of future annual leave entitlements, they could request this from WCT without utilising the provisions of clause 15. If WCT agreed, this would preserve the employee's existing length of service. There would be no need for either party to use the option to return with protected seniority scheme, which provides for something different.

[19] I do not agree that, interpreted properly, clause 15 of the collective should be interpreted to mean that annual leave must be calculated as if from the employee's original start date. The component parts of this clause indicate that the parties considered annual leave entitlements when creating the option to return with protected seniority scheme, and provided for these in a specific way, namely, ending the employment relationship, paying out accumulated annual leave, and stating that the time away from the workplace under this clause would not count as service for the purpose of calculating leave entitlements should the employee decide to return to the workplace. There are no grounds for reading in additional terms where there is no ambiguity and which would conflict with those terms explicitly agreed.

[20] This claim is not made out.

Sick leave – retaining existing un-used sick leave entitlements, and entitlements on recommencement of employment

[21] This claim is based on the union's submissions that (a) properly viewed, the employment only ends after the employee has turned down the offer of re-employment, and (b) the principle behind clause 15 is that – as set out in subclause (v) – the status of the employee will be the same on return as it was prior to taking protected seniority, which must logically include the retention of sick leave.

[22] For the reasons I have already set out above, I do not agree that when an employee takes the option to return with protected seniority their employment continues until they later advise WCT that they do not wish to take up the offer of re-employment or they fail to communicate such that the offer lapses. The employment ends on the last day of employment as agreed between the parties, triggering among other things termination payments due to the employee. The language of clause 15 is consistent with this, as are the obligations on the parties or lack thereof.

[23] The only communications between the parties during the period of leave is the offer of re-employment. The offer of re-employment itself does not create employment status or extend employment status beyond the date of termination. It is an offer of employment at a defined point in the future, with a lengthy time allowed for acceptance. If not actioned within the stated time, the offer will lapse with no further action or obligations arising for either side. This is not sufficient to create employment during a period where no such relationship exists, and is itself inconsistent with such continuing status.

[24] The union has also submitted that the principle behind clause 15 is that the status of the employee will be the same on return as it was prior to taking the option of protected seniority, which must logically include the retention of sick leave and its subsequent calculation. This is a reference to subclause (v), which states that "The principle is that the Full Time or Part Time status of the employee will be the same on return as it was prior to taking Protected Seniority." It is significant that the status which is protected is whether the employee was previously full time or part time. It is not the status of employment itself. On a plain reading of subclause (v), there is no protection for the general status of employment, only a limited protection for full or part time status.

[25] I decline to read the phrase "protected seniority" as "protected service". If done, this would amount to reading in an additional term requiring WCT to retain an unused

sick leave entitlement where an employee resigns and requiring WCT to calculate sick leave differently from how it would calculate sick leave for other employees under the Holidays Act 2003. These are specific and onerous obligations, which are not consistent with the existing provisions of clause 15. I consider that the parties could have negotiated for such matters, and the plain reading of clause 15 shows they did not.

Conclusion

[26] There are no grounds for reading in additional words or terms where there is no ambiguity and which would be inconsistent with those terms explicitly agreed.

[27] Overall, my view is that the option to return with protected seniority does not grant a general right for an employee to resign their employment and then on their return to work have their previous service recognised as if they had not left. It creates a different set of benefits as set out in clause 15 itself.

Orders

[28] The union's claim is not made out. No orders are made.

Claire English
Member of the Employment Relations Authority