IN THE COURT OF APPEAL OF NEW ZEALAND

CA562/2011
[2012] NZCA 25

	BETWEEN	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA Appellant
	AND	CEREBOS GREGG'S LIMITED Respondent

Hearing: 17 November 2011

Court: O'Regan P, Harrison and Wild JJ

Counsel: P J Cranney and A J Connor for Appellant
J E Latimer for Respondent

Judgment: 21 February 2012 at 10.15 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The decision of the Employment Court is quashed and the decision of the Employment Relations Authority is reinstated.

C Cerebos Gregg's Ltd must pay the Union costs for a standard appeal on a band A basis and usual disbursements.

D Costs in the Employment Court are to be fixed by that Court if the parties are unable to agree.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] The Service and Food Workers Union Nga Ringa Tota (the Union) and Cerebos Gregg's Ltd were parties to a collective agreement which applied for three years from August 2005. The collective agreement provided that all Union employees at Cerebos's Dunedin site were entitled to three weeks' paid annual holidays; and that all Union employees at the site with six years continuous service ("long serving employees") were entitled to an "additional one week of annual holiday". The relevant provisions of the Holidays Act 2003, which came into force as of 1 April 2007, increased an employee's statutory minimum paid annual holiday entitlement from three to four weeks.

[2] The parties disagreed on the question of whether the effect of the Holidays Act was to confer on long serving employees one week's paid annual holiday additional to the statutory minimum of four weeks as from 1 April 2007. The Union brought a claim before the Employment Relations Authority which answered that question affirmatively in the Union's favour. The Employment Court reversed the Authority.[1] Its decision had the effect of removing the leave differential provided by the collective agreement: all employees were treated as being entitled to four weeks' annual paid holiday from 1 April 2007 regardless of the agreed additional entitlements previously available to long serving employees.

[3] This Court granted the Union leave to appeal the Employment Court decision on the following question of law:[2]

> Did the Employment Court err in concluding that the extra week's leave, for those employees qualifying for that leave, ceased to be an enhanced or additional entitlement on 1 April 2007 and became part of the four weeks annual holidays provided by the Holidays Act 2003?

[4] Two issues arise sequentially for our determination. The first is the substantive question of law just identified. The second is jurisdictional – does this Court have power to determine the substantive question? Normally, these issues

---

1 *Cerebos Gregg's Ltd v Service and Food Workers Union Nga Ringa Tota* [2011] NZEmpC 55.

2 *Service and Food Workers Union Nga Ringa Tota v Cerebos Gregg's Ltd* [2011] NZCA 431; Employment Relations Act 2000, s 214.

would be determined in the reverse order. But, given the way this Court's approach to its statutory jurisdiction has developed, it is appropriate to consider that issue second.

The Holidays Act 2003

[5] The Holidays Act came into force on 1 April 2004, but the relevant provisions about paid annual holiday entitlements did not come into effect until 1 April 2007. The collective agreement is undated. However, it is common ground that, first, it commenced on 28 August 2005 and expired on 30 August 2008; and, second, it was entered into after the Act was passed and came into force and with the parties' knowledge of the changes due for 1 April 2007.

[6] The legislative purpose of the Holidays Act is stated to be:

> **3 Purpose**
>
> ... to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to—
>
> (a) annual holidays to provide the opportunity for rest and recreation:
>
> (b) public holidays for the observance of days of national, religious, or cultural significance:
>
> (c) sick leave to assist employees who are unable to attend work because they are sick or injured, or because someone who depends on the employee for care is sick or injured:
>
> (d) bereavement leave to assist employees who are unable to attend work because they have suffered a bereavement.

[7] Section 6 provides:

> **Relationship between Act and employment agreements**
>
> (1) Each entitlement provided to 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.

[8] Section 16 provides for employees' entitlements to annual holidays. That provision falls within Subpart 1 of Part 2 of the Act; subs 16(1) stipulates that "After the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks' paid annual holidays." Section 15 provides that the purpose of Subpart 1 is to:

(a) provide all employees with a minimum of 3 weeks' annual holidays to be paid at the time the holidays are taken; and

(b) require employers to pay employees at the end of their employment for annual holidays not taken; and

(c) enable employers to manage their businesses, taking into account the annual holiday entitlements of their employees.

(d) to ensure that, on and from 1 April 2007, when an employee next becomes entitled to annual holidays, the employee's minimum entitlement is increased from 3 weeks' annual holidays to 4 weeks' annual holidays.

The collective agreement

[9] The collective agreement included introductory notes to its leave provisions, clauses 16 to 23, which relevantly provided:

Subject to the following, provisions for leave are in accordance with prevailing legislation. Currently the Holidays Act 2003 provides for public holidays, annual holidays, sick leave and bereavement leave as follows.

…

Note that the entitlements in Clauses 16, 17, 19 and 20 are inclusive of and not in addition to the entitlement for Leave provided in the Holidays Act 2003 and amendments.

[10] Clause 17 provided for annual holiday entitlements as follows:

17 Annual Holidays

17.1 At the end of each year of employment with Cerebos Gregg's you are entitled to three weeks annual holidays …

…

17.4 Upon the completion of 6 years current continuous service you will for the sixth and subsequent years be entitled to an *additional* one week of annual holiday.

…

(Emphasis added.)

[11] Clause 18 set out the eligibility criteria for long service leave.

Employment Court

[12] In a decision delivered in the Employment Court on 27 May 2011, Judge Couch identified what he described as the ultimate issue:

> [6] ... [as] whether, after 1 April 2007, employees who had completed six years' continuous service were entitled to four weeks' annual holidays and no more or, by operation of cl 17.4, were also entitled to an additional week of holiday.
>
> [7] Resolving that issue requires consideration of a number of subsidiary and inter-related issues:
>
> (a) What was the nature of the benefit conferred by cl 17.4? Was it annual holidays for the purposes of s 16(1) of the Holidays Act 2003 or some other form of paid leave?
>
> (b) After 1 April 2007, what was the effect on cl 17.1 of the 2005 collective agreement of s 6(3) of the Holidays Act 2003?
>
> (c) How is s 6(3) of the Holidays Act 2003 to be applied to a collective agreement? In particular, is it to be applied in relation to the circumstances of each individual employee covered by the agreement or to the collective agreement as a whole?

[13] However, the Judge did not approach the issues in this three stage sequence. Instead he focussed primarily on the application of s 6 of the Holidays Act to the collective agreement, within the apparent context of the third issue, before reformulating his inquiry as follows:

> [30] ... On its face, cl 17.1 of the 2005 collective agreement entitled all employees bound by it to three weeks' annual holidays. On its own, that clearly did not meet the statutory minimum of four weeks which applied

> from 1 April 2007. To determine whether the employment agreement of each employee as a whole met the statutory minimum, therefore, the enquiry must then be whether:
>
> (a) The proper construction of cl 17.1 was that all employees were entitled to four weeks' annual holidays; or
>
> (b) Some other provision of the collective agreement entitled the employee to a fourth week of annual holidays; or
>
> (c) An additional term agreed individually with the employee entitled him or her to a fourth week of annual holidays.

[14] Judge Couch observed that the Union's case was focussed on excluding the second of these three possibilities. After reviewing the Employment Court's decision in the *Silver Fern Farms* case,[3] the Judge addressed the effect of cl 17.4 in these terms:

> [33] It was central to Mr Cranney's argument that, because the additional week's holiday conferred by cl 17.4 was only available to employees with long service, that altered the nature of the holiday. I do not accept that proposition. As the full Court recognised in the *Tramways* case, the reason why employees are entitled to a particular holiday and the nature of that holiday are two different concepts. In that case, the employees bound by the collective agreement were entitled to an additional week's holiday in recognition of the nature of their work. The full Court found, however, that the purpose of the additional holiday was for rest and recreation and, consistent with s 3(a) of the Holidays Act 2003, ought to be regarded as annual holidays for the purposes of the statute. In this case, the basis on which employees became entitled to an additional week's holiday under cl 17.4 was long service but that did not necessarily determine the nature of the holiday which I find the parties intended to be annual holidays for the purposes of the Holidays Act 2003.
>
> (Citations omitted.[4])
>
> ...
>
> [37] Overall, I find that the parties intended the additional week's holiday conferred by cl 17.4 of the 2005 collective agreement to be annual holidays for the purposes of the Holidays Act 2003. It follows that the 2005 collective agreement effectively provided employees with six or more years' service with the statutory minimum of annual holidays and s 6 has no application to their employment agreements.

[15] Later the Judge expressed his conclusion in this way:

---

3 *NZ Meat Workers and Related Trades Union Inc v Silver Fern Farms Ltd (formerly PPCS Ltd)* [2009] ERNZ 149.

4 The *Tramways* case is discussed below at [28] – [31].

> [40] ... (a) The benefit conferred on employees by clause 17.4 of the 2005 collective agreement was an entitlement to annual holidays which could form part of the minimum entitlement conferred on employees by s 16(1) of the Holidays Act 2003.

Decision

(a) Question of law

[16] We repeat the substantive question for determination: did Judge Couch err in concluding that the extra week's leave provided for long serving employees by cl 17.4 of the collective agreement ceased to be an enhanced or additional entitlement on 1 April 2007 and was instead absorbed within and became part of the four weeks annual holidays provided by the Holidays Act? This question must be answered by reference to the relevant statutory and contractual provisions according to their terms, measured against decisions on similar provisions in this Court and the Employment Court.

[17] The collective agreement, not the Holidays Act, provides the starting point for our analysis. As Judge Couch noted, the agreement was drawn up in contemplation of the built-in legislative amendments.[5] However, the Judge did not consider the introductory notes to the leave provisions. In our judgment they are of central importance when construing the collective agreement.

[18] By specifying in the introductory notes that the leave provisions were to be "in accordance with *prevailing* legislation" (emphasis added), the parties intended that the collective agreement comply with both existing and future legislation to come into force during the agreement's currency. This intention was reinforced by the immediately following specific reference to the statutory minimum entitlements then in force: "*Currently* the Holidays Act 2003 provides for public holidays, sick leave and bereavement leave as follows" (emphasis added). The operative leave provisions then recited the current statutory entitlements.

---

5 At [32].

[19] Clause 17 must be read in conjunction with the introductory notes. As Mr Cranney emphasised, that provision created two different classes for the purposes of entitlement to annual leave. Clause 17.1 was declaratory of the statutory entitlement then existing for all employees; it provided the base, service related, annual holiday entitlement of three weeks. When the agreement came into being on 28 August 2005, the statutory entitlement to annual leave was also three weeks. When read in that light, the purpose of cl 17.1 was to harmonise the current statutory and contractual entitlements.

[20] Clause 17.4 addressed a separate right, entitling those employees who had completed six years current continuous service to an additional week of annual holiday. The parties could only have intended that the "additional one week" in cl 17.4 meant additional to the minimum entitlement from time to time; that s 6(3) of the Holidays Act would operate to avoid cl 17.1 from 1 April 2007, as the Judge himself appeared to accept, to the extent that it provided for less annual leave than the statutory minimum;[6] and that from that date the minimum entitlement for all employees would be four weeks.

[21] On that basis we are satisfied that cl 17.4 was designed to grant leave to an eligible group of one week in excess of the statutory minimum prevailing at any time during the agreement. Its purpose was to reward long service; the additional week was available as a special benefit for all who satisfied specific eligibility criteria. Eligibility was always to be fixed according to the base of what was then statutorily available as of right to all employees together. Section 6(2) of the Holidays Act[7] contemplated that employers would grant additional leave to employees on such a basis.

[22] Ms Latimer supported the Judge's primary focus on the nature of the benefit conferred by cl 17.4.[8] Like the Judge, she relied on that factor to justify a construction of the collective agreement which eliminated the agreed distinction between the two categories of employees. Ms Latimer submitted that, because the cl 17.4 leave was for the statutory purpose of rest and recreation, the agreement still

---

6 At [18] and [30].
7 See at [7] above.
8 See at [33] and [37].

provided for four weeks annual leave after 1 April 2007 sufficient to meet the statutory minimum; and the fact that an employee only qualified for the extra week's holiday because of long service did not alter the nature of that holiday. Accordingly, from 1 April 2007 the previously available extra week's holiday was subsumed or absorbed within the statutory minimum.

[23] The flaw in Ms Latimer's argument, and in the Judge's reasoning, is two-fold. First, it eliminates from 1 April 2007 the contractual distinction which the parties unarguably agreed was to apply throughout the three year term and strips cl 17.4 of meaning from that date. Second, the question was not whether after 1 April 2007 the collective agreement provided sufficient annual holidays to satisfy the statutory minimum. The statutory nature or purpose of annual leave should not be confused with the parties' contractual purpose of granting an extra week's leave of that nature.

[24] With respect, Judge Couch wrongly focussed his analysis on statutory purpose instead of contractual interpretation. The critical question was whether the parties' agreed purpose was to provide long serving employees with a special benefit. On an orthodox contractual construction, that question leads to an affirmative answer.

[25] Judge Couch's approach was to count the continuous service entitlement towards the statutory minimum entitlement for qualifying employees. He could find no distinction between the purpose of the additional week's holiday and the annual holiday otherwise provided; both were intended to be annual holidays in terms of the Holidays Act.[9] But that rationale falls away once the contractual purpose of the additional entitlement is recognised as an agreed reward for continuous service.

[26] Thus we are satisfied that the collective agreement was intended to preserve the continuous service entitlement for long serving employees of an additional week's annual leave after the legislative changes introduced on 1 April 2007.

---

[9] At [33], referring to Holidays Act 2003, s 3(a).

(b) Silver Fern Farms and other cases

[27] Similar contractual provisions have earlier been considered in a number of decisions, both of the Employment Court and this Court.

[28] The issue first surfaced in what is known as the *Tramways* litigation.[10] In that case the collective agreement entitled bus drivers to three weeks' annual holiday and "a further holiday of one week per annum *in recognition of the nature of the work*" (our emphasis). At first instance, a Full Bench of the Employment Court held that the purpose of the further holiday was "on all fours" with the purpose of "annual holidays" under s 3 (of the Holidays Act) – that is, it was for rest and recreation.[11] The Court held that it was an annual holiday for the purpose of the Act and thus the contractual entitlements complied with the Holidays Act even from 1 April 2007.

[29] In *Tramways* the Employment Court drew a distinction between "enhanced" and "additional" entitlements for the purposes of s 6(2): in its view enhanced entitlements were improvements on statutory minima. By contrast, additional entitlements were extra-statutory in that they provided benefits not subject to statutory minima.[12] On that ground, the Court apparently held that, because the further week of holiday was merely an enhancement, it was essentially indistinguishable in kind from the statutory entitlement. Thus it was able to be counted in assessing whether the contractual entitlements complied with the statutory minimum. This was in essence the approach adopted by Judge Couch and advanced by Ms Latimer.

[30] This Court allowed the Union's appeal in *Tramways*.[13] The majority (Glazebrook and Baragwanath JJ) was satisfied that the Employment Court erred in its construction of the Holidays Act by drawing an absolute distinction between "additional" and "enhanced" for the purposes of s 6(2). The majority held that this

---

10 *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd* [2006] ERNZ 1005 (EmpC); reconsidered in *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd* [2008] ERNZ 584 (EmpC).

11 At [40].

12 At [29]–[31].

13 *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd* [2008] NZCA 159.

Court had jurisdiction because the Employment Court construction of the collective agreement was tainted by an error of law.[14] Chambers J dissented.

[31] The proceeding in *Tramways* was remitted to the Employment Court for reconsideration. The Employment Court concluded that the relevant provisions "unambiguously provide a total four weeks annual holidays".[15] In rejecting the Union's claim, the Court emphasised that the agreement disclosed that the parties had turned their mind to the issue and had identified four weeks as the total number of weeks of annual leave. The Court gave little emphasis to the purpose of the annual holiday provision.

[32] The *Silver Fern Farms* litigation followed. Judge Shaw's decision in the Employment Court is of particular relevance.[16] Notably, Judge Shaw was a member of the Full Court which reheard *Tramways* and she delivered her decision in *Silver Fern Farms* following that rehearing.

[33] The two agreements at issue in *Silver Fern Farms* provided that annual holidays would be allowed and paid in accordance with the Holidays Act; that employees were entitled to three weeks' annual holidays (specifically increased to four weeks' after 1 April 2007); and that those employees who had six years' or more continuous service were entitled "to an additional week of annual holiday". Judge Shaw found that the underlying intention of the relevant provisions was to provide employees with the statutory minimum annual holiday entitlement; and to recognise continuous service leave with an extra week's holiday annually. However, that additional week was not intended to be annual holiday as contemplated by the Holidays Act because:

(a) It was not for the statutory purpose of rest and recreation as described by [s 3] of the Holidays Act but to recognise continuous service;[17]

---

14 At [26].

15 *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd* [2008] ERNZ 584 (EmpC) at [36].

16 *NZ Meat Workers and Related Trades Union Inc v Silver Fern Farms Ltd (formerly PPCS Ltd)* [2009] ERNZ 149 (EmpC).

17 At [42].

(b) The provision for three weeks annual holiday was plainly a reference to the statutory minimum entitlement because when the agreement came into force the parties intended by implication that the continuous service leave be in a different category;[18]

(c) The additional week could be cashed up, which was at the time not an available option relating to statutory annual holiday entitlements.[19]

[34] On the employer's appeal in *Silver Fern Farms* this Court was unable to identify any error of principle by Judge Shaw and thus it had no jurisdiction to interfere.[20] Significantly, when dismissing the appeal the Court noted:

> [45] We are satisfied the decisions of this Court and the Employment Court in the *Tramways* case are distinguishable. *The further annual holiday of one week in that case was available to all employees in addition to the then three week statutory minimum not as a reward for long service but "in recognition of the nature of the work".* There was nothing to indicate that the parties intended the additional week would continue to apply after the increase in the statutory minimum as in the present case. That can be contrasted with the general pattern established by the history of prior instruments in the present case and the plain purpose of differentiating and rewarding longer serving employees by providing an additional week's leave which, unlike the statutory entitlement, could be cashed up. It is also consistent with the conclusion reached by Chief Judge Colgan in the decisions identified in [31] above.
>
> (Our emphasis.)

[35] The two decisions of the Chief Judge referred to in the passage just quoted were the *National Distribution Union* (*NDU*) and *Robinson* cases.[21] The employer was the same but the employment agreements were different. The issues were, however, similar. Both decisions were delivered on the same day and were written to be read together.

[36] In *NDU* the collective agreement provided for an annual holiday of three weeks. However, after seven years' continuous service employees would be

---

18 At [44].

19 At [45].

20 *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317, [2010] ERNZ 317.

21 *National Distribution Union Inc v Capital & Coast District Health Board* [2010] NZEmpC 2; *Robinson v Capital & Coast District Health Board* [2010] NZEmpC 3.

"entitled to an additional week of annual holiday". In finding for the Union, the Chief Judge said:

> [24] 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. Whether as a reward for long service or an incentive to remain in employment or a combination of both, it is clear that the parties intended those employees with more than 7 years' continuous service to have 1 week's holiday more per year than those employees yet to attain that longevity.
>
> [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.
>
> [26] In this sense, the case is distinguishable from the *Tramways* case and, despite the awkward way in which the entitlement was expressed at the time of transition from 3 to 4 weeks' minimum annual holidays under the legislation, I am satisfied that the intention of clause 10.2.2 was to continue to differentiate by 1 week the annual holiday entitlements of employees having less or more than 7 years' service.

[37] In *Robinson* the relevant agreement was a multi-employer collective agreement, providing that all employees were entitled to "four weeks annual leave, taken and paid in accordance with the Holidays Act 2003". As in *NDU*, the *Robinson* agreement provided that after completing seven years of continuous service an employee would be entitled to an additional week of annual holiday. In reaching the same conclusion as in *NDU*, the Chief Judge provided an informed explanation of the rationale for the practice of granting extra annual leave to long serving employees.[22]

[38] A consistent approach emerges from *Silver Fern Farms*, *NDU* and *Robinson*. *Tramways* is a factual exception, as the Chief Judge noted in *NDU*. In the other cases this Court and the Employment Court have examined the purpose or rationale

---

[22] At [14]–[18].

for contractual leave entitlements additional to the statutory minimum. *Silver Fern Farms* and *Robinson* all accept that the dominant purpose of the agreed extra entitlement was to reward long service or loyalty. In *NDU*, as the Chief Judge emphasised, it was also designed to operate as an incentive for an employee to remain in long-term employment with the same employer.[23]

[39] *Tramways* is plainly distinguishable from this and the other cases on its facts. The Employment Court concluded the relevant clause specifying that a worker's gross entitlement was "a total of four weeks leave per year" was sufficient recognition of the nature of the work consistent with the statutory purpose of annual holidays – namely rest and recreation. That was because it was expressly stated in the contract to be "in recognition of the nature of the work". However, that conclusion in a different contractual setting is not a justifiable or logical premise for concluding that, because the statutory purpose of the benefit is rest and recreation, the contractual entitlement must therefore count towards the minimum annual holiday entitlement required by the legislation.

[40] Judge Couch noted all the previous authorities. But he subjected only *Silver Fern Farms* to analysis before distinguishing it. Instead, he applied *Tramways.* In our view, it was *Tramways* that was distinguishable. We are satisfied that Judge Couch would have reached a different conclusion if he had correctly analysed and applied the earlier Employment Court decisions in *Silver Fern Farms*, *Robinson* and *NDU*. Contrary to the Judge's view, this case was much closer to *Silver Fern Farms* than *Tramways*. Moreover, Chief Judge Colgan's later decisions in *NDU* and *Robinson*, which Judge Couch did not discuss, show that Judge Couch erred in focussing his analysis on the statutory purpose or nature of the leave, rather than the contractual purpose of granting the additional benefit.

(c) Jurisdiction

[41] Section 214(1) of the Employment Relations Act 2000 excludes appeals to this Court on:

---

[23] At [25].

> ... a decision on the construction of an individual employment agreement or a collective employment agreement.

[42] At first blush, Judge Couch's error appears to fall within that excluded category. However, there is now a settled line of authority in this Court to the effect that the Employment Court's construction of an agreement consequential upon an error of principle in its approach is in some circumstances reviewable by this Court notwithstanding s 214(1).

[43] This Court's decision in *Secretary for Education v Yates*,[24] decided under the predecessor of s 214(1), is the foundation for that authority.[25] In delivering the leading judgment, McGrath J canvassed the changes brought about by the passing of the Employment Contracts Act 1991, which preceded the Employment Relations Act. It is unnecessary for us to review McGrath J's reasoning except to recite these passages from his judgment:

> [20] Accordingly under the 2000 Act, as under the 1991 Act, if the Employment Court reads the terms of an employment agreement in a manner that was not open to it this Court may intervene on the basis that a wrong principle has been applied, which may include that what the Employment Court has done does not in law amount to an orthodox interpretation of the contract. The latter conclusion will not lightly be reached but is an aspect of appellate supervision of the interpretation of agreements in the Employment Court jurisdiction under the 2000 Act.
>
> [21] On the other hand if the Employment Court adopts an interpretation which reflects its view on an orthodox approach to contractual interpretation this Court must observe the statutory constraint and not intervene, even if it doubts the correctness of the outcome. Deference by this Court to the expertise and experience of the Employment Court remains a requirement of our employment legislation (to this extent).
>
> [22] In this context the modern role of provisions such as ss 135 and 214 of the 2000 Act is to ensure that the Employment Court applies a principled approach to interpretation of employment contracts, protecting litigants to that extent by allowing a right of appeal, now under the 2000 Act with leave. But where an interpretation favoured by the Employment Court is the result of an orthodox application of the principles of contractual interpretation this Court is bound to respect that primacy.

---

24 *Secretary for Education v Yates* [2004] 2 ERNZ 313 (CA).

25 See also *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at fn 21 where the Supreme Court noted that "the limitation in [s 214] prevents an appellate Court from construing a term or terms of a contract but does not prevent it from considering questions of interpretative principle".

[44] To similar effect, William Young J was satisfied that the Employment Court's construction of a contract was in error, leading to this conclusion:

> [97] This Court is required to recognise and comply with the limitation on the appellate jurisdiction provided by the exception to s 135. But the Court is also required to recognise that the parties to Employment Court litigation are entitled to the application of orthodox legal principles. This is plainly so as to the implication of terms (as indicated by the *NZ PPTA* case). But it also applies more generally. If satisfied that the Employment Court "errs in principle in how it goes about interpreting a contract", this Court has jurisdiction to interfere, see for instance the *Walker Corp* case at p 514. I am of the view that the Court is also entitled to interfere where the substance of the complaint is that the Employment Court did not construe the contact in question.

[45] In a number of subsequent decisions this Court has considered and applied the *Yates* principles. It is unnecessary for us to survey them here.[26] Most recently, in *Silver Fern Farms,*[27] this Court said:

> [34] In the light of the authorities, our jurisdiction is limited to an inquiry as to whether the Employment Court Judge adopted a principled approach to the construction of the collective agreements. If the approach adopted is found to be correct, then it is not for this Court to revisit the conclusion reached by the Judge. That is so even if we might have reached a different conclusion as to the proper construction of the agreements at issue.

[46] We accept that on appeal this Court's supervisory jurisdiction is limited to reviewing the Employment Court's methodological approach to contractual interpretation. As a statement of policy, given that employment relations since 1991 have been governed primarily by contract and the same broad principles apply to the interpretation of employment contracts as to contractual interpretation generally, this Court must ensure that those principles are correctly and consistently applied.[28] We have jurisdiction to interfere where the appeal raises questions of principle going beyond the terms of the contract. However, that power is used sparingly, as the results in cases since *Yates* demonstrate.

---

[26] See *The Christchurch Press v NZ Amalgamated Engineering Printing Union Inc* [2005] ERNZ 543 (CA); *TLNZ Auckland Ltd v Neenee* [2006] ERNZ 689 (CA); and *Corrections Association of New Zealand Inc v Chief Executive of the Department of Corrections* (2010) 7 NZELR 329 (CA).

[27] *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trade Unions Inc* [2010] NZCA 317, [2010] ERNZ 317.

[28] See *Secretary for Education v Yates* [2004] 2 ERNZ 313 (CA).

[47] We are satisfied that our jurisdiction to determine the Union's appeal is not ousted by s 214. In our judgment Judge Couch made two errors which justify this Court's review and intervention. First, as we have noted, he approached the appeal by focussing primarily on the statutory nature and purpose of annual leave instead of construing the relevant contractual provisions according to their plain meaning and purpose.

[48] Second, the Judge failed to apply what was by 2010 a settled line of authority in this Court and the Employment Court. He placed primary reliance on *Tramways* which was, in our view, distinguishable, rather than on analogous authorities. He did not analyse or follow *NDU* and *Robinson*, which were both directly on point, and misconstrued *Silver Fern Farms*. For the reasons already given, we do not accept Ms Latimer's submission that those decisions were factually distinguishable. Parties to litigation in the Employment Court are entitled to a consistent approach to construction of largely similar contractual instruments.

Result

[49] The Union's appeal is allowed.

[50] The decision of the Employment Court is quashed and the decision of the Employment Relations Authority is reinstated.

[51] Cerebos Gregg's Ltd must pay the Union costs for a standard appeal on a band A basis and usual disbursements.

[52] Costs in the Employment Court are to be fixed by that Court if the parties are unable to agree.

Solicitors:
Oakley Moran, Wellington for Appellant
Sellars & Co, Helensville for Respondent