

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 99/08  
5105489

BETWEEN	ANGLICAN AGED CARE First Applicant
AND	NEW ZEALAND NURSES ORGANISATION Second Applicant
AND	SERVICE AND FOOD WORKERS' UNION NGA RINGA TOTA INCORPORATED Third Applicant
AND	THE NEW ZEALAND AMALGAMATED ENGINEERING PRINTING AND MANUFACTURING UNION INCORPORATED Fourth Applicant

Member of Authority: Philip Cheyne

Representatives: Raewyn Gibson, Advocate for First Applicant  
Jock Lawrie, Counsel for Second, Third and Fourth Applicants

Investigation Meeting: 9 May 2008 at Christchurch

Submissions received: 26 June 2008 from First Applicant  
27 June 2008 from Second, Third & Fourth Applicants

Determination: 17 July 2008

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1] Anglican Aged Care (“AAC”) is a non-profit organisation that operates private hospital, rest home and secure dementia care facilities in Christchurch.

[2] About 180 of AAC's staff at these facilities are union members covered by a collective employment agreement between AAC, the New Zealand Nurses Organisation, the Service and Food Workers' Union Nga Ringa Toto Incorporated and the New Zealand Amalgamated Engineering Printing and Manufacturing Union Incorporated.

[3] There is a dispute between the parties to the collective agreement about whether it entitles employees with five years continuous service to a fifth week of annual leave.

[4] This is a joint application to the Authority. There is almost no disagreement about the facts except as to some limited aspects of perception and positions in the context of bargaining. While I have been provided with statements of evidence from those involved, I will approach the determination of the dispute by reference to the provisions of the collective agreement and the applicable law.

[5] The decision of the Court of Appeal in *New Zealand Tramways and Public Transport Employees Union Incorporated v. Transportation Auckland Incorporation Ltd and Cityline (New Zealand) Ltd* [2008] NZCA 159 was released after the investigation meeting but I have received further submissions from the parties following its release.

### **The Collective Employment Agreement**

[6] There is a long history of collective bargaining. The most recent agreement was settled in January 2008, although it includes some backdating prior to that date. At that time the current dispute existed but the claims from both sides for amendment to resolve the disputed provision to their respective advantage were withdrawn in favour of seeking this ruling from the Authority.

[7] Part 7 of the 2008 agreement deals with leave. Clause 20 provides for public holidays. Clause 21 deals with annual leave. Clauses 22 to 28 provide for long service leave, sick leave, bereavement leave/tangi hana leave, parental leave, jury service and study leave. It is useful to set out clause 21 in full:

#### **21. ANNUAL LEAVE**

- (a) *An annual holiday of three weeks shall be allowed in accordance with the Holidays Act 2003.*

- (b) *An employee who has completed five years continuous service with the same employer shall, for the fifth and subsequent years be entitled to an extra weeks annual leave.*

### **The Holidays Act 2003**

[8] By section 3 the purpose of the Holidays Act 2003 is to promote work/life balance *and, to that end, to provide employees with minimum entitlement to – (a) annual holidays to provide the opportunity for rest and recreation ....*

[9] Annual holiday means an annual holiday provided under subpart (1) of Part 2: see s.5(1). That subpart itself has as a purpose to ensure that from 1 April 2007 when an employee next becomes entitled to annual holidays that the employee's minimum entitlement is increased from three to four weeks annual holiday. That purpose is achieved by s.16 which declares that for each 12 months of continuous employment an employee is entitled to not less than four weeks paid annual holiday. The purpose and operative provisions just mentioned resulted from amendments that came into force on 1 April 2007 but which were enacted in 2003.

[10] Section 6 of the Act controls the relationship between it and employment agreements. Each entitlement provided to an employee by the Act is a minimum entitlement. Employers and employees are not prevented from providing an employee with enhanced or additional entitlements but an employment agreement that excludes, restricts or reduces an employee's entitlement under the Act has no effect to the extent that it does so.

### **Applying the law**

[11] In *New Zealand Tramways and Public Transport Employees Union Inc v. Transportation Auckland Corporation Ltd* [2006] ERNZ 1005, a Full Bench of the Employment Court held that the words *enhanced* and *additional* in the Holidays Act 2003 had discrete and different meanings, the former referring to a contractual improvement on the statutory minima and the latter referring to entitlements other than those minima. However, the majority of the Court of Appeal held that the Employment Court had erred in law in drawing an absolute distinction that the Act does not make. The case was referred back to the Employment Court for further consideration, but no judgment has yet issued from the Employment Court.

[12] Accordingly, the existing *Tramways* decision of the Employment Court and the determinations of other cases at the Authority level applying that meaning are not helpful to the resolution of this dispute. I turn to interpreting and applying the plain words of clause 21 from the employment agreement in the statutory context.

[13] The situation is clear in respect of any employee covered by the collective employment agreement with less than five years continuous service. To the extent that the collective agreement reduces that employee's entitlement to three weeks annual holidays, the employment agreement is of no effect. That employee is entitled to not less than four weeks annual leave. This result is not in dispute.

[14] What, then, is the situation of an employee who has completed five years service? Under the collective employment agreement, that employee is entitled to an *extra week's annual leave*. Read in context, that phrase is a reference to the preceding subclause providing an annual holiday of three weeks in accordance with the Holidays Act 2003. So to determine this employee's entitlement to annual holidays it is necessary to read both sub-clauses together. That approach was required under earlier versions of the collective agreement containing materially identical provisions. There is no reason for it to change now. Approached that way, the effect of the employment agreement for this employee cannot be said to exclude, restrict or reduce their entitlement under the Holidays Act to a minimum of not less than four weeks annual holidays so s.6 of the Holidays Act 2003 has no application to this employee.

[15] A contrary argument is that the two sub-clauses provide separate entitlements, and compliance with s.16 must be assessed at each stage. On this approach the phrase *extra week's annual leave* reads as a reference to the minimum statutory entitlement to annual holidays applicable for the time being. However, I accept the submission for AAC that s.6 of the Holidays Act 2003 does not require all employment agreements to expressly provide for four weeks annual holidays for every employee. The Act does not modify the words actually used by the parties in their agreement. It simply makes ineffectual an agreement that excludes, restricts or reduces the statutory minimum. Knowing this, in January 2008 these parties nonetheless retained the words *three weeks shall be allowed in accordance with the Holidays Act 2003*. Objectively determined, their contractual intention was to make no change to the annual leave provisions, leaving it to the statute to bring about any change. As

explained above, the statute only affects the entitlement of an employee with less than five years' service.

**Conclusion**

[16] It follows that I accept that meaning supported by AAC that clause 21(b) of the collective employment agreement does not entitle any employee to five weeks annual leave.

[17] This being a dispute there will be no order for costs.

[18] I acknowledge and appreciate the efforts and co-operation of the parties in bringing this matter to the Authority.

Philip Cheyne  
Member of the Employment Relations Authority