IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 3
5295859

	BETWEEN	RITCHIE STEWART AND RAYMOND JOHNSTONE Applicants
	AND	THE SALAVATION ARMY Respondent

Member of Authority:	M B Loftus
Representatives:	Caroline Mayston, Counsel for the Applicants Michelle Banfield, Counsel for the Respondent
Investigation Meeting:	30 July 2010 at Christchurch
Submissions received:	At the Investigation Meeting
Determination:	11 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a dispute about annual leave entitlements. The applicants contend they are, by virtue of their contractual arrangements and length of service, entitled to five weeks annual leave per annum. The respondent is of the view that their entitlement is limited to four weeks annual leave per year.

Background

[2] Mr Stewart commenced employment with the Salvation Army as an Aftercare Co-ordinator on 9 March 1998 and remains in this role. Upon commencement he entered into an Individual Employment Contract which, in accordance with the Holidays Act as it was at the time, allowed three weeks annual leave per annum. The

contract gave a further weeks' leave upon completion of five years service and this Mr Stewart received when he completed the required service in 2003.

[3] Mr Johnstone was appointed a Case Worker in March 2003, having had previous experience with the Salvation Army as a volunteer. He entered into an Individual Employment Agreement which contained an annual leave clause identical to that contained in Mr Stewart's contract.

[4] In 2005 the Holidays Act was amended. One consequence of that amendment was that the minimum annual leave entitlement increased to four weeks with effect 1 April 2007.

[5] Neither employee has had their agreement / contract amended since commencement and while Mr Johnstone had not qualified for what would have been a fourth weeks leave as at the time legislation changed, he states that he always understood he would get an additional weeks leave after five years service.

[6] The clause in question reads:

> *Annual leave entitlement, in accordance with the Holidays Act 1981, is 3 weeks leave after the end of each year of employment for full time employees, pro rated for part time employees.*
> *An additional week of annual leave shall be allowed on completion of the 5th and subsequent years of current and continuous service.*
> *Annual leave must be taken at times approved by The Salvation Army and must include one period of at least two weeks in each year. The employee shall not accumulate annual leave from one anniversary year to another unless by written agreement with The Salvation Army.*
> *Annual leave entitlement of an existing employee shall be transferred to this agreement [contract].*

Determination

[7] There was no argument about the facts with the Salvation Army choosing not to file witness statements. Both parties chose to emphasise their legal arguments which addressed the issue of whether not the applicants, given both now have more than five years service, are entitled to four or five weeks leave per annum. There follows an abbreviated summary of those submissions.

[8] The applicants urge that I follow the approach of Employment Court in *New Zealand Meat Workers & Related Trades Union Inc v Silver Fern Farms Ltd (formally PPCS Ltd)* (2009) 6 NZELR 484 which was more recently upheld by the Court of Appeal (*Silver Fern Farms Ltd v New Zealand Meat Workers & Related Trades Union Inc* CA593/2009 [2010] NZCA 317).

[9] The approach can, in my view, be best illustrated by quoting the Court of Appeal's summation:

> *[18] After referral back from this Court, the Employment Court reconsidered the* [New Zealand Tramways and Public transport Union Inc v Transportation Auckland Corporation Limited [2006] 1 ERNZ 1005] *case and decided that, on the terms of the particular agreement the parties had not agreed to five weeks annual holidays* (see [2008] ERNZ 584). The Employment Court concluded (in a passage cited by Judge Shaw in her decision)*:*
>
> - *Since 1 April 2007 the Holidays Act has provided for a statutory minimum of 4 week' annual holiday for all employees.*
> - *The Holidays Act contemplates that employers may provide enhanced or additional entitlements by agreement and these are enforceable by the employees rather than a Department of Labour inspector as they are separate and distinct from the minimum entitlement.*
> - *The question of whether an agreement does provide an enhanced or additional entitlement and the scope of the entitlement is dependent not on the Act but on the wording of the agreement.*
>
> *[19]* [In *Silver Fern* the company submitted its agreement was not ambiguous]. *The Judge's reasoning to the contrary may be summarised as follows:*
>
> - *Prior to 1 April 2007 all non-casual employees were entitled to three weeks annual holiday while qualifying employees were entitled to "an additional week".*
> - *The 2004 agreement did not take account of the pending increase in the minimum statutory entitlement from 1 April 2007. From that date, the ambiguity arose because the words "additional week of annual holidays" in cl 10.4 "did not tally" with the reference to "three weeks holiday" referred to in the second part of cl 10.4.*
> - *From 1 April 2007, the ordinary meaning of the words in the second part of cl 10.4 conflicted with the first part of that clause and rendered redundant the notion of an additional holiday.*
>
> *[20] Central to the Judge's conclusion that qualifying employees were entitled to five weeks annual holiday after 1 April 2007 was her view that cl 10.2 in the 2004 agreement had to be read after that date as providing for four weeks annual holiday since this was the new statutory minimum. It followed that if cl 10.4 of the 2004 agreement were to be literally construed, qualifying employees would receive no more than four weeks annual holiday. This was no more than the entitlement of all non-casual employees. She concluded by reference to cl 10 and the history of previous awards and agreements in the industry that the intention was to provide the minimum statutory holidays for all non-casual employees and to recognise the continuous service of qualifying employees by granting one week's annual holiday additional to the statutory entitlement.*

[21] The Judge also considered that:

- *To cap the annual holiday entitlement at four weeks for all non-casual employees would rob any meaning from the words "additional week of annual holiday" in cl 10.4.*
- *Employees who were entitled to an additional week's holiday prior to 1 April 2007 would lose that entitlement after that date. Any such diminution of holiday entitlements would require express words in the absence of agreement from affected employees…*
- *Her conclusion would give effect to the underlying intent of the agreement which was to recognise continuous service by the additional week's holiday. It could be distinguished from annual holiday as prescribed by the Holidays Act 2003 because it was not given for rest and recreation as contemplated by s 3(a) of the Act…*

[10] The respondent's position is summarised thus:

1. A plain reading of the Annual Leave clause in question is that it provides those employees with more than 5 years service with "3 weeks leave" plus "an additional week of annual leave". It is submitted that this wording can only provide an entitlement totalling 4 weeks leave.

2. 4 weeks leave was what was intended by the parties when they agreed to the clause.

3. There is no evidence that the parties ever intended to provide more than 4 weeks leave.

4. The parties did not agree to:
(a) 5 weeks annual holidays – as they could have;
(b) leave being granted on the basis of whatever the statutory entitlement is, plus another week; nor
(c) leave for those employees always being more than other groups of employees.

5. There is no ambiguity in the relevant clause and so no need to look to extrinsic materials, the parties' negotiations, nor try to determine what the purpose of the clause was. The entitlement is as stated in the IEAs, as was agreed at the time.

6. The law as set out by the Court in Tramways *2 is the proper law to apply.* Silver Fern Farms *and the* DHB *cases are distinguishable.*

[11] I can not agree with the last point. *Tramways* involved a situation where employees were granted additional leave in recognition of the nature of their work. All employees were eligible and this distinguishes it from both *Silver Fern* and the present scenario as both involve a situation where an identical qualifying criteria, service, limits eligibility.

[12] The respondent's approach has another significant problem. It relies to some extend on intent – (see subparagraphs 2 and 3 in [10] above). As said earlier, the respondent chose not to offer any evidence, relying instead on legal submission. Therefore, and whilst there is, as submitted, no evidence that the parties intended more than four weeks leave, there is no evidence that they didn't (though I suspect it more likely given the dates upon which the agreements were entered into, that they never turned their minds to the issue). There is also no evidence as to why (or why not) the issue was not addressed after the law changed and whether or not that failure confirms an intention to retain the contractual provision granting additional leave after completion of a qualifying period.

[13] The lack of evidence regarding intent leaves me in a situation where I must consider the words of the clause and their literal meaning. In that respect I conclude that the applicants situation is analogous with that of the employees covered by the *Silver Fern* provision.

[14] Essentially, and for the purposes of this determination, the clause has two parts. The first sentence confers an entitlement to 3 weeks leave in accordance with the Holidays Act. The second grants an additional weeks leave after completion of a qualifying period of service.

[15] As said earlier, the first sentence expressly recognises an entitlement granted *… in accordance with the Holidays Act….* The entitlement referred to therein remains but its quantum has been amended by legislation. The reference to three weeks can be considered an explanation of that quantum as it stood prior to the legislative change and can not, in my view, be used to limit or nullify the legislative change.

[16] The second sentence gives an additional grant. There is only one thing that it can be additional to and that is the grant already made in accordance with the first sentence. To find otherwise would, as was the case in *Silver Fern*, render the sentence of no effect. I can not, given the lack of evidence about intent, consider that the parties sought to include a nugatory provision. Indeed, such an outcome would nullify the only relevant evidence I have and that is Mr Johnstone's uncontested statement that he was told he would get an extra week's leave after five years service.

Conclusion

[17] For the reasons above I find in favour of the applicants and conclude that both are eligible for a weeks leave additional to that provided for by statute. In Mr Stewarts' case the entitlement is to apply from his first anniversary date after 1 April 2007. Mr Johnstone became eligible upon the completion of five years service.

Costs

[18] I reserve the issue of costs. The parties should endeavour to resolve that between themselves but should they be unable to do so, either may apply for a determination of the matter provided this is done within 28 days of this determination. Any response should be filed within 14 days of the application.

Mike Loftus
Member of the Employment Relations Authority