

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2011] NZEmpC39
WRC 37/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN THE CHIEF OF THE NEW ZEALAND
DEFENCE FORCE
Plaintiff

AND THE NEW ZEALAND PUBLIC SERVICE
ASSOCIATION INCORPORATED
Defendant

Hearing: 25 March 2011
(Heard at Wellington)

Appearances: Ms Anthea Williams, Counsel for the Plaintiff
Mr Peter Cranney and Caroline Mayston, Counsel for the Defendant

Judgment: 20 April 2011

JUDGMENT OF JUDGE A D FORD

Introduction

[1] Essentially, this challenge is about the interpretation and application of a provision in a collective employment agreement relating to annual leave entitlement. The issues are complex. The case is concerned with the historical position that existed during a defined period between 15 January 2007 and 25 June 2009.

[2] The plaintiff, (the Defence Force), and the defendant union (the PSA) were parties to the 2004 New Zealand Defence Force General Collective Agreement which applied until 7 September 2007 and thereafter the 2007 New Zealand Defence Force General Collective Agreement. Each agreement (the collective agreement) contained an identical provision relating to annual leave save that the 2007

agreement included recognition that under the Holidays Act 2003, as from 1 April 2007, an employee's entitlement to paid annual holidays would increase from three weeks' to four weeks'.

[3] In this challenge, the PSA represents approximately 20 Defence Force permanent security guards who work on rostered shifts providing round-the-clock security coverage 365 days per year at Defence Force headquarters, Aitken Street, Wellington. The PSA contend that, during the relevant period, the security guard employees were entitled to 20 days' annual leave per year. The Defence Force, on the other hand, argue that because security guards work an unusual shift pattern, which can vary between eight and 12 hours per day, it is necessary to calculate their annual leave entitlements in terms of hours (rather than days) "to provide a realistic calculation of leave entitlements and deductions."

[4] In a determination dated 16 November 2010,¹ the Employment Relations Authority (the Authority) upheld the PSA's claim that the annual leave provision in the collective agreement entitled the security guards to 20 days' annual leave per year and held that leave also accrued on that same basis. The Defence Force then challenged that determination and sought a hearing de novo of the entire matter.

[5] The parties agreed to proceed on the basis of an agreed statement of facts and, accordingly, no oral evidence was presented at the hearing. There was, however, an uncontentious affidavit produced on behalf of the plaintiff from a Mr Mark Williamson, whose position is described as "Deputy Director Conditions of Service and Employment, in the Directorate of Personnel Capability Development, Defence Personnel Executive at the Headquarters of the New Zealand Defence Force".

Background

[6] From the documentation produced, it would appear that sometime in 2006 a final report was produced resulting from a review of security guard staffing arrangements at Defence Force headquarters. Following on from the presentation of

¹ WA 185/10.

that report, the parties entered into a formal variation (the variation agreement) of the collective agreement. The variation agreement, dated 23 November 2006, came into force on 25 January 2007. The variation agreement provided for the operation and management of the security guards' rostered shifts. It also contained a specific provision relating to "Leave management" which I will need to return to.

[7] The following paragraphs, taken from the agreed statement of facts, describe the rather complicated roster system for security guards:

5. The NZDF Security Guards do not work an eight hour day, 40 hour work week. Senior Security Guards on an annual basis work an average of 42 hours per week, with an average of 3.5 12 hour shifts per week. On a four-weekly cycle, the Senior Security Guards will work a fortnight of 96 hours, followed by a fortnight of 72 hours based on 12 hours for each shift.
6. Security Guards work mainly a 12 hour shift pattern similar to Senior Security Guards, but after eight weeks will work eight hour shifts for a fortnight from Monday-Friday before recommencing a four days on, four days off shift pattern (each of 12 hours), for eight weeks. Depending on where their shift cycle commences in a given calendar year, they average between 41.4 and 41.8 hours per week in a calendar year.
- ...
8. The wages of Senior Security Guards and Security Guards are averaged out so that each is paid the same amount fortnightly regardless of whether they have worked the possible shift combinations of 96 hours, 80 hours (the Security Guard's two weeks of eight hour shifts), or 72 hours in the fortnightly pay period.
9. When NZDF Security Guards take leave on a 12 hour day, they are paid for the period of 12 hours, on the averaged wage based on a 42 hour week, for the period (with a holiday pay increment).
10. A new variation to the CEA was entered into in May 2009. This records the basis of leave entitlement for NZDF Security Guards is based on 168 hours over a four week period, and either eight hours or 12 hours is deducted depending on whether the guard would have worked an eight hour or 12 hour shift if they had not taken leave.
11. The new variation came into operation from 12 June 2009 so the period at issue in this proceeding is 15 January 2007 – 25 June 2009.

[8] Another complicating factor, which related to the Defence Force payroll system at the relevant time period, is referred to in Mr Williamson's affidavit:

2. NZDF uses a computer human resources system called Atlas for its payroll. Atlas only operates on the basis of five day working weeks and eight hour days. The calculation of the payroll and leave for Security Guards and Senior Security Guards requires “work-arounds” – manual adjustments to the Atlas calculations, as it is unable to cope with a four day on, four day off roster that does not fit neatly within a “standard” seven day week and 14 day fortnight. For instance, a dummy roster must be loaded into Atlas in order to pay the salary for guards (the salary calculation is set out in paragraph 8 of the agreed statement of facts).
3. Prior to the period at issue, the plaintiff’s practice was that if a Senior Security or Security Guard took annual leave on a 12 hour day shift, their leave balance was manually adjusted so as to deduct 12 hours leave from their leave balance. The Atlas system recorded this as a deduction of 1.5 days of leave.
4. Around January 2007, the manual adjustment changed. NZDF payroll staff stopped deducting 1.5 days leave when leave was taken on a 12 hour shift, and one eight hour day was deducted regardless of the length of the shift.
5. In 2008 NZDF realised leave had not been accruing [in the way] it considered correct and that leave balances had grown disproportionately during this period. NZDF sought to retrospectively recalculate the leave entitlements for NZDF Security Guards from 15 January 2007. This is the effective date of the new variation which coincided with the relocation of the security operation to the new Defence House. On the same date the security guards were allocated one higher grade. NZDF amended the accrued leave balances.
6. The recalculation was based on the deduction of an eight hour leave day, if the guard was taking leave on a rostered eight hour shift day, or a 12 hour leave day if the guard was rostered on for a 12 hour day. The annual leave entitlement was calculated for Senior Security Guards (who work four on, four off rosters continuously) as an average of 3.5 12 hour days per week (or 14 12 hour days per year) for four weeks entitlement. The same entitlement was given to Security Guards, who worked slightly fewer hours on average, for ease of administration and perceived fairness.

The annual leave provisions

[9] I now set out the relevant provisions in the collective agreement relating to annual leave. The words in *italics* appear only in the 2007 agreement:

- 4.3.2 **Permanent** employees, and **fixed term** employees whose period of employment is for greater than 12 months, will accrue annual leave for all time worked on the following basis:
 - (a) Employees who have completed less than 5 years continuous service, will accrue annual leave of 3 weeks per year e.g. if

worked 4 months, entitled to 5 days annual leave. *Employees who were employed on and after 1 April 2007 will accrue annual leave of 4 weeks per year.*

- (b) Employees who complete 5 or more years of continuous service, will accrue 4 weeks annual leave per year e.g. if worked 6 months, entitled to 10 days annual leave.
- (c) *Employees with a 3 week annual leave entitlement move to a 4 week entitlement on their first anniversary date falling after 1 April 2007.*
- (d) Part time employees shall accrue annual leave as prescribed above. Salary during leave will be paid at the same rate that would be paid for the usual working week.
- (e) Subject to approval, employees may anticipate up to half of their annual leave entitlement subject to refund on resignation if necessary.
- (f) Employees with over 20 years' continuous service may anticipate one year's annual leave entitlement, i.e. 20 days annual leave.

4.3.3 Except as specifically provided, where the employee has been absent on special leave with or without pay in excess of 35 consecutive days (including Saturdays and Sundays) in one or more periods in any leave year, employee's annual leave entitlement shall be reduced on a proportionate basis in accordance with the following table:

...

There then follows a table setting out the reductions. It shows, for example, an employee absent on special leave for, say, between 72 and 107 days (based on a "Five-day week") in any leave year would have his or her leave entitlement reduced by four working days. An employee absent between 180 and 215 days would have his or her leave entitlement reduced by 10 days and so on.

[10] The relevant provisions in the variation agreement are set out as follows:

Leave management

6.18 **Leave General:** For each Rostered Shift day that a rostered shift employee takes annual, sick, bereavement, long service or other approved paid leave in terms of the Holidays Act and/or employment agreement, one days' entitlement will be deducted.

6.19 **Annual Leave:** Annual Leave is provided for the purposes of rest and recreation, and this is particularly important in circumstances where a roster is operated. The Manager Security or Assistant Manager Security Operations will therefore closely manage and monitor annual leave in

discussion with individual employees to ensure that the taking of annual leave is well planned and programmed.

The contentions

[11] Not having heard evidence in the case, makes it difficult to determine all the nuances associated with the submissions of the respective parties. The Authority Member succinctly summed up the opposing contentions in these terms:

[11] Defence maintains that security guards are only entitled to the minimum entitlement under the Holidays Act, whereas the PSA claims that the security guards are entitled to 20 days of annual leave paid according to their normal length of shift, often 12 hours.

[12] Ms Williams' principal contentions on behalf of the Defence Force are explained in the following two paragraphs from her submissions:

15. NZDF argues that, in respect of the CEA, clause 4.3.2 must be interpreted and applied in the context of the hours worked by Guards. As Senior Guards work an average of 3.5 x 12 hour shifts a week (and Guards slightly less), four weeks leave is 4 x 3.5 x 12 hour shifts, ie 14 x 12 hour shifts or 168 hours. This is equivalent to 21 x 8 hour shifts.
16. The Security Guards entitlement should be calculated in light of the actual hours they work. This is necessitated by the CEA, is consistent with the approach in the Holidays Act, and is a common sense approach to the scheduling for Guards.

[13] In developing her submissions, Ms Williams made the following further points. First, in reference to the examples given in subparagraphs (a), (b) and (f) of cl 4.3.2 of the collective agreement, which tend to indicate that leave is to be assessed on a 20 days' per year basis, counsel stressed that they were examples used only to illustrate how leave accrues during the leave year and they did "not provide the mechanism for calculating leave". Ms Williams submitted that the examples must be read in the context of other provisions in the collective agreement which refer to hours of work. In the alternative, she submitted that the collective agreement provides for a 40 hour working week "and so a week of leave at clause 4.3.2 is 40 hours for calculation".

[14] Ms Williams then submitted that the four week provision in the collective agreement was intended to mirror the entitlement in the Holidays Act 2003 of "four

weeks” annual leave and on average, in a week, a guard would work 3.5 x 12 hour shifts. Counsel referred to s 17(1) of the Holidays Act 2003 which permits an employer and an employee to agree on what genuinely constitutes a working week and said that the Defence Force “argue the genuine working week here is 3.5 x 12 hour shifts...”.

[15] Finally, Ms Williams submitted that the approach to calculating the accrual of annual leave for guards contended for by the Defence Force was the “common-sense approach”. Under this head, counsel outlined what would appear to be the nub of the problem from the Defence Force’s perspective:

32. Thus, by choosing when to take leave, based on the roster, a Guard could obtain the equivalent of 6 weeks of annual leave, or 240 hours. This is significantly more than other employees working for the plaintiff, who are covered by the same leave provisions under the CEA, ...

[16] For the union, Mr Cranney contended that the collective agreement, on its plain language, expressly addressed in each subclause the basis upon which leave was to be accrued by describing, first, the number of weeks and then, secondly, identifying the number of days’ pay to be accrued for each week. In this regard, he noted the example given in relation to cl 4.3.2(b) was that an employee entitled to four weeks’ annual leave per year will have an annual leave entitlement of 10 days if he or she worked for only six months.

[17] Mr Cranney acknowledged that if annual leave is calculated on a 20 day per year basis, rather than on the hourly basis as claimed by the Defence Force, the security guards on shift work would have a greater entitlement to annual leave than is normal. But he submitted that there is no injustice in shift workers having a greater entitlement to annual leave than employees working regular hours and he claimed that: “The [anomaly] is usually dealt with by granting an extra week’s leave for shift workers.”

[18] In relation to the 2006 variation agreement, Ms Williams had submitted that cl 6.18 did not specify whether the “one days’ entitlement” was to be calculated on an eight hour or 12 hour basis. Mr Cranney, in response, emphasised that the clause

simply stated that if a rostered shift is taken as annual leave, then one day of the accrued annual leave is deducted, regardless of the length of the shift.

[19] Mr Cranney noted that in 2009 the parties agreed to another variation which, as counsel put it: “changed the situation from an accrual system based on days to one based on hours. This is essentially what the Plaintiff seeks to impose retrospectively for the period 15 January 2007 to 25 June 2009.”

Discussion

[20] No authorities were cited by counsel, but the principles relating to the interpretation of collective agreements were recently reviewed by this Court in *New Zealand Meat Workers Union of Aotearoa Inc v AFFCO New Zealand Ltd*,² where reference was made to the judgment of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.³ I will not repeat what I said in the *New Zealand Meat Workers* case, but I respectfully refer to and adopt two additional passages from *Vector* which restate the principles applicable to the interpretation exercise in cases of alleged ambiguity.

[21] First, there is the statement by Tipping J:⁴

An ambiguity arises when the language used is capable of more than one meaning, either on its face or in context, and the court must decide which of the possible meanings the parties intended their words to bear.

Secondly, in his judgment McGrath J summarised Lord Hoffmann’s five principles of interpretation as stated in *Investors Compensation Scheme Ltd v West Bromwich Building Society*⁵ - paragraph [61] of *Vector*:

In summary, Lord Hoffman said that interpretation of a commercial agreement is the ascertainment of the meaning it would convey to a reasonable person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract. The language the parties use is generally given its natural and ordinary meaning, reflecting the proposition that the common law does not easily accept that linguistic mistakes have been made in formal documents. The background, however, may lead to the conclusion that

² [2011] NZEmpC 32.

³ [2010] NZSC 5, [2010] 2 NZLR 444.

⁴ At [33].

⁵ [1998] 1 WLR 896 at 912-913.

something has gone wrong with the language of an agreement. In that case the law does not require the courts to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.

[22] Although the Defence Force now submits that the interpretation of the security guards' annual leave entitlement contended for by the PSA defies common sense, the reality is that it is consistent with the natural and ordinary meaning of the words used in cl 4.3.2 of the collective agreement and it cannot be said that the PSA's approach "flouts business common sense". As Mr Cranney submitted, a basis could be made out for shift workers having a more generous annual leave entitlement than workers who work regular hours.

[23] Ms Williams' submission at [13] above, that the examples provided in subclauses (a) and (b) of cl 4.3.2 are not a mechanism for determining the annual leave entitlement cannot be said to be the position in relation to what is stated in subclause (f) because the reference to "20 days" in that subclause is the actuality and not an example. The annual leave entitlement is very clearly stated, not in weeks or hours, but as "20 days annual leave". That approach is perfectly consistent with the PSA's approach to the interpretation of the whole of cl 4.3.2.

[24] Ms Williams' reference to the provisions of s 17(1) of the Holidays Act 2003, which permit an employer and an employee to agree on what genuinely constitutes a working week has no relevance to the facts of the present case where the only evidence of any agreement on the issue are the provisions in cl 4.3.2, of the collective agreement and cl 6.18 of the variation agreement which, of course, are the provisions in contention. Ms Williams submitted that the Defence Force "argue" that it is necessary to calculate the entitlement in hours, but an argument on an issue of interpretation by one party only does not constitute an agreement in terms of s 17(1) of the Holidays Act 2003.

[25] The 2006 variation agreement is obviously an important document which contains provisions replacing and superseding many of the conditions of employment for security guards otherwise covered by the collective agreement. But the variation agreement does not replace, and does not purport to replace, the annual leave provisions in the collective agreement or vary their application in respect of

security guards. Because each term of the variation agreement added to, subtracted from or generally varied the collective agreement, it can be assumed that the parties would have realised the significance of the document. If the parties had so intended, it would have been a relatively easy matter to incorporate into the variation agreement an express provision defining the annual leave entitlement for the security guards in terms of hours instead of weeks or days. That step was subsequently taken under the 2009 variation.

Conclusions

[26] I have given careful consideration to all of the detailed submissions advanced by Ms Williams but I have not been persuaded that the annual leave entitlement of security guards for the relevant period should be calculated on the basis contended for by the Defence Force. On the contrary, I am satisfied that the Authority Member was correct in his determination in concluding that the clear wording of the collective agreement meant that, during the period in question, permanent security guard employees were entitled to 20 days' annual leave per year and that leave accrued on that same basis.

[27] The PSA is entitled to costs, which I anticipate will be reasonably modest given that there was no oral evidence, together with disbursements. If counsel cannot reach agreement on this issue then Mr Cranney should file a memorandum within 28 days and Ms Williams will have the same period in which to respond.

A D Ford
Judge

This judgment was signed at 12.30 pm on 20 April 2011