New Zealand Employment Relations Authority Decisions

Donaldson v Canterbury District Health Board (Christchurch) [2017] NZERA 1004; [2017] NZERA Christchurch 4 (9 January 2017)

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Last Updated: 6 March 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 4
5640545

BETWEEN SUSAN GAY DONALDSON Applicant

A N D CANTERBURY DISTRICT HEALTH BOARD Respondent

Member of Authority: Helen Doyle

Representatives: Neville Donaldson, Advocate for Applicant

Stephanie Manning, Advocate for Respondent

Investigation Meeting: On the papers

Submissions Received: 28 October 2016, from the Respondent

4 November 2016, from the Applicant

Date of Determination: 9 January 2017

A The dispute is resolved in favour of Canterbury District Health

Board.

B. **I have reserved costs but I have noted that this was a dispute where it is not invariable that costs follow the event.**

Employment relationship problem

[1] Susan Donaldson seeks a determination that she is entitled to 5 weeks' annual leave under clause 15.1 read in conjunction with clause 2 of the South Island Clerical/ Administrative collective employment agreement. The collective agreement is between Canterbury District Health Board, Nelson/Marlborough District Health

Board, South Canterbury District Health Board, Southern District Health Board, West Coast District Health Board and the New Zealand Public Service Association (the PSA) and its terms is 1 October 2013-30 September 2015 (the MECA). Ms Donaldson is a member of the PSA and her work is covered by the MECA.

[2] Canterbury District Health Board (CDHB) does not accept Ms Donaldson is entitled to 5 weeks annual leave and seeks a determination that she is only entitled to

4 weeks annual leave.

[3] Ms Manning confirmed on 6 December 2016 by email to the Senior Authority officer that in accordance with s 129 (2) of the Employment Relations Act 2000 (the Act) she would, notwithstanding the obligation falls to the person pursuing the dispute, contact the other employer parties to the MECA to advise them of the claim that day. The Authority is satisfied that the PSA has also had notification of the dispute. The Authority is grateful to Ms Manning and satisfied therefore the other employer parties to the agreement have notice of the existence of the dispute.

The material clauses in the MECA

[4] Clause 15.1 of the MECA provides under the heading *Annual Leave*:

Employees, other than casuals, shall be entitled to 4 weeks annual leave, taken and paid in accordance with the Holidays Act 2003 and subject to the other provisions of this clause, except that on completion of five years recognised current continuous service the employee shall be entitled to 5 weeks annual leave. For the purposes of this clause, "current continuous service" shall be defined in clause

2 for *"service"*...

[5] Clause 2 of the MECA provides the definition of service as follows:

"Service" means current, continuous service with the individual Employer except for the purpose of determining annual leave entitlement when continuous service with other South Island District Health Boards shall be recognised.

Background against which the dispute is to be determined

[6] Ms Donaldson was employed by Nelson Marlborough District Health Board (NMDHB) from 26 January 2004 until 25 September 2015 and except for a period of two months was employed as a Medical Secretary. On 18 April 2016 Ms Donaldson commenced employed with CDHB as Medical Secretary Oncology.

[7] There was a break between ending service with NMDHB and commencing with CDHB of a little over six months. CDHB says that means Ms Donaldson is only entitled to four weeks leave.

Interpretation approach

[8] In a recent Employment Court judgment,1 Judge Inglis stated that the interpretative exercise is "directed at establishing the meaning the parties to the agreement intended the words in dispute to bear."2

[9] Mr Donaldson and Ms Manning agree that the starting point is an assessment of the natural and ordinary meaning of the words themselves in clause 15.1 and clause

2 of the MECA. It has been recognised that the plainer the words, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say.3 The contractual context sometimes called a cross check is however a necessary ingredient in ascertaining meaning.4 Interpretation should be approached on an objective basis and the necessary inquiry concerns what a

reasonable and properly informed third party would consider the parties intended the words of their contract to mean.5 What a party subjectively intended or understood their words to mean is irrelevant.6

[10] Whilst recognising that the language used is generally given its natural and ordinary meaning there may be a conclusion that something has gone wrong with the language and the law does not require the Court 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.7

Analysis

[11] Mr Donaldson submits, and this is the nub of the dispute, that the exception in clause 2 for establishing an annual leave entitlement does not require current continuous service rather continuous service of 5 years or more with an employer

party to the MECA.

1 *New Zealand Airlines Pilots' Association Inc v Air New Zealand Limited* [2016] NZEmpC 161 at [33]

2 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19]

3 At [23]

4 At [24]

5 At [19]

6 At [14]

[12] Ms Manning submits that there are two elements to the definition of service in clause 2. The service must be current and continuous. She submits that Ms Donaldson's service was not unbroken and without interruption because of the period between service ending with NMDHB and commencing with CDHB. Ms Manning submits that the definition of service in clause 2 read in conjunction with clause 15.1 can only be activated in respect of an annual leave entitlement when an employee goes directly from one District Health Board to another with no gap in service and the aggregate of service across both employers, including the current one, reaches five years.

[13] Clause 15.1 provides that on completion of five years recognised current continuous service the employee shall be entitled to 5 weeks' annual leave but "current continuous service" shall be as defined in clause 2. Clause 2 defines service as current, continuous service with the individual employer except for the purpose of determining annual leave entitlement when continuous service with other South Island District Health Boards shall be recognised. The word "continuous" is not separately defined.

[14] Ms Donaldson does not have five years current, continuous service with her current employer CDHB. The focus therefore is on the exception expressed for the purpose of determining her annual leave entitlement in clause 2. There is no dispute that Ms Donaldson has in excess of five years continuous service with NMDHB. The issue is whether the break in service between NMDHB and CDHB disqualifies her from having that service recognised for assessing her annual leave entitlement.

[15] There is some ambiguity about what is meant by the words continuous service in the exception in clause 2 and whether the words "continuous service" mean continuous with CDHB or continuous service with another Southern District Health Board. I accept as submitted by Ms Manning that the second meaning could result in a requirement to recognise service even with a break of a considerable period, even years.

[16] The word "current" in clause 2 is not carried through to the exception for the purpose of determining annual leave entitlement but the words "continuous service" are.

[17] I have cross-checked any view about the meaning of continuous service in the exception in clause 2 with the balance of the definition of service in that clause and the annual leave entitlement in clause 15.1. From those provisions I accept that the focus is on current continuous service with the exception for annual leave entitlement when continuous service with other South Island District Health Boards shall be recognised.

[18] I have reached a provisional view that the meaning of "continuous service" in the exception in clause 2 is to be read as continuous service with the current employment and not continuous service with other South Island District Health Boards. I am strengthened in this view by the application of clause 2 to an annual leave entitlement in the following situation. An employee covered by the MECA has in excess of five year's current continuous service with CDHB which entitles her or him to five weeks annual leave under clause 15.1 of the MECA. The employee then resigns but is subsequently appointed some months or a year later again to a role with the CDHB. The plain words of clause 2 do not entitle that employee to 5 weeks annual leave under clause 15.1 because the current service has not been continuous.

[19] Objectively assessed I do not find that the parties intended the words continuous service with other South Island District Health Boards in clause 2 to be separately and independently assessed from any continuity between that service and that with the new employer. The contractual context I find in ascertaining the meaning of the words supports that continuous service with other South Island District Health Boards is to be considered and assessed with the current employment.

Determination

[20] The dispute, I find, is resolved in favour of CDHB. Ms Donaldson does not have an entitlement to five weeks annual leave.

Costs

[21] Where there is a dispute between the parties that requires the Authority to

intervene to resolve it costs are often found to lie where they fall. In the event the parties may have a different view I will reserve the issue of costs.

Helen Doyle

Member of the Employment Relations Authority
