

documents. It was also agreed that, unless I required any additional information or discussion, I would issue a determination “on the papers”. I commend the parties for their cooperative and sensible approach to this matter.

Background

[3] The Company’s standard Individual Employment Agreement (iea), which applies to Ms Porter and her management colleagues at JohnsonDiversey says, under the general heading of “Leave”:

Annual Leave:

Annual holidays shall be paid in accordance with the Holidays Act 1981 and its amendments.

Upon completion of each year of current continuous service with the Company you shall be entitled to 3 weeks paid holiday per year.

An additional five days annual leave per annum is granted after five years current continuous service.

Entitlements to various other forms of leave are also set out including *Sick and family leave, Bereavement leave, Parental leave, long service leave and Statutory Holidays*. The iea also includes the statements that:

The sick, family and bereavement leave provisions are inclusive of and not in addition to section 30A of the Holidays Act 1981 and its amendments.

And, in respect to Statutory Holidays:

The provisions of the Holidays Act 1981 and its amendments apply.

[4] The Holidays 1981 was replaced by the Holidays Act 2003. (the 2003 Act). With effect from 1 April 2007 amendments to the relevant section of the 2003 Act came into force to increase the minimum statutory entitlement to annual holidays. The relevant sections of the 2003 Act say:

6 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 entitlement 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.

...

Part 2

Subpart 1 --Annual Holidays

15 Purpose of this subpart-

The purpose of this subpart is to-

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

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

(c)...

(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. [This subsection was added by schedule 1 of the Act and came into force on 1 April 2007]

16 Entitlement to annual holidays

(1) After the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks paid annual holidays
[Schedule 1 substituted 4 for 3 from 1 April 2007]

(2)

Subpart 2 -- Entitlement to 4 weeks' annual holidays from 1 April 2007

41 Purpose of this subpart --

The purpose of this subpart is 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.

42 Increase in minimum annual holiday entitlement

Subpart 1 of this Part is amended in the manner indicated in Schedule 1.

[5] Ms Porter argues that the wording of her iea entitles her to receive *an additional 5 days leave* over and above the 4 weeks leave to which she is entitled by the Holidays Act i.e. a total of 5 weeks leave. Her employer argues that she already receives 4 weeks annual holidays by virtue of her iea and the statutory minimum entitlement to annual holidays is satisfied.

Previous cases

[6] In *New Zealand Tramways and Public Transport Employees Union Inc and National Distribution Union Inc. v Transportation Auckland Corporation Ltd and Cityline (NZ) Ltd*, 27 November 2006, AC 61A/06, the Employment Court considered a similar case to this in respect to members of the respective unions' entitlement to receive five weeks annual leave by way of the operation of their collective employment agreement. It is important to note that the Court of Appeal have granted leave to appeal the *Tramways* decision. However the parties to this case are aware of that appeal and have asked me to determine the current case without the benefit of the Court of Appeal's decision. The parties have agreed that when the Court of Appeal issues its decision on that appeal they will discuss what if any impact that decision may have on the annual holiday entitlements of Ms Porter and her colleagues.

[7] While there are some similarities between the *Tramways* case and the matter I am now required to determine, the Court, in the *Tramways* case said:

[48] While the parties expressed the view that this decision will set a precedent for other cases involving this same issue, we believe that it is only so in relation to our interpretation of the statute. The resolution of any future case about s 6 of the 2003 Act will also require an analysis of the exact terms of the employment agreement then under consideration in the light of the scheme and true meaning of the 2003 Act.

[8] The relevant clauses the collective employment agreement (cea) the Court was required to interpret in the *Tramways* case included:

19 Statutory Leave Provisions

Employees are entitled to leave in accordance with the Holidays Act 2003 and the terms of this agreement. A summary of employees' key entitlements, under the Holidays Act 2003, is attached as schedule E to this agreement.

...

21. Annual Leave

21.1 Three weeks annual holidays shall be allowed each year in accordance with the provisions of the Holidays Act 1981 and its amendments.

21.2 In addition to the holidays provided for in clause 21.1, employees shall be entitled to a further holiday of one week per annum in recognition of the nature of the work making a total of four weeks leave per year.

[9] After a careful analysis of the statutory provisions the Court, in *Tramways*, said:

[26] Section 6 is the pivotal section for present purposes. It sets the standards by which (enforcement or legality) of entitlements to holidays is to be measured. It provides the means of assessing the holiday entitlements of employment agreements under the provisions of the 2003 Act for the purposes of measuring compliance and entitlement.

[27] Section 6(1) iterates s3 by providing that each of the four entitlements provided to an employee by the 2003 Act are minimum entitlements.

Principles of interpretation.

[10] In *Tramways* (supra) the Employment Court said:

[9] *While this matter involves a decision on the construction of the cea, the Authority and this Court are compelled by the provisions of s6 of the 2003 Act to assess the provisions for annual holidays in the cea against the minimum entitlements in the Act.* (emphasis added)

That statement must equally be applied to the current case. The Court also said:

Principles of contract and construction

[16] *The starting point is to examine the words used to see whether they are clear and unambiguous and to construe them according to the ordinary meaning. Consideration must be given to the whole of the contract. The circumstances of the entering into the transaction may be taken into account, not to contradict or vary the written agreement, but to understand the setting in which it was made and to construe it against that factual background having regard also to the genesis end, objectivity, the aim of the transaction: see *Melanesian Mission Trust Board vs. Australian Mutual Provident Society* [1977] 1 NZLR 391 at 394 -- 395 and *Lowe Walker Paeroa Ltd v. Bennett* [1998] 2 ERNZ 558 (CA).*

Discussion and Determination

[11] As the Employment Court said in *Tramways*, the 2003 Act sets the minimum standard of entitlements against which the provision of holidays set out in an employment agreement is to be measured. In the case of annual holidays that minimum is 4 weeks.

[12] Turning now to the wording of Ms Porter's iea. At the time that document was drafted it was *clear and unambiguous*. It provided that the individual employee would receive three weeks annual holidays (in accordance with the then statutory minimum) and after five years continuous service would receive an additional, i.e. fourth, weeks leave per annum. Unlike the cea which was the subject of the Court judgement in *tramways*, the iea makes no reference to the 2003 Act. The 2003 Act is an entirely new piece of legislation and is not an amendment to the 1981 Act. It is reasonable to assume that, when the parties to each of the individual agreements signed those agreements, either the 2003 Act had not been enacted or the parties had not intended that the 2003 Act would materially alter the terms of the agreement. The 2003 Act does not amend the iea. It simply increases the minimum annual holidays to which all employees are entitled. The parties are of course entitled to renegotiate the terms of the employment agreement. To date the parties to this dispute had not done so and the iea sets out the currently agreed terms of employment.

[13] The plain meaning of the words of the iea establish the entitlement to annual holidays for Ms Porter and her colleagues at either three weeks or four weeks depending on the length of service with JohnsonDiversey – i.e. three weeks with less than five years service, four weeks after five years service. Clearly when tested against the minimum entitlement set by the 2003 Act all employees are entitled to a minimum of four weeks annual holidays. In terms of the iea those purported to be entitled to three weeks are by statute entitled to four. Those employees with five years service, and by way of the iea entitled to four weeks annual holiday, meet the minimum standards as established by the 2003 Act and are not therefore entitled in terms of the 2003 Act to receive a fifth weeks holiday.

[14] For completeness I record that the applicant's request that the Authority instruct the respondents to credit her with an additional five days annual leave per annum is declined.

Costs

[15] I understand that the parties had already reached an agreement regarding the question of costs in this matter. In case my understanding is incorrect I reserve the question of costs to allow the parties time to settle this matter between themselves. If they are unable to do so the respondent may file and serve a submissions in respect to costs within 28 days of the date of this determination. Ms Porter will then have 14 days in which to file and serve a response

James Wilson

Member of the Employment Relations Authority