IN THE EMPLOYMENT COURT
AUCKLAND

AC 61A/06
ARC 46/06

	IN THE MATTER OF	a de novo challenge to a determination of the Authority
	BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC TRANSPORT EMPLOYEES UNION INCORPORATED First Plaintiff
		AND NATIONAL DISTRIBUTION UNION INCORPORATED Second Plaintiff
	AND	TRANSPORTATION AUCKLAND CORPORATION LIMITED AND CITYLINE (NEW ZEALAND) LIMITED Defendants

Hearing:	9 November 2006 (Heard at Auckland)
Court:	Judge B S Travis Judge C M Shaw Judge M E Perkins
Counsel:	Peter Cranney, counsel for the first and second plaintiffs and counsel for New Zealand Council of Trade Unions Andrew Caisley, counsel for defendant Tim Cleary, counsel for Business New Zealand
Judgment:	27 November 2006

JUDGMENT OF THE FULL COURT

Introduction

[1] This case concerns the interpretation of the annual leave entitlements of the members of the plaintiff union under their current collective employment agreement (the "cea"**)**. Currently each receives 3 weeks annual holiday and, in addition is

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*" (clause 21.2 cea).

[2] From 1 April 2007 s41 of the Holidays Act 2003 (the 2003 Act) increases the minimum entitlement to annual holidays for all employees in New Zealand from 3 weeks to 4 weeks. The issue is whether the cea allows for this further holiday to continue from 1 April 2007 over and above that minimum annual holiday. In other words whether the present 4 weeks provided in the cea becomes 5 weeks.

[3] The case comes before the full Court as a challenge to a determination of the Employment Relations Authority.

[4] Business New Zealand Incorporated and the New Zealand Council of Trade Unions were both granted leave to appear and be heard in these proceedings. Mr Cleary represented Business New Zealand. Mr Cranney represented the NZCTU. It did not make a separate submission as it considered that its interests would be adequately addressed in the submissions made on behalf of the two plaintiffs by Mr Cranney.

[5] The original proceedings involved two additional unions, the Akarana Public Transport Drivers Association and the National Distribution Union. Mr Cranney advised us that they had not challenged the determination but will abide the decision of the Court.

The Employment Relations Authority determination

[6] We have also been informed that the Authority was not provided with the full terms of the cea but made its determination only on extracts. The Authority determined that the relevant clauses in the cea were clear on their face. They provided all employees covered by the cea with an annual leave entitlement of 4 weeks and this complied with the changes that would come into effect on 1 April 2007. It found that the wording of clause 21 of the cea had been agreed between the parties prior to the passing of what it called the 2007 amendments, which would see all employees in New Zealand receive the minimum annual leave entitlement of 4 weeks.

Evidence

[7] The President of the Auckland branch of the Tramways Union, Mr Froggatt, said that the additional week's holiday was inserted into the national award in 1987 to recognise the nature of the work of bus operators. Bus operators had long hours of on duty time of up to 14 hours per day, anti-social hours of shift work (4.45am to 1.30am the following day plus Night Rider Services, midnight to 4am) and extended time away from their families.

[8] Mr Cook, the National Human Resources Manager for Stagecoach New Zealand, the trading name of Transportation Auckland Corporation Limited and Cityline (New Zealand) Limited, said the cea, which has the full name of Bus Operators, Servicepersons/Operators & General Hands Combined Union Collective Employment Agreement 2005-2007, came into force on 3 July 2005 and expires on 2 July 2007. Stagecoach is the largest operator of buses in New Zealand and the Auckland region owns over 600 buses that cover over 90 different routes. Stagecoach Auckland currently employs approximately 1000 bus operators and servicepersons of whom about 85 percent are members of one of the four unions who are parties to the cea. For some time the bus drivers have been provided with a total of 4 weeks' annual leave per annum under previous collective arrangements. At one time they received 5 weeks' annual leave if they were shift workers (1990 Collective Agreement). Since that time 4 weeks' annual holidays has been a standard feature of the collective employment agreements and this is on par with competitors within the industry.

The cea

[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.

[10] The cea covers employees who are members of one of the four unions including the two plaintiffs. They are employed in the Auckland region as bus operators or servicepersons providing cleaning, refuelling and other services. The following are the relevant clauses of the cea.

5. GENERAL PRINCIPLES

5.1. The parties acknowledge that this agreement was negotiated fairly and in good faith and with knowledge of information relevant to the terms agreed.

…

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.

…

20.5 Public holiday's [sic] *days that fall during an employee's annual leave will be counted as public holidays and not annual leave. Where the day of the public holiday is a day that an employee would otherwise have worked, then they will be entitled to public holiday pay at their relevant daily pay.*

…

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.

21.3 An employee's annual leave shall be taken at a time to be mutually agreed between the Company and the employee except that where agreement cannot be reached the company shall determine when the holidays are to be taken provided that a minimum of six weeks notice of holidays will be given.

21.4 Holidays may be taken in advance of the date on which they fall due.

21.5 The payment of annual holidays shall be in accordance with the Holidays Act 2003. (Generally this will be the average weekly wage for the 12 months prior to the holidays)

Where a full time employee takes more or less than a week's leave at any given time, the Company will calculate the amount of holiday pay payable to the employee for each day of leave less than or in excess of a week, by dividing the greater of the employee's "ordinary week" or "average weekly" pay by 5 days. A similar but pro rata calculation will be made for part time employees.

[11] There are numerous other parts of the cea in which express reference is made to the Holidays Act 2003. Examples are provisions inserted for the purposes of

calculating the relevant daily pay for sick leave and bereavement leave. There is also a Schedule E which opens with the following words:

> *The Holidays Act 2003 sets out your minimum entitlements to annual leave, public holidays, sick leave and bereavement leave. A summary of your key entitlements is set out below. The provisions in your employment agreement may improve upon these minimum entitlements.*

[12] Schedule E summarises the current leave entitlements under the 2003 Act but does not refer to the change to 4 weeks' minimum annual leave from 1 April 2007.

[13] Under specific headings the cea categorises various forms of leave, which includes public holidays (20), annual leave (21), long service leave (22), sick leave (23), bereavement leave (25), parental leave (26), unpaid leave (27), and tuition leave (29).

The Holidays Act

[14] The relevant sections of the Holidays Act 2003 are:

> ***3 Purpose***
> *The purpose of this Act is to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to—*
>
> *(a) annual holidays to provide the opportunity for rest and recreation:*
>
> *(b) public holidays for the observance of days of national, religious, or cultural significance:*
>
> *(c) sick leave to assist employees who are unable to attend work because they are sick or injured, or because someone who depends on the employee for care is sick or injured:*
>
> *(d) bereavement leave to assist employees who are unable to attend work because they have suffered a bereavement.*
>
> ***4 Parties to employment relationship to deal with each other in good faith***
> *(2) The employment relationships are those between—*
>
> …
>
> *(c) a union and a member of the union:*
>
> ***5 Interpretation***
> *(1) In this Act, unless the context otherwise requires,—*
> ***annual holiday** means an annual holiday provided under subpart 1 of Part 2*
>
> …

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 entitlements 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 3 weeks' annual holidays to be paid at the time the holidays are taken; and

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

(c) enable employers to manage their businesses, taking into account the annual holiday entitlements of their employees.

(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 comes 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 3 weeks' paid annual holidays.

[Schedule 1 substitutes 4 for 3 from 1 April 2007]

…

[15] The Act is divided into various parts which set out the four classes of holidays and leave entitlements specified in s3. These are contained in Part 2 and include: annual holidays (subpart (1)), public holidays (subpart (3)), sick leave and bereavement leave (subpart (4)). The present case deals only with annual holidays. Subpart 2 deals with the increase in minimum annual holidays from 3 to 4 weeks and reads:

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
Subpart1 of this Part is amended in the manner indicated in Schedule 1.

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 their 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 and, objectively, the aim of the transaction: see *Melanesian Mission Trust Board v Australian Mutual Provident Society* [1977] 1 NZLR 391 at 394-395 and *Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558 (CA).

Summary of parties' positions

[17] Mr Cranney's principal argument was that clause 21 has two separate components of annual leave entitlements. The first is the statutory minimum, currently 3 weeks. The second, which he eventually conceded as an annual holiday, is a contractual entitlement under the cea, which is additional to the statutory entitlement. His contention is that from 1 April 2007 the additional week of contractual leave could not be used to satisfy the requirements of the 2003 Act. He argued that on its plain meaning clause 21 should be construed to mean that employees are entitled to the statutory minimum of 3 weeks for the time being plus the additional one week and that the total of 4 weeks' leave is a mere label, a factual statement of the current position. He submitted that the proper construction of the cea in its statutory context led to the conclusion that the "further holiday" was a separate entitlement additional to the annual holidays conferred by statute. For this reason the total of 4 weeks had to be revisited in light of the changing entitlement to a minimum of 4 weeks' annual holidays thereby increasing the total annual leave entitlement under the cea to 5 weeks. It is implicit in this argument that failure to

increase the total annual leave to 5 weeks per annum would be a breach of the minimum entitlement to annual holidays provided in the 2003 Act.

[18] Mr Caisley submitted that the intention of clause 21, ascertained on an objective reading of the two sub-clauses was clear. The total of 4 weeks annual leave presently provided to employees covered by the agreement will be sufficient to meet the employer's obligations under the 2003 Act after 1 April 2007.

[19] Mr Cleary focused on the requirements of the 2003 Act to determine whether the cea satisfies the requirements of the 2003 Act. He noted that the cea was agreed to and entered into well after the date of the coming into force of the 2003 Act and the parties were plainly aware of or ought to have been aware that the statutory minimum entitlements would move to 4 weeks during the currency of the cea. He submitted that the parties are able to use existing arrangements to satisfy the 2003 requirements citing *Small v New Zealand Fire Service Commission* unreported, Travis J, 17 May 1996, AEC 21/96.

[20] He also relied on s6 of the Holidays Act 2003 as interpreted by the full Court in *New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc v ACI Operations New Zealand Ltd* (2006) 3 NZELR 457. The Court held that s6 of the 2003 Act had a very similar effect to that of s33 under the Holidays Act 1981. The question was whether the terms of the collective agreement purported to or had the effect of contracting out of the minimum entitlements. As the terms in the cea did not exclude or restrict or reduce entitlements under the 2003 Act, all that would happen is that the further holiday in clause 21.2 of the agreement will be included in the 4 weeks' holiday cap contained in the cea.

[21] Mr Cleary submitted that to construe the cea so as to entitle employees to a fifth week of annual holiday would be inconsistent with the common law principle on the separability of promises mentioned in *ACI* and in *Marshall v NM Financial Management Ltd* [1995] 1 WLR 1461 and confirmed by the Court of Appeal [1997] 1 WLR 1527. To construe the cea in the context of the 2003 Act to require 5 weeks instead of the 4 would be to leave the additional weeks of leave unsupported by any consideration and would substantially alter the nature of the promises made by the parties in their negotiations.

Analysis

[22] We consider that because of the way the construction issue has been argued in this case, the relevant provisions of the cea should be construed in the context of the scheme and purpose of the 2003 Act. This is generally because the 2003 Act ultimately governs all holiday entitlements and specifically because s6 expressly relates employment agreements to the 2003 Act.

[23] The scheme of the 2003 Act is ascertained by considering first the purposes in s3 and relating it to all the subsequent provisions of the 2003 Act.

[24] The purpose section of the 2003 Act contains four minimum entitlements. The use of the words "minimum" and "entitlements" provide the key to the interpretation of s6 of the 2003 Act, which deals with the relationship between the Act and employment agreements. We note that s6 covers all employment agreements, not just collective agreements and not just those entered into following the enactment of the new Holidays Act in 2003.

[25] The statutory reason for annual holidays is to provide the opportunity for rest and recreation. The provisions in clause 21.2 of the cea conferring the entitlement to the further week of annual leave "*in recognition of the nature of the work*" appears to us to be the same as the purpose set out in the Act.

[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 against the provisions of the 2003 Act for the purposes of measuring compliance and entitling enforcement.

[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.

[28] Section 6(2) provides that such entitlements may be enhanced or that an employer may agree to additional entitlements, which we take to mean additional to the four already specified in the 2003 Act. Each of the words "enhanced" and "additional" must have been inserted into the section for a specific purpose and must therefore be given a separate and distinct meaning.

[29] We find that the word "*enhanced*" means enhancement of one or all of the four minimum entitlements. To "*enhance*" is to "*heighten or intensify qualities, powers or values etc to improve, especially something already of good quality"* (see Concise Oxford Dictionary). It is implicit that enhancement acts on something already in existence. Thus to increase the statutory minimum of 3 weeks' annual holidays already specified in the Act to say 4 weeks would be an enhancement.

[30] "*Addition*" is the act or process of adding or being added and "*additional*" is added, extra or supplementary. We find that the words "*additional entitlements*" refer to entitlements other than the four specified in the 2003 Act. This would include long service leave or long service rewards, rewards for extra productivity, rewards for time spent on special projects and so on.

[31] Mr Cranney suggested that the words are synonymous (hence his reference to s74 in conjunction with s6). We do not accept that submission.

[32] Section 6(3) must be read in the context of ss6(1) and (2). It provides that where a provision of an employment agreement excludes, restricts or reduces an employee's entitlement under the 2003 Act (and that can only mean the four minimum entitlements) then such provision shall be of no effect, but shall not, nevertheless, render the contract in its entirety an illegal contract under the Illegal Contracts Act 1970.

[33] The majority of the Court of Appeal in *Air New Zealand Ltd v New Zealand Airline Pilots' Association Industrial Union of Workers Inc*, unreported, 13 November 2006, William Young P, Chambers and O'Regan JJ, CA 113/05, states at paragraph [44]:

> *The introduction of statutory minimum entitlements, independent of the terms of the collective agreement, was a major change in approach, and the strict terms of s6(3) make it clear that the new approach overrides the terms of employment agreements.*

Construction of the cea

[34] We turn now to the construction of clause 21 in order to ascertain the terms of the bargain that was agreed between the parties.

[35] We consider it is important to look at the wording of entitlements to each type of leave in the cea and set it against the purpose for which the leave is given to

determine whether there has been compliance with the 2003 Act. Here the parties have helpfully followed the template of the 2003 Act by distinguishing between the 4 sets of minimum entitlements expressed in the 2003 Act and the additional entitlements, which are not provided for in the legislation.

[36] Applying s6(2) to this cea it is clear that the extra week of annual holiday (which we are informed has historically been provided between these parties) is merely an enhancement to the minimum entitlement. The reference in clause 21.1 of the cea to the 1981 Act indicates that the intention of the parties was to ensure that it was the 3 weeks' annual holiday specified in that Act that was to be enhanced. If it had referred to the minimum entitlement in the new Act that would have been a source of confusion in view of the increase to occur on 1 April 2007. We assume that the parties intelligently considered the effect of the new Act when they drafted the cea. Thus their intention in clause 21.1 and consequently 21.2 is clear. We hold that the extra week in clause 21.2 is to be interpreted as meaning (and the parties clearly intended it as meaning) that the extra week is an enhancement of the previous minimum entitlement of 3 weeks' leave. If it were the parties' intention that the extra week in the cea was to be an enhancement of first the minimum entitlement of 3 weeks up until 1 April 2007 and subsequently the minimum entitlement of 4 weeks after that date (thereby increasing annual holidays or annual leave to 5 weeks per annum after that date) then clause 21.1 would have expressly referred to the new Act.

[37] The effect of our decision means that the provisions of the cea for long service leave, longer periods of sick leave, bereavement leave and more beneficial public holiday provisions remain unfettered. For instance, long service leave has a different statutory purpose of providing recognition of service. It is an additional entitlement under s6(2) and cannot be subsumed for the purposes of annual leave. Annual leave and long service leave are not the same entitlement for the purposes of the Act, even though the latter could be taken on a continuing annual basis if the employment contract so provided.

[38] In clause 21.1 the parties have expressly set out that the 3 weeks' annual holidays are to be allowed in accordance with the Holidays Act 1981 and its amendments. At the time the cea was entered into the 1981 Act had been repealed by the 2003 Act. The reference to the 1981 Act in clause 21.1 is the only place in

the cea in which this Act is referred to. Every other relevant provision including other forms of leave including long service leave refers to the 2003 Act. The parties must be taken to have intended the reference to the now repealed 1981 Act because by so doing the effect was to enshrine 3 weeks' annual holidays as the entitlement. The 1981 Act was no longer in force and could not be amended. Clause 5.1 of the cea confirms that the parties had the knowledge of information relevant to the terms agreed. Clause 19 states that employees were entitled to leave in accordance with the 2003 Act and the terms of the cea. The cea refers to the 2003 Act throughout to provide a code for dealing with the means of payment for the various forms of leave. The code provided in the 2003 Act is used even where the entitlement provided in the cea is not one of those governed by the 2003 Act.

[39] If the cea referred to the 2003 Act, with its differing minimum entitlements before and after 1 April 2007, that would not reflect what we perceive to be the true intentions of the parties. We find that what was being provided was an enhancement to the minimum contained in the 1981 Act. The further holiday of 1 week is annual leave as the heading to clause 21 indicates. The way in which the further week is to be taken and paid for is dealt with in the remaining subclauses of clause 21. In addition, enforcement, if necessary, is to be governed by the 2003 Act.

[40] We conclude that the further week of annual holidays in the cea is in recognition of the nature of the work and is on all fours with the purposes of s3 of the 2003 Act. On its plain wording clause 21.2 provides an annual holidays entitlement totalling 4 weeks leave per year. It is inescapable that the parties have therefore agreed that the employees are to be provided with 4 weeks' annual leave. The further week is treated as an enhancement to the 3 weeks minimum entitlement and in all respects as though it was an annual holiday governed by the 2003 Act.

[41] From 1 April 2007 the cea will still provide 4 weeks' annual leave, which will accord with the minimum requirements under the 2003 Act. We do not agree with Mr Cranney's argument that to include the further weeks' leave as a way of satisfying the 2003 requirements from 1 April 2007 would reduce the contractual entitlement and thus breach s6(3). The cea does not breach the 2003 Act, which is to provide 4 weeks' annual holidays from 1 April 2007.

[42] For these reasons we conclude that when the minimum annual leave increases next year, the cea will not be in breach of s6 because it appears that clause 21 has been purposely drafted to ensure that this is so.

[43] Although the point was not argued by counsel, in the plaintiffs' statement of claim the second declaration sought is that the further holiday of 1 week per annum in recognition of the nature of work is an enhanced and/or additional entitlement within the meaning of s6(2) and 74(2) of the 2003 Act.

[44] Section 74(2) states that the employees entitlement to annual holidays, public holidays, sick leave or bereavement leave that are in addition to the entitlement under the 2003 Act, may only be enforced by an employee, an authorised representative of the employee or a representative of a union of which the employee is a member.

[45] We have some difficulty in reconciling the words "*in addition to*" in s74(2) with the concept of enhancement, as expressed in s6(2). We take the view that if an employee is provided with annual holidays in excess of the 4 weeks, which will apply from 1 April 2007, that would be more properly regarded as an enhancement of the statutory entitlement. While s74(2) is inconvenient to our findings as to the overall scheme of the Holidays Act 2003, we find that the use of "*in addition to*" is a mistake. The correct terminology to be consistent with the rest of the Act would be "*in enhancement of, or in addition to*".

[46] Nevertheless the intention of s74 is clear. It is to ensure that it is enforcement of only the minimum entitlements of the 2003 Act that may be exercised by an employer or a Labour Department Inspector. Those holidays or leave provisions, which are an enhancement of the minimum entitlements or which are additional entitlements, may only be enforced by the employees for whose benefit they provide, or their union or authorised representative. While the language of the section is inconsistent with the overall scheme of the 2003 Act and specifically the provisions of s6 its intention and meaning is nevertheless clear.

[47] We make the same point about s66(3) where the words "*enhanced or additional*" are also used. Again that section was not referred to by counsel. However, because it needs to be read in conjunction with s65, which prescribes the

circumstances under which the minimum entitlement to sick leave may be taken, it does not affect the interpretation we have reached.

[48] While the parties expressed the view that this decision will set a precedent for other cases involving this same issue, we believe that is only so in relation to our interpretation of the statute. The resolution of any future case about s6 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.

Conclusions

[49] The plaintiffs sought six declarations in the prayer for relief in the statement of claim.

[50] A declaration was sought that the further holiday of 1 week per annum in recognition of the nature of the work was not annual leave within the meaning of subpart 1 of Part 2 of the Act. We find, to the contrary, that the further holiday is annual leave and may be applied for the purposes of subpart 1 of Part 2 of the 2003 Act.

[51] A declaration was sought that the further holiday of 1 week per annum in recognition of the nature of the work was an enhanced or additional entitlement within the meaning of s6(2) and 74(2) of the Act. At present, in relation to both the 2003 Act and the 1981 Act, the further holiday is an enhanced entitlement towards the annual holidays of the employees covered by the cea. From 1 April 2007, clause 21 will provide the minimum of 4 weeks annual holidays to be paid for at the time the holidays are taken.

[52] A declaration was sought that the further holiday of 1 week per annum was additional to and not part of the 3 weeks' annual holiday conferred by the Act prior to 1 April 2007. The further holiday does form part of the annual holidays and can be applied when it becomes a statutory entitlement to 4 weeks' annual holiday.

[53] A declaration was sought that the further holiday of 1 week per annum was additional to and not part of the 4 weeks' annual holiday conferred by the Act after 1 April 2007. The further holiday of 1 week is part of the 4 weeks' annual holiday and

may be used to meet the minimum entitlement under the 2003 Act after 1 April 2007.

[54] A declaration was sought that in seeking to reduce annual holidays due to employees from 4 weeks to 3 weeks after 1 April 2007, the defendants are or will be in breach of subparts 1 and 2 of Part 2 of the Act and of schedule 1 of the Act. The defendants are not seeking to reduce annual holidays under the cea, which provides for 4 weeks' annual holidays, a provision which will satisfy the entitlement under the 2003 Act from 1 April 2007.

[55] A declaration was sought that if there is a term in the cea limiting the combined total of the annual holidays as defined in the 2003 Act and the additional further holiday of 1 week per annum in recognition of the nature of the work to 4 weeks (which was denied), such term excludes, restricts or reduces the employees' entitlements under the Act and therefore, pursuant to s6(3)(a) of the Act, has no effect to the extent that it does so. The total of 4 weeks' annual holidays provided by clause 21 does not exclude, restrict or reduce the employees' entitlements under s6 of the 2003 Act from 1 April 2007.

[56] We therefore decline to make the declarations sought.

Costs

[57] At the request of counsel costs are reserved and if they cannot be agreed may be addressed by an exchange of memoranda the first of which is to be filed and served within 30 days of the date of this judgment. Any memoranda in reply may be filed 30 days thereafter.

M E Perkins
Judge
for the full Court

Judgment signed at 5.00pm Monday, 27 November 2006

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