**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI**
**TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 236
3172402

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| BETWEEN | NEW ZEALAND PUBLIC SERVICE ASSOCIATION TE PUKENGA HERE TIKANGA MAHI INCORPORATED<br>First Applicant |
| AND | E Tu<br>Second Applicant |
| AND | ACCESS COMMUNITY HEALTH<br>Respondent |

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| Member of Authority: | Claire English |
| Representatives: | Peter Cranney, counsel for the Applicants<br>Chloe Luscombe, counsel for the Respondent |
| Investigation Meeting: | On the papers |
| Submissions received: | 22 December 2022 and 9 March 2023 from Applicant<br>13 February 2023 from Respondent |
| Determination: | 11 May 2023 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The collective agreement between the parties provides that workers covered by the collective agreement receive 5 days sick leave per annum, plus an extra 4 days sick leave per annum due to the value that the employer attaches to collective bargaining and this collective agreement. The collective agreement was put into place prior to

recent amendments to the Holidays Act 2003 (Holidays Act), which now provide all employees with a minimum statutory entitlement to 10 days sick leave per annum.

[2] The parties disagree as to the correct interpretation and application of the collective agreement in light of this amendment to the Holidays Act. The applicant unions (unions) say that this means workers are now entitled to 10 days sick leave per annum, plus the extra 4 sick days in addition to this. The respondent employer (Access) says that workers are now entitled to 10 days sick leave per annum, and that as this is in excess of the previous total of 9 days sick leave per annum provided for under the collective agreement, the extra 4 days provided in that agreement have effectively been subsumed by/within the increased minimum entitlement.

[3] As the parties cannot reach agreement, they have asked the Authority to determine their dispute.

**The Authority's investigation**

[4] Given the scope of the matter to be determined, the parties agreed that it was appropriate for the matter to be determined "on the papers" following the provision of written submissions from both parties.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

**The issues**

[6] The issues requiring investigation and determination were:

(a) Does the collective agreement between the parties provide for 4 extra sick days in addition to the statutory minimum entitlement to sick leave?

**The collective agreement**

[7] This dispute arises out of clause 7 of the collective agreement. I note that clause 7 of the collective agreement is headed simply "Leave".

[8] Clause 7.1(a) through (e) provides for annual leave, and refers to "the Holidays Act". Clause 7.2(a) through (e) provides for public holidays. Clause 7.3(a) through (h)

provides for sick leave, and it is about this clause that the parties are in dispute. Clause 7.4(a) through (d) provides for bereavement/tangihanga leave. Clause 7.5 provides that parental leave is to be provided in accordance with the Parental Leave and Employment Protection Act 1987. Clause 7.6(a) through (c) provides for work/life balance. Clause 7.7(a) and (b) provides for jury service.

[9] Clause 7.3(b) states:

> After six months current continuous service with Access Community Health and on each annual anniversary thereafter employees are entitled to 5 days sick leave per annum.

[10] Clause 7.3(c) states:

> Taking into account clause (b) above, due to the value that the employer attaches to collective bargaining and this collective agreement members of the union(s) party to this agreement shall be entitled to an extra four days sick leave per annum, for so long as they remain a member of the union.

[11] The unions' position is that, when interpreted correctly, clause 7.3(b) of the collective agreement provides for the minimum statutory entitlement to sick leave (as it then was), and that clause 7.3(c) provides, by its very wording, for an extra or additional entitlement to sick leave, for a particular reason, namely to recognise "the value that the employer attaches to collective bargaining and this collective agreement".

[12] The extra sick leave provided for in recognition of the value of collective bargaining is therefore a separate contractual entitlement to sick leave which is not affected by any alternation to the minimum statutory provisions. Mr Cranney submits on behalf of the unions that this is a "special additional benefit" in addition to the statutory minimum entitlements, as found in the case of *SFWU v Cerebos Greggs Limited*[1].

[13] In contrast, Access says that the parties agreed and recorded in the terms of the collective agreement, that the entitlement to sick leave would be nine days per annum, and that accordingly the entitlement provided under the collective agreement has now been subsumed by the statutory entitlement, which is more favourable than the entitlement provided under the collective agreement[2].



[1] [2012] NZCA 25 CA at [24].
[2] At paragraphs 2.3 and 2.5 of the statement in reply.

**Relevant Law**

[14] There is significant case law on the interpretation of employment agreements when parties are faced with the increase of statutory minimum entitlements.

[15] The leading case remains that of *SFWU v Cerebos Greggs Limited* in the Court of Appeal. In that case, the court analysed previous cases stemming from the increase in the minimum entitlement to annual leave from 3 weeks to 4 weeks per annum. The court considered that:

a. The starting point for the analysis was the collective agreement[3];

b. The question was not whether after a certain date, the collective agreement provided sufficient annual holidays to satisfy the statutory minimum[4].

c. Rather, the critical question was whether the parties' agreed purpose was to provide long serving employees with a special benefit[5].

**Analysis**

[16] I will first consider the collective agreement. Notably, the collective agreement provides for two types of sick leave.

[17] The first is under sub-clause (b). It is an entitlement of 5 days per annum available to employees generally in a lump sum 6 months after the employee's anniversary date, in a manner consistent with the minimum entitlement to sick leave provided by the Holidays Act at the time the collective agreement was entered into.

[18] The second is under sub-clause (c). It is an entitlement of 4 days per annum, that is:

a. only available to union members;
b. to be applied in accordance with the additional rules set out in clause 7.3(d);

[3] Above, note 1, at para [17].
[4] Above, note 1, at para [23].
[5] Above, note 1, at para [24].

c. expressed to be "extra" "taking into account" the provision of 5 days per annum already made; and
d. due to the value that the employer places on collective bargaining.

[19] Given the wording of the collective agreement, I have no hesitation in finding that the 4 days sick leave provided for at clause 7.3(c) is a type of special benefit, and was intended by both parties to be in addition to the statutory minimum entitlement to sick leave.

[20] The 5 days sick leave provided for at clause 7.2(b) is the provision of the minimum entitlement to sick leave, to all workers. The way this clause is worded is consistent with the provision of the minimum entitlement under the Act.

[21] In contrast, the 4 days sick leave provided for at clause 7.2(c) is expressed to be in addition to, or "extra" to the sick leave provided for in clause 7.2(b). It uses the word "extra". And specifies that this leave has been granted while bearing the other leave granted by sub-clause (b) in mind. To interpret the collective agreement as Access invites me to do would require me to ignore the plain wording of the collective agreement in a way that is not permitted by section 163 of the Employment Relations Act 2000.

[22] In addition, clause 7.3(c) sets out in plain language that the parties had an agreed purpose for providing this extra sick leave, and what that purpose was. It was not to meet any of the objectives set out in section 3 of the Holidays Act, but was to recognise the value of collective bargaining. The parties set out in this clause that this leave was a special additional benefit available only to union members, and the reasons why.

[23] In addition, Access submits that "the parties agreed that the entitlement to sick leave would be nine days per annum". There is no provision in the collective agreement that states this.

[24] The collective agreement does provide a mechanism for how and when the extra 4 days sick leave will be allocated to union members, dependant on the interaction of their anniversary date and the date upon which they joined the union.

[25] Under the heading "Example" at clause 7.3(d), the collective agreement provides:

> **Example**
> Employee A: Joins the union on 1 January. Their anniversary is 31 March. They will be allocated 1 day on joining the union on 1 January and then allocated 9 days on their anniversary 31 March.
> Employee B: Joins the union on 1 January. Their anniversary is 30 September. They will be allocated 2 days on joining the union on 1 January and then allocated 9 days on the anniversary in September.
> [bold text in the original]

[26] Leaving aside that this is explicitly expressed to be an "example", this provision does not say that the parties have agreed that the entitlement to sick leave will be nine days per annum. Nor does it set out any total allocation of sick leave, or use any words of that nature. Rather, it sets out a method by which the extra sick leave is to be allocated to union members (depending on their personal circumstances) in a certain way that will over time result in them being allocated 9 days sick leave per annum.

[27] In this way, this example supports the unions' position that the extra sick leave provided for in clause 7.3(c) is a special additional benefit, in that it makes it clear that it is to be provided in a way that is different from and inconsistent to, the way that the statutory minimum entitlement to sick leave is to be provided under the Holidays Act.

[28] Access submits that the collective agreement provides for a total of 9 days sick leave per annum, in reliance on the case of *Tramways*[6]. The present case is plainly distinguishable from *Tramways*, for all the above reasons. The extra 4 days sick leave provided in clause 7.3(c) of the collective agreement is in addition to the statutory minimum entitlement, and was intended to be a special additional benefit for the reasons expressed in that clause.

[29] It is also necessary for me to touch on two other points raised by Access. First, Access point out that there is no reference to the provisions of the Holidays Act 2003 in clause 7.3, and that this means that all the entitlements in that clause are merely contractual, and therefore can and should be interpreted as providing for an entitlement

[6] *New Zealand Tramways and Public Transport Employees Union Inc v Transportation Auckland Corporation Ltd and Cityline (New Zealand) Ltd,* [2008] ERNZ 584.

to sick leave of a total of nine days per annum, which has now been exceeded by the statutory minimum entitlement.

[30] As will be apart from the above, I do not accept that this is an accurate characterisation of what the collective agreement actually says. Firstly, the collective agreement does not provide for an entitlement of nine sick days per annum, or any "total" amount of sick leave, as Access contends. So this argument must fail, as this is not what the collective agreement provides for.

[31] Secondly, although Access is technically correct that clause 7.3 does not refer to the Holidays Act 2003, the provision of sick leave in sub-clause (b) does follow the amount and scheme of the Holidays Act (being a provision of the then-minimum amount of paid sick leave, provided to all workers, provided in the same way and at the same time as required by the Holidays Act), and the provision of sick leave in sub-clause (c) does not, and is expressed to be "extra" to the sub-clause (b) entitlements.

[32] It is clear from the way the collective agreement is worded, that only the leave provided for in sub-clause (b) can meet the requirements of the Holidays Act, and the leave provided in clause (c) was always intended to sit outside that Act and be additional to it. So while changes to the Holidays Act may affect the provisions in clause 7.3(b), they will not affect the provisions in clause 7.3(c), because the provisions of clause 7.3(c) can not be said to have ever been drawn from that Act.

[33] This also answers a second point raised by Access that when the collective agreement was negotiated, the changes to the Act had not occurred and were not in the minds of the parties. Clause 7.3(c) was not a provision designed or intended to meet the parties' obligations under the Holidays Act in any of its forms, so changes to that Act do not change the nature of the bargain struck by the parties in clause 7.3(c).

**Outcome**

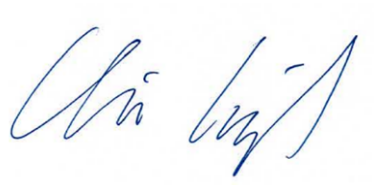
[34] Union members continue to be entitled to an extra four days sick leave per annum in addition to the statutory minimum entitlement to sick leave provided for under the Holidays Act 2003.

**Costs**

[35] Although the parties invited me to reserve costs, the Authority's Practice Note on costs indicates that, from 2 May 2022 the Authority's discretion regarding costs is

generally to be exercised on a presumption that certain categories of matter are not subject to a daily tariff and that parties bear their own costs, including disputes about the application, interpretation or operation of a collective agreement.[7]

[36] Accordingly, costs shall lie where they fall.




Claire English
Member of the Employment Relations Authority


[7] Please note the Authority's Practice Note on costs, effective from 2 May, available at https://www.era.govt.nz/assets/Uploads/practice-note-2