Determination Number: WA 26A/01
File Number: WEA 129/01

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	New Zealand Merchant Service Guild Industrial Union Incorporated (First Applicant)
AND	Aviation & Marine Engineers Association (Second Applicant)
AND	Pacifica Shipping (1985) Limited (Respondent)
REPRESENTATIVES	Mr P McBride for the Applicants Mr G Blair for the Respondent
MEMBER OF AUTHORITY	G J Wood
INVESTIGATION MEETING	26 July 2001 Further evidence received on 13 August 2001
DATE OF DETERMINATION	24 August 2001

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

1. The applicants claim that their members have been incorrectly classified as "temporary/relieving officers" and that in fact they are employees/officers whose employment is of indefinite duration. They also claim that they have been appointed by Pacifica in breach of section 66 of the Act, because the reasons for their fixed term employment are not genuine and are not based on reasonable grounds. Pacifica claim that they have the right to employ 'temporary/relieving officers" for a variety of reasons, which in the present case consist of an inability to offer permanent employment preceding a decision whether to maintain four ships in the company's fleet.

The Facts

2. Helpfully the parties provided an agreed statement of facts in respect of this employment relationship problem. It states –

> *1.At all relevant times the Respondent was a duly incorporated company having its registered office at Dunedin, and carrying on business as a coastal shipping operator.*
>
> *2.At all relevant times (hereinafter meaning all times after 2 October 2000), the First Applicant was a registered Union representing Masters and Deck Officers employed by the Respondent.*

3.At all relevant times the Second Applicant was a registered Union representing Engineering Officers employed by the Respondent.

4.At all relevant times, the parties were bound by a collective employment contract entitled the Pacifica Shipping (1985) Limited Masters, Deck and Engineering Officers Integrated Ship Collective Employment Contract. [I must add here, as an additional agreed fact, that on 1 July 2001 the collective employment contract expired following a ballot held pursuant to section 246 of the Employment Relations Act.]

5.At all relevant times, the Respondent operated four ships.

6.At all relevant times three of the four ships were foreign flagged.

7.At all relevant times, the ships have been operating with an officer complement of 21. [I add here that the parties have specific staffing level arrangements with respect to two of the four vessels.]

8.At all relevant times, by reason of equal time on and off under clause 7 of the CEC, that required 42 officers.

9.At all relevant times the Respondent has employed less than 42 permanent officers. The difference between the permanent officer complement and 42 has been made up by the Respondent engaging "temporary/relieving officers".

10.The Applicants consider that the Respondent's actions are in breach of s.66 Employment Relations Act and in breach of the collective employment contract. The Respondent denies that.

3. The collective contract between Pacifica Shipping (1985) Limited ("Pacifica") and the master's deck officers, chief engineers, and engineer officers engaged on the "Spirit of Competition", the "Spirit of Freedom", the "Spirit of Resolution", and the "Spirit of Vision" requires that Pacifica offer the contract to any employees it subsequently employs in any of the above positions.

4. The applicant unions represent six officers who wish to be treated as "permanent" employees in all respects, but who have been engaged as "temporary/ relieving officers". Those employees are Messrs R Hunter, S Kamath, C McGrath, A Potts, A Anderson and P Nesfield. Those employees have been engaged in this manner continuously (on the equivalent of an equal time-off for time worked basis) for periods up to the investigation meeting of between almost a year and over two years. As they are the only people who have (directly or indirectly) brought an employment relationship problem before the Authority they are the only persons to whom this determination will relate.

5. The collective employment contract that applied until 1 July 2001 provided (at clause 29.1) a definition of "Temporary/Relieving Officer", i.e. that it -

Means an employee who signs on the articles of a vessel to relieve a regular crew member for time off or other reason and who shall be paid for the actual days on articles and the appropriate salary and leave conditions shall apply.

6. The rest of the contract refers to employees, officers, and on two or three occasions "permanent employees". I accept that the line of authority beginning with *Wellington Road Transport etc IUOW v Fletcher Construction Co. Ltd* [1983] ACJ 653 and continuing through *Selu v Spotless Services (NZ) Ltd* [1998] 3 ERNZ 57 proves that a contract which refers to permanent employment is in fact a contract for employment of indefinite duration.

7. At the date of the investigation meeting the "Spirit of Resolution's" charter party had recently expired, but had been extended to the end of October 2001. For at least the last three to four years the market for Pacifica's services has been extremely volatile and trading conditions very difficult. Ms Gardiner, the Operations Manager for Pacifica, could not say when this situation was likely to change, if ever. It was Pacifica's concern that if a decision was made to reduce their fleet from four ships to three, then all current "temporary/relieving officers" would no longer have successive engagements available to them and that there would need to be redundancies of permanent officers as well.

8. The collective contract, while it provides for notice and a selection process for redundancies, also provides for no redundancy compensation.

Interpretation of the collective employment contract

9. In interpreting the collective employment contract it is clear that one must first analyse the contract's plain words (*Lowe Walker Paeroa v Bennett* [1998] 2 ERNZ 558). It is clear to me that the unions' submissions on the meaning of clause 29.1 are correct. "Temporary/relieving officers" are to be employed to relieve a regular crew member for time off or other reason. The phrase, other reason, must be restricted in meaning to reasons analogous to relieving a regular crew member having time off, such as training and study leave for example. In this respect I note that clause 7 of the collective employment contract relates to leave and time off and clause 26 relates to training and study leave.

10. If the object of the clause was to allow Pacifica to employ "temporary/relieving officers" for any reason whatsoever then the clause would have needed to so specify - either by using the word "for" other reason(s) and/or by the use of parenthesis or commas around the words "or other reason".

11. It is also therefore clear that the engagement of temporary/relieving officers is to be restricted to reasons relating to relieving regular crew members as provided for in clause 29.1. Thus it is clear that the applicant unions' members referred to above have been engaged as "temporary/

relieving officers" for invalid reasons (namely because of the possibility of redundancies) and thus employed in breach of the collective contract.

Application of Section 66 of the Act to this Case

12. Section 66 of the Act did not come into effect until 2 October 2000. Between that date and 1 July 2001, when the collective contract expired pursuant to section 246, the collective contract continued in force according to its tenor. The provisions of section 66 relating to individual employees' terms and conditions of employment therefore did not apply.

13. A difficult issue arises, however, in respect of what employment arrangements apply to the applicant unions' members and Pacifica after 1 July 2001. Their collective contract expired that day. Section 19(4) of the Employment Contracts Act, which provided that where a collective employment contract expired employees would be bound by an individual employment contract based on the expired collective employment contract, was not specifically carried forward into the Employment Relations Act's transitional provisions. It is thus necessary to determine what terms and conditions of employment applied to the parties from 1 July onwards.

14. As held by a Full Court in *Corrections Association of* NZ *v Attorney General in respect of the Department of Corrections* (Unreported, Goddard CJ, Travis J, Colgan J, WC27/01, 14 August 2001) the dicta of the Labour Court in *NZ Local Government IAOE v Wellington etc Local Bodies Officers IUOW* [1988] NZILR 183 in relation to the introduction of the Labour Relations Act 1987 can equally be applied to the introduction of the Employment Relations Act 2000. At 189 and 190 the Court held –

> *Parliament's overall purpose in enacting the Labour Relations Act was to put in place a new system governing bargaining and certain employment relationships in substitution for various earlier systems. The new system was to be different in many ways from its predecessors. Relationships between employers and employees, and between bodies representing those parties, and concerning bodies dealing with those parties are a continuing process and this factor must have been in the contemplation of Parliament. Parliament is likely to have wanted to interrupt the continuity as little as possible. Parliament is likely to have wanted the new system in full operation as soon as was reasonably possible. Parliament is likely to have wanted to preserve pre-existing rights, except to the extent that it decided to take away those pre-existing rights.*

15. In this respect I note that s.242 (relating to the enforcement of existing individual employment contracts) provides that Part 6 does not apply to individual employment contracts in force immediately before the commencement of the Employment Relations Act. No such provision is made in s.243. It follows in my view that even if, as discussed below, once a collective employment contract expires the employees covered by it remain covered by an individual

employment agreement based on the terms of the collective employment contract, then Part 6 will apply to those individual employment agreements.

16. I turn first to consider the implications of the parties' collective employment contract continuing in force beyond 2 October 2000 "according to its tenor". In *Zip Commercial Interiors Ltd v NZ Building Trades Union* [1992] 2 ERNZ 489 the Court of Appeal held that these words meant that the substance and intent (here of a collective employment contract) were to be given effect for the purposes of the relevant Act. The "intent" of all collective contracts with respect to expiry was that employees affected would then be bound by an individual contract based on the collective, pursuant to s.19(4). Each collective contract had to have an expiry date, so terms of employment on expiry must have been in the contemplation of the parties, as determined by statute (i.e. s.19(4)). It follows that these provisions on expiry form part of the tenor of all collective contracts. The Employment Relations Act's transitional provisions should therefore be so interpreted, subject of course to the requirements of Part 6 of the Employment Relations Act.

17. I note further that s.61(2) provides that where a collective employment agreement expires employees are employed under an individual agreement based on the collective agreement. I also note that s.246, allowing ballots of employees to determine whether a collective contract's expiry date may be brought forward, presumably in order to allow collective bargaining in an environment which acknowledges and addresses the "inherent inequality of bargaining power" (see s.3(a)(ii)), would not be effective if the terms of the collective contract did not remain while bargaining took place.

18. All in all, if the objects of the Act, which include promoting mutual trust and confidence by recognising the need for good faith behaviour and addressing the inherent inequality of bargaining power in employment relationships, are to be met, one outcome of employment contracts continuing in force according to their tenor must be that upon expiry employees will be bound by an individual employment agreement based on the collective contract.

19. In the alternative, in case I am wrong, I note that even if Pacifica had not adopted the terms of the collective contract on an individualised basis, then there is a strong argument that staff whose employment is of indefinite duration are entitled to retain them anyway. This follows from an analysis of cases such as *Grant v Super Strike Bowling Centres Ltd* [1992] 1 ERNZ 727 and *McCarthy v Owens Project Services Ltd* [1994] 2 ERNZ 572. *McCarthy* related to the issue

of whether or not an unregistered redundancy agreement comprised part of an individual's terms and conditions of employment. It was held at 582-3 –

> *"… that the agreement between the union and Carlton Cranes Limited was intended by those parties and the two applicants to operate as a contractual term of the employment of the two applicants. As concluded above, use of a statutory process for enforcement was excluded so long as the agreement remained unregistered, but enforcement at common law was open. I cannot however take from that the further step urged by counsel for the employer and conclude from that circumstance that the parties intended the agreement to be a stand-alone contract not part of the employment contract…*
>
> *It is my clear view therefore that the redundancy agreement, which was made for the benefit of the two applicants, became incorporated into the terms and conditions of their employment as soon as it was made, but even if I am wrong in that it was still a contract enforceable for their benefit and thus came within the terms and conditions upon which the present employer employed them from 1 October 1990…*
>
> *That being my view, it is consonant with the submissions that were made to me, which in my view are correct, that I should hold that section 19(4) of the Employment Contracts Act 1991 made no difference to the redundancy provisions in the employment contracts of the two applicants. Before that section came into force each already had an employment contract, wider than the terms of the award, capable of becoming (in the terms of section 19(4)) "an individual employment contract based on the expired collective employment contract". Whatever modifications may have been necessary for that to occur could not in my view have affected the pre-existing contractual term for payment of redundancy compensation".*

20. The Authority clearly has the jurisdiction to make similar orders to the Employment Court in the above cases pursuant to s.162.

21. Also in the alternative, I note that in this case Pacifica have carried on employing officers in just the same way as they did while the collective employment contract remained in force. Pacifica has therefore, I hold, adopted the terms of the collective contract in respect of its officers. By way of analogy, this is what occurs when a tenant carries on his or her tenancy following the expiry of a lease, see *Braidwood v Dunn* [1917] NZLR 269.

22. Finally in the alternative, the same conclusion can be reached by noting the objects of the Act discussed above and filling any unintended hole in the Act by giving practical effect to the clear legislative intention that productive employment relationships be built and therefore presumably maintained. In this regard it is important to note again that s.61(2) of the Act is an equivalent provision to s.19(4) of the Employment Contracts Act, clarifying as it does that once collective employment agreements expire, employees remain employed under an individual agreement based on the expired collective agreement. It would be most unlikely that Parliament intended that workers covered by collective contracts under the transitional provisions of the Act would not be entitled to similar protections. For authority for the proposition that holes in an Act may be "filled" see *Ter Haar v Eliot-Cotton Associates* [1993] 1 ERNZ 371 and *New Zealand Timber & Pulp and Paper Workers Union v Riga Developments Ltd* [1992] 2 ERNZ 428.

23. However, as noted above, such individual employment agreements as now exist must comply with Part 6 of the Act. Here the applicant unions have a concern with respect to "temporary/relieving officers". As these officers are employed voyage by voyage it is clear that they are covered by section 66 of the Act. It provides –

> ***Fixed term employment***
>
> *(1) An employee and an employer may agree that the employment of the employee will end -*
>
> *(a) at the close of a specified date or period; or*
>
> *(b) on the occurrence of a specified event; or*
>
> *(c) at the conclusion of a specified project.*
>
> *(2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must –*
>
> *(a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
>
> *(b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.*
>
> *(3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):*
>
> *(a) to exclude or limit the rights of the employee under this Act:*
>
> *(b) to establish the suitability of the employee for permanent employment.*

24. The issue for determination under this head is whether or not Pacifica have genuine reasons based on reasonable grounds for specifying that the unions' members be employed on separate engagements as "temporary/relieving officers". Given that the threatened redundancy situation has been in existence for 3 or 4 years and there is no sign of this situation changing, I hold that Pacifica does not have genuine reasons based on reasonable grounds for continuing to employ temporary relieving officers in this manner. Section 66 was clearly inserted by the legislature in order to overcome the perceived detriment to employees of the Court of Appeal's judgment in *Principal of Auckland College of Education v Hagg* [1997] ERNZ 116. It appears to me that Pacifica are using "temporary/relieving officers" as in effect fixed term employees when they are very much in the same situation as all other employee officers previously covered by the collective employment contract. That is not permissible.

25. I note also that their appointment is in breach of section 66(2)(b), in that the advice as to when or how their employment would end and the reasons for it ending that way have not been in writing, when it is clear that that is required under section 65.

26. It therefore follows that these breaches have been ongoing since 1 July 2001. However, because I have already determined that Pacifica has been acting in breach of the collective employment contract, this need not have any impact on the remedies sought by the applicants.

Conclusion

27. Pacifica has been acting in breach of the collective contract between it, the applicant unions, and the workers named in the text of this determination by treating them as "temporary/relieving officers" instead of officers or employees as otherwise provided for in their collective employment contract. Pacifica has also breached section 66 of the Act since July 1 2001 by so engaging the workers referred to in the body of this determination as "temporary/relieving officers" in breach of section 66 of the Employment Relations Act.

Remedies

28. I order that the respondent must, within seven days of this determination, comply with the employment agreements binding the applicants and those represented by them by treating the six named employees as officers or employees and not "temporary/relieving officers" in all respects. The six employees encompassed by this order are Messrs R Hunter, S Kamath, C McGrath, A Potts, A Anderson and P Nesfield.

29. In so doing I am not determining the number of employees Pacifica must employ, which if it had not been agreed between the parties would be contrary to s.161(2), but simply clarifying the employment status of the employees named above under the employment arrangements that apply to them.

Costs

30. Costs are reserved.

G J Wood
Member of Employment Relations Authority